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The Best Interests of the Child or the State? The Rights of the Child in Non-LPR Cancellation of Removal

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THE BEST INTERESTS OF THE CHILD OR THE STATE?
The Rights of the Child in Non-LPR Cancellation of Removal

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ABSTRACT

This thesis argues that the United States is failing to fulfill its obligations under the Convention on the Rights of the Child (CRC) in its adjudication of the hardship standard in non-LPR cancellation of removal. It is well-documented that the current interpretation of the "exceptional and extremely unusual hardship" standard results in the separation of families and de facto deportation of children, many of whom are U.S. citizens. This thesis contends that this practice is not only unjust, but also unlawful.

First, it argues that the CRC in general and Article 3 (the "best interests" principle) in particular have risen to the status of customary international law. Second, drawing on legal principles of statutory interpretation, it finds that the hardship provision of the statute governing cancellation of removal for non-LPRs, INA § 240A(b)(D), is ambiguous and should therefore be interpreted in a way that accords with the CRC and the "best interests" principle. Third, it illustrates that the current adjudication of the "exceptional and extremely unusual hardship" standard is substantially different to a "best interests" assessment and is therefore not in compliance with the CRC.

It concludes that, because the CRC is customary international law, and ambiguous statutes must be interpreted in a way that complies with international law, the hardship standard must be re-interpreted so that it incorporates a "best interests" assessment in all cases involving children. Finally, it offers guidelines for short- and long-term changes which could bring the hardship standard in line with the Convention and the "best interests" principle.

TABLE OF CONTENTS

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INTRODUCTION

I. "Exceptional and Extremely Unusual Hardship"

In 2001, two United States citizen children, aged 8 and 12 years old, were "de facto" deported to Mexico.[1] Their father, a 34-year old citizen of Mexico who had lived in the United States for twenty years, had been found removable and ineligible for a form of relief known as cancellation of removal.[2] The Board of Immigration Appeals (BIA) determined that the hardship his children would suffer on return to Mexico was not sufficient to prevent his removal: it was not "exceptional and extremely unusual."[3] In accompanying their father to Mexico, the children would leave their school, friends and family behind – to arrive in a country they knew very little of, with fewer education opportunities and poorer economic prospects. But that was not enough.

In 2002, a 30-year-old Mexican single mother of two U.S. citizen children, who had lived and worked in the United States for seventeen years, was also found ineligible for cancellation of removal.[4] The Immigration Judge (IJ) had initially found that the children, aged 6 and 12, would face "complete upheaval in their lives and hardship that could conceivably ruin their lives."[5] The BIA, in reversing the IJ's decision, determined that the children, who had lived in the United States for their entire lives, would "likely be able to make the necessary adjustments" to their future lives in Mexico.[6]

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[1] *In re Francisco Javier Monreal-Aguinaga* (B.I.A. 2001); Amanda Colvin, "Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution," *Saint Louis University Law Journal* 53 (2008): 219–46.
[2] *Matter of Monreal*.
[3] *Matter of Monreal*.
[4] *In re Martha Andazola-Rivas* (B.I.A. 2002).
[5] In re Martha Andazola-Rivas (BIA 2002).
[6] *Matter of Andazola*.

These two decisions, *Matter of Monreal* and *Matter of Andazola*, form the guidelines for determination of the hardship level necessary for non-LPR cancellation of removal.[7] Under the current statute, INA § 240A(b), an applicant for cancellation of removal who is not a lawful permanent resident (non-LPR) must provide evidence that they fulfill four requirements: (A) a ten-year period of continuous physical presence, (B) good moral character during that period, (C) no convictions of certain specified criminal offenses, and (D) evidence that removal would result in "exceptional and extremely unusual hardship" to a citizen or lawful permanent resident (LPR) spouse, parent or child.[8] In both *Monreal* and *Andazola*, the applicant had fulfilled the first three requirements, but failed the final hardship determination. The BIA has published just three decisions that determine how judges should interpret this barrier to relief.

The third published decision, *Matter of Recinas,* illustrates just how high the BIA has interpreted the hardship standard to be. In the 2002 decision, the Board granted relief to the respondent, a 39-year old citizen of Mexico, who was a single mother of four U.S. citizen children (aged 5, 8, 11, 12) and two noncitizen children (aged 15 and 16). Her four youngest children were entirely dependent upon her, had never been to Mexico and did not speak Spanish. As the daughter of two LPRs and sister of five U.S. citizens, she had no relatives in Mexico who might be able to assist with return, and her family would

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[7] *Matter of Monreal*; *Matter of Andazola*.

[8] Immigration and Nationality Act 8 U.S.C. § 1229b, INA § 240(A)(b) (1996).

(b) CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS.-

(1) IN GENERAL.-The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3), subject to paragraph (5) 2a/ 5/; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

face significant upheaval. In its decision, the Board emphasized that this case was on the "outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met."[9] Other cases, with "smaller families and relatives who reside in both the United States and country of origin" would be unlikely to meet the standard.

Most families are not like the family in *Matter of Recinas.* Because of the high hardship standard, thousands of children face de facto deportation or separation from their parents.[10] In 2016, approximately 18 million children under the age of 18 lived with at least one immigrant parent – accounting for 26% of the population of children in the United States.[11] Of these children, 15.9 million (88%) were born in the United States.[12] Between 2011 and 2013, half a million U.S. citizen children experienced the apprehension, detention and deportation of at least one parent.[13] In just the first six months of 2011, the government removed over 46,000 mothers and fathers of U.S. citizen children.[14] The problem of parental deportation has existed for years, but became worse after the introduction of the current hardship standard under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). With the Trump Administration's ongoing expansion of immigration enforcement, these laws are affecting more and more children.[15]

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[9] *In re Ariadna Angelica Gonzalez Recinas* (B.I.A. 2002).
[10] Lucy Twimasi, "Hardship Reconstructed: Developing Comprehensive Legal Interpretation and Policy Congruence in INA Sec. 240A(b)'s Exceptional and Extremely Unusual Hardship Standard," *Chicano-Latino Law Review* 34, no. 35 (2016); Colvin, "Birthright Citizenship in the United States."
[11] Jie Zong Hallock Jeanne Batalova Jie Zong, Jeanne Batalova, and Jeffrey, "Frequently Requested Statistics on Immigrants and Immigration in the United States," Migration Policy Institute, February 2, 2018.
[12] Hallock.
[13] American Immigration Council, "U.S. Citizen Children Impacted by Immigration Enforcement" (Washington DC: American Immigration Council, May 2018).
[14] Applied Research Center (now Race Forward), "Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System" (Applied Research Center, November 2011).
[15] Randy Capps, Muzaffar Chishti, and Michelle Mittelstadt, "Revving Up The Deportation Machinery: Enforcement and Pushback under Trump" (Washington DC: Migration Policy Institute, 2018).

There is clear evidence that parental deportation has incredibly traumatic effects on children.[16] This is true whether the child remains in the U.S. or accompanies their parent(s) – a statistic that the government does not track.[17] The group of children who are most likely to face parental deportation are already at much higher risk for poor health outcomes, in part due to the constant fear of apprehension by immigration authorities.[18] When children are exposed to adverse events such as parental deportation, their neurobiology is significantly altered, precisely at the age when brain development is critical in determining future health.[19] Parental deportation causes toxic stress accumulation, which can lead to long-lasting, irreversible health impacts on children.[20] This stress affects a child's mental health, increasing risk of depression, anxiety, isolation, self-stigma, withdrawal, and behavioral problems. It can also alter a child's biology, causing changes at the DNA level which increase the risk of inflammatory diseases such as cancer.[21] The broader economic consequences of deportation also impact health outcomes: deportation causes significant loss in median household income, which results in decreased educational opportunities and healthcare options.[22]

Under current immigration laws, these consequences are not considered severe enough to warrant relief from deportation. Because the hardship must be more extreme

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[16] Ajay Chaudry et al., "Facing Our Future: Children in the Aftermath of Immigration Enforcement" (The Urban Institute, February 2010); Lisseth Rojas-Flores et al., "Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation," *Psychological Trauma: Theory, Research, Practice, and Policy* 9, no. 3 (May 2017): 352–61; Fernando Stein, "AAP Statement on Protecting Immigrant Children," January 25, 2017; American Immigration Council, "U.S. Citizen Children Impacted by Immigration Enforcement."
[17] American Immigration Council, "U.S. Citizen Children Impacted by Immigration Enforcement."
[18] American Immigration Council; Randy Capps et al., "Implications of Immigration Enforcement Activities for the Well- Being of Children in Immigrant Families" (Washington DC: Migration Policy Institute, Urban Institute, September 2015); Eleanor Chung, "Expert Affidavit of Dr. Eleanor Chung Regarding Toxic Health Outcomes in Children Who Experience Parental Detention and Deportation" (City and County of San Francisco: Zuckerberg San Francisco General Hospital and Trauma Center, July 4, 2018).
[19] Chung, "Affidavit Regarding Toxic Health Outcomes."
[20] Chung; American Academy of Pediatrics, "Toxic Stress on Children: Evidence of Consequences," n.d.; Samantha Artiga and Petry Ubri, "Living in an Immigrant Family in America: How Fear and Toxic Stress Are Affecting Daily Life, Well-Being, & Health," *The Henry J. Kaiser Family Foundation*, December 13, 2017.
[21] Chung, "Affidavit Regarding Toxic Health Outcomes."
[22] Chung.

and unusual than the "typical" hardship faced on deportation, factors that affect *all* children who experience parental deportation are insufficient. The rights of children are given no particular consideration in the adjudication of non-LPR cancellation of removal claims, despite their increased vulnerability; hardship to children is considered in the same way as hardship to qualifying spouses or parents.[23] This stands in stark contrast with international legal norms, in particular Article 3 of the United Nations Convention on the Rights of the Child (CRC), the duty to consider the "best interests" of the child in every decision that affects children.[24]

II. Literature Review

Non-LPR cancellation of removal is not the only element of immigration law which fails to consider the interests and rights of children. U.S. immigration law lags behind family law and international standards, with limited and outdated conceptions of children's rights deeply embedded into its basic framework.[25] With the exception of Special Immigrant Juvenile Status (SIJS), a form of relief for unaccompanied minors, immigration law does not include any kind of "best interests" consideration.[26] Because of these failures, David Thronson advocates for a variety of reforms across immigration law which would alter its treatment of children and incorporate mainstream legal and social values regarding children.[27]

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[23] Immigration and Nationality Act § 240(A)(b). Under Section (D), an adjudicator considers hardship to "the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."
[24] The United Nations Convention on the Rights of the Child (1990), Article 3(1).
[25] David B Thronson, "Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law," *Ohio State Law Journal* 63 (2002).
[26] David B Thronson, "Choiceless Choices: Deportation and the Parent-Child Relationship," *Nevada Law Journal* 6 (2006 2005): 51.
[27] David B. Thronson, "Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children," *UC Davis Journal of Juvenile Law & Policy* 14 (2010): 239; David B. Thronson, "Entering the Mainstream: Making Children Matter in Immigration Law," *Fordham Urban Law Journal* 38 (2011 2010): 393.

Drawing on Thronson, scholars argue that the introduction of a "best interests" standard into immigration law is both "common sense"[28] and the moral responsibility of the United States.[29] Joyce Koo Dalrymple contends that the best interests of the child principle, following the model of SIJS, should be used in the asylum process in order to prevent the deportation of unaccompanied asylum-seeking children.[30] Bridgette Carr argues that the United States should follow the Canadian model in order to implement a best interests approach in all aspects of immigration law and procedure that affect accompanied children.[31]

Other scholars focus on the Convention on the Rights of the Child itself as a tool for reform. Timothy Fadgen and Dana Prescott argue that U.S. ratification of the CRC would lead to the modernization of immigration law in line with international standards.[32] Erica Stief argues that the U.S. is violating its duties to comply with the principle of family preservation, a principle that she argues has risen to the status of customary international law.[33] Erin Corcoran recommends the formation of a statutory federal "best interests of the child" standard that is informed by the CRC and unconditionally applied to all children seeking immigration relief.[34]

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[28] Jennifer Nagda and Maria Woltjen, "Best Interests of the Child Standard: Bringing Common Sense to Immigration Decisions," Big Ideas 2015 - Pioneering Change: Innovative Ideas for Children and Families (Chicago: University of Chicago, 2015).
[29] Becky Wolozin, "Doing What's Best: Determining Best Interests for Children Impacted by Immigration Proceedings," *Drake Law Review* 64 (2016): 48; Ann Laquer Estin, "Child Migrants and Child Welfare: Toward a Best Interests Approach," *Washington University Global Studies Law Review* 17, no. 589 (July 25, 2018).
[30] Joyce Koo Dalrymple, "Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors," *Boston College Third World Law Journal* 26 (2006): 131.
[31] Bridgette A Carr, "Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure," *Yale Human Rights & Development Law Journal*, 2009, 120–49.
[32] Timothy P Fadgen and Dana E Prescott, "Do the Best Interests of the Child End at the Nation's Shores? Immigration, State Courts, and Children in the United States," *American Academy of Matrimonial Law* 28, no. 359 (2016): 32.
[33] Erica Stief, "Impractical Relief and the Innocent Victims: How United States Immigration Law Ignores the Rights of Citizen Children," *UMKC Law Review* 79 (2011 2010): 477.
[34] Erin B. Corcoran, "Deconstructing and Reconstructing Rights for Immigrant Children," *Harvard Latino Law Review* 18, no. 53 (2015).

The statute governing non-LPR cancellation is problematic even without a consideration of international norms. Its implementation under the 1996 IIRIRA has been characterized as a drastic response to popular pressure which, in the absence of fundamental procedural safeguards including judicial review, has enormous potential for arbitrary and unjust decisions.[35] Scholars note that Congress' failure to provide a clear definition of "exceptional and extremely unusual hardship" has led to uncertainty and unpredictability in decision-making.[36]

Scholars suggest various approaches to addressing the harsh and unjust law. Reform to non-LPR cancellation is viewed as a practical and possible short-term solution in a political climate that is not conducive to larger-scale change.[37] Lucy Twimasi recommends a new interpretation of the hardship standard, measured less subjectively in terms of "loss," rather than "hardship."[38] Other scholars recommends reverting to pre-1996 immigration laws[39] or implementing new laws through legislation such as the Child Citizen Protection Act (CCPA).[40]

A smaller group of scholars propose reform of non-LPR cancellation of removal based on the "best interests" standard. Molly Sutter examines the conflict between the hardship standard and international law and suggests a wide range of reforms both of the

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[35] William Underwood, "Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases," *Indiana Law Journal* 72, no. 3 (July 1, 1997).
[36] Twimasi, "Hardship Reconstructed"; Margaret Taylor, "What Happened to Non-LPR Cancellation - Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal," *Journal of Law & Policy* 30, no. 527 (2015).
[37] Taylor, "What Happened to Non-LPR Cancellation."
[38] Twimasi, "Hardship Reconstructed."
[39] U.C. Berkeley International Human Rights Law Clinic, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, and U.C. Davis Immigration Law Clinic, "In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation," March 2010.
[40] U.C. Berkeley International Human Rights Law Clinic, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, and U.C. Davis Immigration Law Clinic. (recommending that Congress enact the CCPA); Applied Research Center (now Race Forward), "Shattered Families."(recommending that Congress reinstate judicial discretion to consider the best interests of children and families in decisions about deportation i.e., the Child Citizen Protection Act).

immigration system and the "best interests" standard itself.[41] Satya Kaskade examines the ways in which the deportation of undocumented immigrants affects citizen children and analyzes the CCPA, which would amend the cancellation statute to include a "best interests" consideration when the qualifying relative is a child.[42]

III. Argument and Outline

Despite a growing body of research that criticizes the United States' failure to adopt a child-centered standard both in immigration law broadly and in non-LPR cancellation of removal, the adjudication of the hardship standard has not changed. In the current political climate, legislative and policy changes remain extremely unlikely. Rather than focusing on the policy side, this thesis takes a legal approach, arguing not only that the U.S. should incorporate a "best interests" principle into the hardship standard, but that it is bound to do so under international law.

Chapter 1 examines the UN Convention on the Rights of the Child, arguing that both the Convention itself and Article 3, the "best interests" principle, have risen to the status of customary international law, and are therefore binding on the United States. Chapter 2 analyzes the legal principles of statutory interpretation, arguing that the hardship standard is ambiguous and therefore must be interpreted in a way that accords with customary international law. Chapter 3 outlines the differences between the hardship standard and the "best interests" standard, demonstrating that – despite caselaw suggesting otherwise – the two forms of assessment are considerably different from one another with respect to both procedural and substantive considerations. The concluding

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[41] Molly Hazel Sutter, "Mixed-Status Families and Broken Homes: The Clash between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law," *Transnational Law & Contemporary Problems* 15 (2006 2005): 783.

[42] Satya Kaskade, "Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children," *William & Mary Journal of Race, Gender, and Social Justice* 15, no. 2 (February 1, 2009): 447.

chapter outlines changes necessary to bring the hardship standard in compliance with the CRC and Article 3, the “best interests of the child” principle.

CHAPTER 1: IS THE UNITED STATES BOUND BY THE CRC?

The United States is the only country in the world that has failed to ratify the United Nations Convention on the Rights of the Child (CRC). However, this does not excuse the U.S. from adhering to the Convention or its guiding principle, the "best interests of the child." This chapter argues that, because of its widespread ratification and acceptance in courts around the world, the CRC has become customary international law (CIL) and is therefore binding on the United States. It further argues that the "best interests" principle has itself become a tenet of customary international law, due to its widespread use both in and outside of the United States. It concludes with an examination of existing caselaw relevant to this argument in the cancellation of removal context, under both sections of INA § 240A.

Part I provides a background on the CRC and the best interests principle. Part II examines the United States' obligations as a signatory to the Convention. Parts III and IV argue that the CRC and best interests principle respectively are customary international law. Part V examines the authority of customary international law in the United States, and Part VI outlines relevant caselaw.

I. The CRC and the "Best Interests" Principle: Background

The "best interests of the child" concept is a longstanding principle of domestic and international law. The principle emerged at the turn of the 20th Century, as traditional notions of children as property were replaced with more progressive ideas about child welfare and rights.[43] Reformist discourse in the late 19th century began to introduce the idea of children as individual rights-bearers. The movement was not without controversy,

[43] David B. Thronson, "Kids Will Be Kids - Reconsidering Conceptions of Children's Rights Underlying Immigration Law," *Immigration and Nationality Law Review* 23 (2002): 3.

but it eventually led to a broad acceptance that "control of children by parents, or the States, is not absolute and children have rights."[44] The United States was at the forefront of the "best interests" movement, using the principle in family law, particularly in cases of child custody and abuse, and creating special juvenile courts in the early 1800s.[45]

The "best interests principle" emerged as a rule of international law in the mid-20th century. The process of establishing international standards on children's rights began in 1924, when the League of Nations adopted the Declaration of the Rights of the Child.[46] This first Declaration focused primarily on the "care" and "protection" of children, rather than giving children the power to exercise rights.[47] The 1959 UN Declaration on the Rights of the Child took a step towards a more rights-centered approach, incorporating the principle that "the best interests of the child shall be the paramount consideration."[48] Both Declarations were important developments in the children's rights movement, but neither placed any direct obligations on states.[49]

The most important development of the "best interests" principle came with the 1989 UN Convention on the Rights of the Child. The CRC represented a "fundamental shift away from the notion of a child as a passive dependent" and codified "a vision of a child as an independent bearer of a unique, tailored set of human rights."[50] This approach was based on the principle that "children possess not only the rights reserved to all persons, but may also claim special assistance in effectuating those rights because of their

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[44] Thronson. p. 981
[45] Carr, "Incorporating a 'Best Interests of the Child' Approach." p. 125
[46] Jonathan Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law," *Columbia Human Rights Law Review* 30, no. 159 (1998). p. 161
[47] Cynthia Price Cohen, "The Role of the United States in Drafting the Convention on the Rights of the Child," *Emory International Law Review* 20 (1998): 185–98.
[48] Todres, "Emerging Limitations on the Rights of the Child." p. 162
[49] Todres.
[50] Jason M. Pobjoy, *The Child in International Refugee Law*, Cambridge Asylum and Migration Studies (Cambridge: Cambridge University Press, 2017), https://doi.org/10.1017/9781316798430.

youth."[51] The CRC quickly became the most widely ratified human rights treaty in history: all UN Member states except the United States have ratified the Convention.[52] The civil, political, economic, social and cultural rights articulated in the Convention constitute the "minimum standards that States must ensure for every child within their jurisdiction."[53] Unlike the prior Declarations, the CRC is legally binding on states that have ratified it.

The advancement of the best interests of the child is the central principle of the CRC.[54] Article 3(1) states that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." As the "umbrella provision" of the Convention, Article 3 entails a consideration of all other articles in the Convention.[55] Article 3 is interpreted broadly and encompasses any action that directly or indirectly affects children. It does not require that the child's best interests be the *only* criteria, or even the paramount criteria (as in the previous Declaration), but they must be "a primary" consideration.[56]

A best interests assessment should be made "at every stage of the process in preparation for any decision that impacts the child's life."[57] As such, Article 3 is engaged "whenever a child may be affected by an immigration decision."[58] The Committee on the Rights of the Child has stated that in order to be in compliance with the Convention, migration policies, practices and decisions that are made in relation to the "entry, stay or

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[51] Thronson, "Kids Will Be Kids - Reconsidering Conceptions of Children's Rights Underlying Immigration Law." p. 989
[52] United Nations Convention on the Rights of the Child.
[53] Committee on the Rights of the Child, "The Rights of All Children in the Context of International Migration," Background Paper, 2012 Day of General Discussion, August 2012.
[54] Todres, "Emerging Limitations on the Rights of the Child."
[55] Todres.
[56] Todres.
[57] Committee on the Rights of the Child, "The Rights of All Children in the Context of International Migration."
[58] Pobjoy, *The Child in International Refugee Law*. p. 223

return of a child and/or of his or her parents" must be determined by the principle of the best interests of the child.[59]

A second fundamental principle of the CRC is the importance of the views of the child. Article 12 grants "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."[60] Early "best interests" models often excluded the views of the child from the process, with the identification of those interests made entirely by adults. Under the Convention, children have a voice and are entitled to play a role in the identification of their best interests.[61] These two fundamental principles – the best interests of the child and the importance of the child's views – place the child at the center of the decision-making process.

II. U.S. Obligations as Signatory to the CRC

Although the United States played a pivotal role in the drafting of the CRC, it never ratified the Convention. During the drafting process, from 1979 to 1989, the U.S. proposed more articles than any other nation, including Article 10, the right to family reunification.[62] The Clinton Administration signed the Convention in 1995 but did not submit it to the Senate for ratification primarily because of strong opposition from Congress.[63] Opposition stemmed from concerns regarding domestic law and sovereignty, and conservative views regarding the freedom of parents to raise their children as they see fit.[64] During the 2008 presidential campaign, Obama stated that his Administration

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[59] Committee on the Rights of the Child, "The Rights of All Children in the Context of International Migration."
[60] The United Nations Convention on the Rights of the Child. Article 12(a)
[61] John Tobin, "Justifying Children's Rights," *International Journal of Children's Rights* 21 (2013).
[62] Cohen, "The Role of the United States in Drafting the Convention on the Rights of the Child." p. 190
[63] Luisa Blanchfield, "The United Nations Convention on the Rights of the Child" (Congressional Research Service, April 1, 2013).
[64] Blanchfield.

would review the treaty, and reiterated this support in 2011 and 2013.[65] Despite these statements, the Convention was never sent to the Senate for ratification.

However, as a signatory to the CRC, the United States does have obligations under the Convention. Under Article 18 of the Vienna Convention on the Law of Treaties, a nation that has signed a treaty must refrain from "acts which would defeat the object and purpose of a treaty" until it has made clear its intention not to become party to the treaty.[66] The U.S. has made no such statement, and therefore cannot engage in acts that defeat the object and purpose of the convention, namely the protection and advancement of the best interests of the child. The Immigration and Naturalization Service (INS) has acknowledged these obligations in the context of children's rights during the asylum process, stating in its 1998 guidelines that the provisions of the CRC "provide guidance" and that, as a signatory, the United States is obliged to "refrain from acts which would defeat the object and purpose of the Convention."[67]

III. The CRC as Customary International Law

According to contemporary theory, the Convention on the Rights of the Child is customary international law. Customary international law is, by its nature, indeterminate and has thus been the subject of much debate. The definition of customary international law has evolved over time, from a rigid definition to a more fluid and flexible process. The International Court of Justice (ICJ) defines customary international law as "international custom, as evidence of a general practice accepted as law."[68] Traditionally, this has been determined by two elements: the consistent practice of states and the

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[65] Blanchfield.
[66] Vienna Convention on the Law of Treaties (1969).
[67] Pobjoy, *The Child in International Refugee Law*; Jeff Weiss, "Memorandum: Guidelines For Children's Asylum Claims," *Immigration and Naturalization Service*, December 10, 1998.
[68] International Court of Justice, "Statute of the International Court of Justice." Article 38

determination (by the practicing state) that the practice is being undertaken out of a sense of legal obligation, or *opinio juris*.[69] Contemporary scholarship has shifted the weight on the second element, legal obligation, placing the role of international legal opinion – something which can evolve relatively quickly – above the role of state practice.[70] This means that customary international law can be created more quickly and bind a wider group of nations than in the past.[71]

Under contemporary theory, a treaty can become customary international law if it has been widely ratified by a representative group of nations. An ICJ decision in 1969 held that widely ratified multilateral conventions or treaties can form customary international law binding on *all states,* rather than just the signatories.[72] In the landmark ruling, *North Sea Continental Shelf,* the ICJ explained that a conventional law (binding only on those who have ratified the convention) can become a customary law (binding on all) as the result of "widespread and representative participation in the convention."[73] Scholarship on the subject subsequently held that ratification by a large number of parties constitutes evidence that "these provisions are generally acceptable, and that indeed they have been generally accepted."[74] Generally accepted provisions constitute clear evidence of *opinio* juris, one of the two traditional building blocks for customary law generation.[75]

The CRC has been widely ratified and consistently used by states. The CRC is an internationally agreed treaty which has been ratified not only by a representative group of

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[69] Roozbeh (Rudy) B. Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates," *European Journal of International Law* 21, no. 1 (February 1, 2010): 173–204.
[70] Sonja Starr and Lea Brilmayer, "Family Separation as a Violation of International Law," *Berkeley Journal of International Law* 21, no. 2 (2003): 213–87.
[71] Chelsea Padilla-Frankel, "Contemporary Theory on Customary International Law and Human Rights Violations in the United States: Languishing Behind Bars - Juveniles Sentenced to Life Without Parole," *Arizona Journal of International & Comparative Law* 33, no. 3 (2016): 803–24.
[72] Baker, "Customary International Law in the 21st Century."
[73] *North Sea Continental Shelf (W Germany v. Denmark, W Germany v. Netherlands)* (International Court of Justice February 20, 1969).
[74] Louis B Sohn, "'Generally Accepted' International Rules," *Washington Law Review* 61 (1986): 1073–80.
[75] Sohn. p. 1077

nations, but "*the* representative group of nations."[76] This overwhelming support "clearly makes it a piece of international customary law."[77] Since its entry into force in 1989, the Convention has been cited in courts across the world. Within the first ten years of its existence, the CRC was cited in at least 13 legal systems across a range of cases, including immigration.[78] A database created by the Child's Rights International Network (CRIN) includes over 100 cases that have cited the CRC and its provisions, spread across Europe (38), the Americas (35), Africa (21), Asia (20) and Oceania (20).[79]

Furthermore, contemporary scholarship illustrates that customary international law can develop over a relatively short period of time. Under traditional theory, consistent practice over an "extended period of time" was necessary for a treaty to become customary international law.[80] However, in the *North Sea Continental Shelf* ruling, the ICJ found that just a "short period" of time could be sufficient for this transformation to take place.[81] Therefore, the fact that the CRC is a relatively new Convention does not disqualify it from becoming CIL.

IV. The "Best Interests" Principle as Customary International Law

In theory, a state may opt out of customary international law by making a verbal objection (although failure to ratify a Convention does not qualify as such).[82] However, there are certain rules of customary international law, *jus cogens* norms, that are considered so vital that they cannot be "contracted out" by states.[83] Similarly, obligations

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[76] Padilla-Frankel, "Contemporary Theory on Customary International Law and Human Rights Violations in the United States: Languishing Behind Bars - Juveniles Sentenced to Life Without Parole." p. 816
[77] Stief, "Impractical Relief and the Innocent Victims."
[78] Todres, "Emerging Limitations on the Rights of the Child."
[79] Patrick Geary, "CRC in Court: The Case Law of the Convention on the Rights of the Child" (Child Rights International Network (CRIN), 2012).
[80] Padilla-Frankel, "Contemporary Theory on Customary International Law and Human Rights Violations in the United States: Languishing Behind Bars - Juveniles Sentenced to Life Without Parole."
[81] *North Sea Continental Shelf (W Germany v. Denmark, W Germany v. Netherlands).*
[82] Baker, "Customary International Law in the 21st Century."
[83] Baker. p. 177

erga omnes are so important that any state has jurisdiction to sue another state which is failing to meet those obligations.[84] *Opinio juris* generally determines what norms become *jus cogens* and what obligations become *erga omnes*.[85] The prohibition of genocide, slavery, and torture are traditional examples of *jus cogens* norms.

Contemporary scholarship and jurisprudence have expanded the theory of *jus cogens* norms and *erga omnes* obligations. In the 1964 decision, *Barcelona Traction,* the ICJ held that the "basic rights of human persons" created *erga omnes* obligations.[86] This led to a new understanding of the sources of international law, by which human rights norms could be "seamlessly transmuted into customary international law."[87] Fundamental rights can become customary international law simply by virtue of their inclusion in multilateral conventions. The theory of "customary law generation" holds that widely ratified conventions with prohibitions against torture, genocide, or slavery form confirmation of customary international law on all state parties, not just the signatories.[88] In this way, conventions themselves "generate customary rules of law."[89]

Under this theory, the rights in the CRC may be considered obligations *erga omnes,* binding upon the U.S. despite non-ratification.[90] This applies in particular to Article 3, because of its widespread use across states and its existence in other international conventions.[91] The best interests principle has become a "ubiquitous feature

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[84] Baker. p. 177
[85] Baker. p. 177
[86] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 284 (International Court of Justice 1964).
[87] Baker, "Customary International Law in the 21st Century." p. 180
[88] Anthony D'Amato, "The Concept of Human Rights in International Law," *Columbia Law Review* 82, no. 6 (October 1982): 1110–59.
[89] D'Amato. p. 1129
[90] Padilla-Frankel, "Contemporary Theory on Customary International Law and Human Rights Violations in the United States: Languishing Behind Bars - Juveniles Sentenced to Life Without Parole."
[91] Dina Imam Supaat, "Establishing the Best Interests of the Child Rule as an International Custom," *International Journal of Business, Economics and Law* 5, no. 4 (2014): 6.

of international treaties and the reasoning of international institutions."[92] Furthermore, the "best interests" principle existed before the CRC, and has been a consistent feature of U.S. family law for two centuries.[93]

The United States' use of the "best interests" principle in areas of the law outside immigration reinforces its place as a widely accepted and used principle of law. Under current laws, courts must consider the best interests of the child in all decisions regarding placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights.[94] All states have statutes requiring that the "best interests" be considered whenever certain decisions are made regarding "a child's custody, placement, or other critical life issues."[95] Although state guidelines for assessing the best interests principle differ, many guidelines echo articles of the CRC. Across state laws, common guiding principles include the importance of family integrity and preference for avoiding the removal of a child from his or her home;[96] the importance of promoting the health, safety and protection of the child;[97] and assurances that any child removed from their home will receive care that will assist the child in developing into a self-sufficient adult.[98]

Although the "best interests" principle does not exist in immigration law generally, it is used in Special Immigrant Juvenile Status (SIJS). SIJS was created in 1990 – the year after the CRC came into force – as an avenue to legal immigration status for children who become juvenile court dependents as a result of being victims of abuse

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[92] Starr and Brilmayer, "Family Separation as a Violation of International Law." p. 225
[93] Starr and Brilmayer.
[94] Child Welfare Information Gateway, "Determining the Best Interests of the Child" (Child's Bureau, March 2016).
[95] Child Welfare Information Gateway.
[96] Included in approximately 28 state statutes.
[97] Included in 21 state statutes.
[98] Child Welfare Information Gateway, "Determining the Best Interests of the Child." Included in 12 state statutes.

and neglect.[99] A child can gain LPR status through SIJS after she is declared dependent on a juvenile court, found eligible for long-term foster care, and a determination is made that it is not in the child's best interests to be returned to her home country.[100] The best interests determination in SIJS follows state, rather than federal, guidelines and procedures. The existence of the best interests principle in family law and SIJS reinforces its status as a principle of customary international law.

V. Authority of Customary International Law in the US

The United States has long recognized the binding nature of customary international law. The *Paquete Habana*, a case involving the seizure of fishing vessels during the Spanish-American War, provides the foundation for U.S. understanding of customary international obligations. In the decision, the Supreme Court held that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[101] The Court explained that customary international law may originate "in custom or comity, courtesy or concession," which over time grows "by the general assent of civilized nations, into a settled rule of international law."[102]

The Supreme Court has also acknowledged the influence that standards of the Convention on the Rights of the Child and the practices of other nations can have on U.S. law. In the 2005 case, *Roper v. Simmons,* the court drew on customary international law and international jurisprudence in its decision to abolish the death penalty for juveniles. Literature in the years leading up to the decision had advanced the argument that Article

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[99] Thronson, "Kids Will Be Kids - Reconsidering Conceptions of Children's Rights Underlying Immigration Law."
[100] Dalrymple, "Seeking Asylum Alone."
[101] *The Paquete Habana,* 175 U.S. 677 (Supreme Court of the United States 1900).
[102] *The Paquete Habana.*

37 of the CRC, the prohibition of juvenile capital punishment, should be considered a norm of *jus cogens.*[103] In the decision, the Court acknowledged that, in light of the almost-universal ratification of the CRC, "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[104] Although not determinative or binding in the United States, the "opinion of the world community" provides "respected and significant confirmation for our own conclusions."[105] The Court also stated that the experience of the United Kingdom, a country which had abolished the juvenile death penalty 56 years prior, "bears particular relevance" in light of "historic ties."[106] As Chapter 3 illustrates, the U.K. – along with the EU, Australia and Canada – may similarly useful in providing a model for a more humane interpretation of the cancellation of removal statute.

VI. The CRC and "Best Interests" in Cancellation of Removal Caselaw

There has been some examination of the role of the CRC and the "best interests" principle in the cancellation of removal context. In a case that involved LPR cancellation of removal under INA § 240A(a), the District Court of New York accepted the CRC as customary international law.[107] In the 2002 decision, *Beharry v. Reno,* the court held that the cancellation statute must be interpreted in a way that is in compliance with the Convention. The case involved a habeas petition for a U.S. LPR and citizen of Trinidad who was ineligible for relief because he had been convicted of an aggravated felony. The petitioner, who had a U.S. citizen daughter, argued that, under international law, he

[103] N. E. Walker, "The United Nations Convention on the Rights of the Child: A Basis for Jus Cogens Prohibition of Juvenile Capital Punishment in the United States," *Behavioral Sciences & the Law* 19, no. 1 (2001): 143–69.
[104] *Roper v. Simmons*, 543 U.S. 551 (United States Supreme Court 2005).
[105] *Roper v. Simmons.*
[106] *Roper v. Simmons.*
[107] *Beharry v. Reno*, 183 F. Supp. 2d 584 (United States District Court for the Eastern District of New York 2002).

should be granted a hearing to illustrate the effect deportation would have on his daughter.[108]

In its decision, the District Court determined that the CRC has become customary international law. Recognizing that customary law is "not static, but rather is subject to change over time as customs change," the court stated that a law becomes customary through "broad and long-term acceptance" – or one of the two, if it strong enough.[109] Because of the "overwhelming acceptance" of the CRC and the fact that it contains "provisions codifying longstanding legal norms" such as the best interests principle, the court held that the CRC should be read as CIL.[110] As such, the court granted the petitioner a writ of habeas corpus. Although the Second Circuit later reversed the decision, in *Beharry v. Aschroft,* the reversal was made on other grounds: the petitioner had failed to exhaust all possible remedies before appealing, and therefore both courts lacked jurisdiction to review the claim.[111]

The statements in *Beharry v. Reno* have formed the basis for later arguments concerning the applicability of the CRC and "best interests" principle for cancellation of removal under both INA § 240A(a) and 240A(b). Between 2005 and 2016, seven Circuit Courts considered appeals against cancellation of removal cases based on arguments relating to the CRC and the best interests of the child (See Table 1). Two of these were, like *Beharry v. Ashcroft,* dismissed due to lack of jurisdiction.[112]

In each case where the court did have jurisdiction, it failed to determine whether or not the CRC is customary international law, instead basing arguments on one (or both)

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[108] *Beharry v. Reno.*
[109] *Beharry v. Reno.*
[110] *Beharry v. Reno.*
[111] *Beharry v. Ashcroft,* 329 F.3d 51 (2nd Circuit 2003).
[112] *Vasquez v. Gonzales*, 176 Fed. Appx. 717 (9th Circuit 2006); *Santana-Medina v. Holder*, 616 F.3d (1st Circuit 2010).

of two secondary issues. Each court makes their argument based on a hypothetical scenario in which the CRC is customary law. The first issue raised is the rules governing statutory interpretation in light of customary international law: The Second, Third and Sixth Circuits have employed arguments that the statute "controls" over customary international law, since it constitutes a clear expression of congressional intent.[113] This issue is addressed in Chapter 2. The second issue is compliance of the hardship standard with the Convention: The Ninth and Sixth Circuits have argued that the hardship standard *already* entails a consideration of the "best interests of the child," and is therefore already in compliance with the CRC.[114] This issue is addressed in Chapter 3.

Case	Petitioner's argument	Court opinion
***Cabrera-Alvarez v. Gonzales* (9th Cir. 2005)**	Statute should be interpreted in a manner consistent with the CRC.	Assuming CRC is customary international law, statute involves consideration of best interests. Denied.
***Torres v. Gonzales* (9th Cir. 2005)**	Best interests should be considered under hardship standard.	Best interests are at the core of hardship analysis. Denied.
***Oliva v. United States DOJ* (2nd Cir. 2005)**	Petitioner should be permitted to apply for relief under CRC.	CRC not ratified and international law inapplicable because statute controls (and petitioner fails under physical presence requirement). Denied.
***Vazquez v. Gonzales* (9th Cir. 2006)**	Removal results in deprivation of children's rights under CRC.	Statute does not violate CRC, removal would not deprive children of rights. Dismissed in part, denied in part.
***Santana-Medina v. Holder* (1st Cir. 2010)**	Best interests assessment required under CRC.	Petitioner failed to make this argument before the IJ or the BIA, therefore waived. Dismissed.
***Flores-Nova v. AG of the United States* (3rd Cir. 2011)**	Statute conflicts with best interests principle of CRC (part of argument).	Assuming CRC is customary international law, statute controls. Petitioner fails under physical presence requirement. Denied.
***Bamaca-Perez v. Lynch* (6th Cir. 2016)**	Best interests should be considered under hardship standard.	Statutory standard applies, not CRC. If CRC relevant, statute does consider best interests. Denied.

Table 1: Existing Caselaw on the CRC and "Best Interests" under INA § 240A(b)

[113] *Oliva v. United States DOJ*, 433 F.3d 229 (2nd Circuit 2005); *Flores-Nova v. AG of the United States*, 652 F.3d 488 (3rd Circuit 2011); *Bamaca-Perez v. Lynch*, 670 Fed. Appx. 892 (6th Circuit 2016).
[114] *Cabrera-Alvarez v. Gonzales*, 423 F.3d (9th Circuit 2005); *Torres v. Gonzales*, 158 Fed. Appx. 872 (9th Circuit 2005); *Bamaca-Perez v. Lynch*.

VII. Conclusion

This Chapter has argued that the Convention on the Rights of the Child and Article 3, the "best interests" principle, should be considered customary international law. There is substantial evidence to suggest that the Convention is customary law, due to its almost-universal ratification and consistent use by nations. There is also evidence that the "best interests" principle, a longstanding legal norm which is regularly used in U.S. domestic law, is customary international law. Supreme Court precedent emphasizes both the binding nature of CIL and the authoritative weight of the CRC, demonstrating that the Convention must be considered in domestic law.

Although some litigation has been conducted regarding the applicability of the CRC and "best interests" principle in the context of cancellation of removal, these arguments have, so far, been unsuccessful. The following chapters address the two main arguments that Circuit Courts have employed in denying petitions based on the CRC and "best interests" principle. Chapter 2 examines the principles of statutory interpretation, assessing the issue of whether the CRC is applicable in the context of relief under INA § 240A(b). Chapter 3 addresses the issue of whether the hardship standard is in compliance with the Convention.

CHAPTER 2: AMBIGUITY AND STATUTORY INTERPRETATION

Chapter 1 demonstrated that the Convention on the Rights of the Child and the "best interests" principle should be considered customary international law. It also demonstrated that CIL is, in general, binding on the United States. However, the relationship between customary law and domestic law is not straightforward or well-understood.[115] Although CIL is recognized as a source of law in U.S. domestic courts, it does not necessarily trump domestic law: both types of law are of equal importance. As such, the principles of statutory interpretation must be examined in order to understand whether the CRC applies under the statute governing cancellation of removal for non-LPRs, INA § 240A(b). According to the *Charming Betsy* canon, a statute that is ambiguous must be interpreted in a way that accords with international law. If, on the other hands, the statute is unambiguous and expresses the clear intent of Congress, then the statute controls.

This chapter contends that the hardship provision of the statute is ambiguous and therefore should be interpreted in accordance with the CRC. Part I outlines the *Charming Besty* canon of statutory interpretation and Part II examines the legal concept of ambiguity. Parts III and IV analyze existing caselaw concerning ambiguity under INA § 240A(a) and (b) respectively. Finally, Part V examines the ambiguity of the hardship standard under INA § 240A(b)(D), concluding that the standard is ambiguous and should therefore be interpreted in a way that accords with the CRC and "best interests" principle.

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[115] Jack M. Goldklang, "Back on Board the Paquete Habana: Resolving the Conflict between Statutes and Customary International Law," *Virginia Journal of International Law* 25 (1985 1984): 143–52.

I. The *Charming Betsy* and Rules of Statutory Interpretation

The juridical relationship between international law and domestic law, two legitimate and equal sources of law in the United States, is governed by several long-standing principles. These principles serve as "rules of decision for resolving in domestic courts the potential inconsistencies between external and internal sources of law."[116] They also express the Supreme Court's view that domestic and international law are two "legitimate sources of norms binding on the United States and enforceable in its courts."[117] The most relevant principles concerning customary international law come from two historic Supreme Court decisions: the *Paquete Habana* (discussed in Chapter 1) and the *Charming Betsy.* The *Paquete Habana* established the principle that CIL can provide a rule of decision in the absence of controlling legislative or executive acts.[118] The *Charming Betsy* created the principle that domestic statutes should be interpreted, when possible, so as not to violate international law.[119]

According to the *Paquete Habana,* customary international law applies when there is no controlling legislative or executive act. As explained in Chapter 1, the *Paquete Habana* established the importance of customary international law in domestic courts. However, the decision qualified this by stating that customary law must be consulted when there is "no controlling executive or legislative act or judicial decision."[120] In the case of non-LPR cancellation of removal, there is clearly a statute, but it is not clear whether or not the statute should "control" in the case of a conflict with the CRC. This issue is addressed in the *Charming Betsy*.

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[116] Ralph G. Steinhardt, "The Role of International Law as a Canon of Domestic Statutory Construction," *Vanderbilt Law Review* 43 (1990): 1103–97.
[117] Steinhardt.
[118] *The Paquete Habana*.
[119] *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (Supreme Court of the United States 1804).
[120] *The Paquete Habana.*

According the *Charming Betsy* canon, ambiguous congressional statutes should be construed in harmony with customary international law. The canon originated with the Supreme Court decision, *Murray v. Schooner Charming Betsy.* The 1804 case involved the application of international norms regarding the capture of neutral nations and their citizens in wartime and an Act of Congress which prohibited trade.[121] In the decision, Chief Justice Marshall stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[122] In essence, the *Charming Betsy* doctrine acts as a "rebuttable presumption that Congress did not intend to place the United States in breach of international law."[123] To rebut this presumption, Congress must provide an "affirmative expression of congressional intent"[124] to "abrogate the international agreement."[125]

The *Charming Besty* canon has been the subject of some debate, but has become "deeply embedded in American jurisprudence."[126] The Supreme Court and federal courts apply the *Charming Betsy* principle regularly, and it is enshrined in the provisions of the *Restatement (Third) of the Foreign Relations Law of the United States.*[127] The *Restatement,* which outlines the American Law Institute's opinion on the rules that a tribunal should apply when deciding a controversy in accordance with international law, states that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[128]

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[121] *Murray v. The Schooner Charming Betsy.*
[122] *Murray v. The Schooner Charming Betsy.*
[123] Michael Franck, "The Future of Judicial Internationalism: Charming Betsy, Medellin v. Dretke, and The Consular Rights Dispute," *Boston University Law Review* 86 (2006): 515–46.
[124] *Weinberger v. Rossi*, 456 U.S. 25 (Supreme Court of the United States 1982).
[125] Andrew H Bean, "Constraining Charming Betsy: Textual Ambiguity as a Predicate to Applying the Charming Betsy Doctrine," *Brigham Young University Law Review* 2015, no. 6 (2016): 1901–1824.
[126] "The Charming Betsy Canon, Separation of Powers, and Customary International Law," *Harvard Law Review* 121 (2008): 1215–36.
[127] Curtis A. Bradley, "The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law," *The Georgetown Law Journal* 86 (1997): 479–537.
[128] American Law Institute, "Restatement, Third, Foreign Relations Law of the United States (Revised)," 2018.

Such a construal will be possible when the statute at issue allows some degree of ambiguity in its interpretation.

More recent jurisprudence and statutory guidance affirms the importance of the *Charming Betsy* canon. In *McCulloch v. Sociedad Nacional de Marineros de Honduras,* the Supreme Court applied the *Charming Betsy* principle to avoid construing the National Labor Relations Act in a manner inconsistent with State Department regulations.[129] The Court based its ruling in part on the fact that there was no clear expression of Congress' intent, and that proposed construction would have been contrary to a "well-established rule of international law."[130] In *United States v. Yousef,* a 2002 decision involving the conviction of terrorist acts conducted outside the United States, the Second Circuit Court reaffirmed the *Charming Betsy* principle. The Court stated that "while it is permissible for United States law to conflict with customary international law, where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with 'the law of nations' is preferred."[131]

II. What is Ambiguity?

The determination of statutory ambiguity is a prerequisite to the application of the *Charming Betsy* principle, but there is considerable debate regarding what constitutes ambiguity. Courts have not provided a definitive answer, despite the fact that the *Charming Betsy* canon has guided U.S. courts for over two centuries.[132] Scholars emphasize the difficulty posed by the *Charming Betsy*: decision-makers have often been

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[129] *McCulloch v. Sociedad Nacional De Marineros De Honduras*, 372 U.S. 10 (Supreme Court of the United States 1963).
[130] *McCulloch v. Sociedad Nacional*.
[131] *United States v. Yousef*, 327 F.3d 56 (2nd Circuit 2003).
[132] Bean, "Constraining Charming Betsy: Textual Ambiguity as a Predicate to Applying the Charming Betsy Doctrine."

starkly split on whether a statute is ambiguous.[133] This can be explained by the simple fact that clarity is "very much in the eyes of the beholder."[134]

An examination of the broader legal principle of ambiguity sheds some light on the issue. Somewhat ironically, the meaning of "ambiguity" is subject to multiple interpretations.[135] As a result, expert testimony of linguists is frequently called upon in order to "convince the court of the presence of ambiguity or vagueness."[136] According to Black's Law Dictionary, ambiguity is "doubtfulness; doubleness of meaning; indistinctness or uncertainty of meaning of an expression used in a written instrument."[137] An ambiguity may be either "latent" or "patent." A latent ambiguity occurs when the language may be clear and intelligible, but an extrinsic fact creates the necessity for interpretation or a choice among two or more possible meanings. A patent ambiguity "appears on the face of the instrument," arising from "defective, obscure, or insensible language."[138]

Ambiguity in legal texts can be categorized in two further senses: a general meaning and a more restrictive, legal meaning – both of which have been used by courts. In its "general meaning," ambiguity relates to the way language is "used by speakers or writers and understood by listeners or readers."[139] In this sense, ambiguity can be lack of clarity in language; a word or phrase that is capable of being understood in more senses than one. General ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.[140] In its more

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[133] "The Charming Betsy Canon, Separation of Powers, and Customary International Law."
[134] "The Charming Betsy Canon, Separation of Powers, and Customary International Law."
[135] Sanford Schane, "Ambiguity and Misunderstanding in the Law," *University of California San Diego*, 2018, 21.
[136] Schane.
[137] Black's Law Dictionary, "What Is Ambiguity?," The Law Dictionary, November 4, 2011.
[138] Black's Law Dictionary.
[139] Schane, "Ambiguity and Misunderstanding in the Law."
[140] Jabez Gridley Sutherland, *Statutes and Statutory Construction* (Chicago: Callaghan and Company, 1891).

restrictive meaning, ambiguity occurs "where there is a lack of clarity or when there is uncertainty about the application of a term."[141] This can occur, for example, when the word "treaty" could be understood to involve several different types of international instruments, and the list of instruments is not clarified.[142] Within the law, there has been considerable overlap of these terms, with courts employing the term in its general meaning as well as its restricted meaning.[143]

III. Ambiguity under INA § 240A(a): *Beharry* and *Guaylupo-Moya*

The most thorough assessment of the *Charming Betsy* in the cancellation of removal context is in relation to first part of the statue, INA § 240A(a), which governs relief for lawful permanent residents. In *Beharry v. Reno*, the Court held not only that the CRC is customary international law (as examined in Chapter 1), but also that, in light of the *Charming Betsy*, it is legally enforceable. The petitioner argued that, under principles of CIL, including the CRC, he should be granted a hearing to demonstrate the effect his deportation would have on his family and himself. The Court granted the petition, finding that his deportation could be unlawful without a consideration of the impact the deportation would have upon the petitioner's daughter.[144]

In its decision, the court argued that because Congress has not enacted legislation which shows clear intent to repeal the norms of the CRC, the Convention is binding. The court drew on the interaction of the *Paquete Habana* and *Charming Betsy* principles to argue that "since Congress may overrule customary international law (*Paquete Habana*), but laws are to be read in conformity with international law where possible (*Charming Betsy*), it follows that in order to overrule customary international law, Congress must

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[141] Schane, "Ambiguity and Misunderstanding in the Law."
[142] Schane.
[143] Schane.
[144] *Beharry v. Reno.*

enact domestic legislation which both postdates the development of a customary international law norm, and which clearly has the intent of repealing that norm."[145]

In making this argument, the *Beharry* court cited an earlier decision, *Maria v. McElroy*, which recognized that in the absence of a statement to the contrary, Congress can be assumed to be legislating "in conformity with international law."[146] The court also cited a provision in the *Restatement*, that an Act of Congress supersedes an earlier rule of international law as U.S. law "if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled."[147] Therefore, the *Beharry* court determined that "customary international law is legally enforceable unless superseded by a clear statement from Congress."

Although the *Beharry* decision addressed the issue of Congressional intent, it failed to examine the issue of ambiguity, a fact for which it was subsequently criticized. In *Guaylupo-Moya v. Gonzales,* a case which involved similar facts, the Second Circuit argued that the statutory prohibition of relief for aggravated felons was unambiguous.[148] The *Guaylupo-Moya* court agreed with the *Beharry* court to a limited degree but questioned some of its reasoning. The court recognized that the *Beharry* decision applied "the *Charming Betsy* principle that, where legislation is ambiguous, it should be interpreted to conform to international law."[149] However, the *Guaylupo-Moya* court explained that the *Charming Betsy* "comes into play only where Congress's intent is ambiguous." Because there are clear sections in IIRIRA which restrict relief for aggravated felons and expand the definition of aggravated felony, "Congress's intent is

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[145] *Beharry v. Reno.*
[146] *Maria v. McElroy*, 68 F. Supp. 2d (United States District Court for the Eastern District of New York 1999).
[147] American Law Institute, "Restatement, Third, Foreign Relations Law of the United States."
[148] *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2nd Circuit 2005).
[149] *Guaylupo-Moya v. Gonzales.*

controlling."[150] The *Beharry* court fell short in its reasoning primarily because it failed determine whether the relevant provisions of the statute were ambiguous. The *Guaylopo-Moya* court found that, in the case of the bar on relief for on aggravated felons, governed under INA § 240A(a)(C), there was no ambiguity.

The *Guaylopo-Moya* decision emphasizes the importance of assessing ambiguity in order to determine the role of that the CRC may play in the application of that statute. The decision also provides evidence that a particular provision of a statute, in this case section (C) of INA § 240(a), can be assessed individually. The ruling that INA § 240A(a)(C) is unambiguous does not preclude an ambiguity finding in another part of the statute.

IV. Ambiguity under INA § 240A(b): *Oliva, Flores-Nova, Bamaca-Perez*

Later cases have drawn on the reasoning in both *Beharry* and *Gaylupo-Moya* to assess the issue of ambiguity and statutory interpretation under non-LPR cancellation of removal. Three Circuit Court decisions have examined the interpretation of INA § 240A(b) in the context of the CRC as customary international law. In 2005 and 2011, the Second and Third Circuit Courts argued that the statute controls over the CRC.[151] However, neither court determined whether the *hardship* requirement of the statute (§240A(b)(1)(D)) was unambiguous, instead focusing on the physical presence requirement (§240A(b)(1)(B)), which neither petitioner had met. In 2016, the Sixth Circuit cited these two decisions as precedent in making a broader argument that the Congressional statute controls.[152] The court failed, however, to address the issue of ambiguity.

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[150] *Guaylupo-Moya v. Gonzales.*
[151] *Oliva v. United States DOJ; Flores-Nova v. AG of the United States.*
[152] *Bamaca-Perez v. Lynch.*

In *Oliva v. United States DOJ,* the Second Circuit argued that, even if the CRC and Article 3 have risen to the status of customary international law, the statute controls. The case involved a Guatemalan father of a U.S. citizen child, who had been denied cancellation of removal. The petitioner argued that the BIA erred as a matter of law by failing to permit him to apply for relief under the CRC, and that he could not be removed without a hearing considering whether his removal was in the best interests of his U.S. citizen son. The court addressed the *Beharry* and *Guaylupo-Moya* issue, arguing that the *Charming Betsy* canon "does not apply where the statute at issue admits no relevant ambiguity."[153] In its analysis, the court explained that the first three parts of the statute are primary requirements – physical presence, good moral character, and no specified offenses – necessary for a consideration under the hardship requirement. The court argued that in this case "no ambiguity can be discerned in the timeliness requirement" because the statute "clearly limits relief based on family hardship to aliens who have been continuously physically present in the United States for ten years."[154] The petitioner failed to fulfill one of the primary requirements, so was not entitled to a hardship consideration or any kind of best interests assessment that that might involve. The court therefore did not need to address the issue of whether the hardship requirement is ambiguous.

In 2011, the Third Circuit echoed the *Oliva* reasoning in *Flores-Nova v. AG of the United States.* The case involved similar facts: the Mexican parents of three U.S. citizen children had been denied cancellation of removal. The couple failed to meet the continuous physical presence requirement, having left the country for a period exceeding

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[153] *Oliva v. United States DOJ.*
[154] *Oliva v. United States DOJ.*

90 days.[155] The petitioners made several claims, including the argument that the cancellation of removal statute does not comply with customary law as expressed in Article 3 of the CRC. The Court dismissed this claim, arguing that "Article 3(1) is not binding on the United States or this Court to the extent that it conflicts with 8 U.S.C. § 1229b(b),[156] in which Congress set forth the extent to which a child's hardship may be considered in determining eligibility for cancellation of removal."[157]

In 2016, the Sixth Circuit relied in part on *Oliva* and *Flores-Nova* to make a broader argument that the *entire* statute – rather than simply the physical presence requirement – controls over the CRC.[158] The case, *Bamaca-Perez v. Lynch*, involved a Guatemalan father of two U.S. citizen children, who had been denied relief under the hardship standard. The petitioner contended that the "best interests of the child" must be considered as an explicit factor in the hardship analysis when the qualifying relative is a child. In a short decision, the court denied the petition, citing the *Paquete Habana* and *Oliva* to argue that resort to international law is appropriate in the absence of a treaty, controlling executive or legislative act or judicial decision.

Relying on *Oliva, Flores-Nova* and *Payne-Barahona*, the *Bamaca-Perez* court argued that, since Congress has enacted legislation establishing "the applicable standard for cancellation of removal," it is that standard, rather than Article 3(1) of the CRC, which applies.[159] These citations are misplaced: as already examined, both *Oliva* and *Flores-Nova* focus on the narrower issue of the physical presence requirement, while *Payne-Barahona* concerns the bar to relief for LPRs who have been convicted of

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[155] *Flores-Nova v. AG of the United States.*
[156] (INA § 240A(b))
[157] *Flores-Nova v. AG of the United States.*
[158] *Bamaca-Perez v. Lynch.*
[159] *Bamaca-Perez v. Lynch.*

aggravated felonies. In all three cases, the court makes an ambiguity assessment and determines that the statute is clear. The *Bamaca-Perez* Court fails to make such a determination, falling into the same trap as the *Beharry* court.

Therefore, although several courts have addressed the issue of statutory interpretation in the case of potential ambiguity in the hardship standard, none have clearly addressed the issue of whether the hardship standard is ambiguous. Indeed, in *Bamaca-Perez*, the Court went on to make a secondary argument: that the inquiry *does* involve a best interests determination (see Chapter 3), perhaps recognizing that it had failed to adequately address the issue of statutory interpretation. Since no court has determined whether the hardship standard is ambiguous or not, there is room for arguments that it is ambiguous. Furthermore, these cases illustrate that a single provision of a statute can be interpreted as ambiguous or unambiguous. Therefore, an argument can be made for the ambiguity of just the hardship section of the non-LPR cancellation of removal statute, INA § 240A(b)(D).

V. The Ambiguity of the Hardship Standard: INA § 240A(b)(D)

The history of the hardship standard in cancellation of removal law is one of ambiguity and varying interpretations. Congress first introduced the standard into what was then known as "suspension of removal" in the 1952 Immigration and Nationality Act. Under the Act, an applicant needed to provide proof of five years physical presence and evidence that deportation would result in "exceptional and extremely unusual hardship" to the applicant's citizen or LPR spouse, parent or child.[160] The previous administrative remedy had been more lenient, allowing suspension of deportation if the

[160] Underwood, "Unreviewable Discretionary Justice."

applicant could provide evidence of "serious economic detriment" on return.[161] Under the 1952 law, suspension of deportation was available in the "very limited" category of cases in which deportation would be "unconscionable."[162] Since then, the standard has been changed several times in part as a result of efforts to standardize its interpretation.[163]

In 1962, Congress make the standard more lenient, dividing the statute into two categories so that individuals who were deportable on less serious grounds were subject to a lower "extreme hardship" standard.[164] After this change, there was considerable controversy over what was required to prove extreme hardship and the standard was applied inconsistently.[165] This culminated with the controversial 1996 BIA decision, *Matter of O—J—O—*. The case involved a citizen of Nicaragua who was granted relief despite having no family ties in the United States.[166] The BIA based its decision primarily on his ties and assimilation in the United States and the economic and political conditions of Nicaragua.[167] In the decision, the majority stated that "as evidenced by this very decision, and the decisions of this Board which have preceded it, the term 'extreme' in the statute is not readily defined, at least in its application."[168] Several board members dissented with the opinion and argued that the level of hardship did not rise to the sufficient level. One of the few matters of agreement between the majority and dissent is that the phrase "extreme hardship" is "ambiguous."[169]

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[161] Underwood.
[162] Curtis Pierce, "The Benefits of 'Hardship': Historical Analysis and Current Standards for Avoiding Removal," *West Group*, March 15, 1999.
[163] Underwood, "Unreviewable Discretionary Justice"; Pierce, "The Benefits of 'Hardship'"; Elwin Griffith, "Admission and Cancellation of Removal Under the Immigration and Nationality Act," *Michigan State Law Review*, 2005, 979–1063.
[164] Underwood, "Unreviewable Discretionary Justice."
[165] Underwood.
[166] Under the new "extreme hardship" standard, an applicant could supply evidence of hardship to him or herself, without having any qualifying relatives.
[167] Griffith, "Admission and Cancellation of Removal Under the Immigration and Nationality Act." p. 1025
[168] *In re O-J-O-*, 3280 (B.I.A.) 1996).
[169] *In re O-J-O-*.

The hardship standard was altered again in the 1996 Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), creating the current standard of relief. Congress stated that the applicant must show evidence of hardship "substantially beyond that which ordinarily would be expected to result from the alien's deportation."[170] The accompanying Senate Report stated that a case with similar facts to *O—J—O—* would not be approved under the new standard.[171]

Aside from that statement, though, Congress failed to give any further direction as to how the standard should be interpreted. Writing soon after the introduction of the new standard, one scholar noted that Congress has "never defined the ambiguous 'extreme' and 'exceptional and extremely unusual' hardship standards" and argued that the factors established in caselaw do "little in the way of providing content to the ambiguous phrase."[172] He further stated that "under any approach, it would be difficult to say that the term 'extreme hardship' is anything but ambiguous."[173] Later scholarship on the standard argues that there is "nothing predictable or even remotely rational about the current system for adjudicating applications for non-LPR cancellation."[174]

As a result of minimal guidance from Congress, the interpretation of the new "exceptional and extremely unusual hardship" standard was left almost entirely to the Board of Immigration Appeals. Congress granted decision-makers "discretion" when determining the level of hardship that would qualify (unlike the physical presence and disqualifying crimes requirements, which are fixed), meaning that the decision-maker has

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[170] "House Report 104-828 - Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (House of Representatives, 1996).
[171] H. Rept. 104-828.
[172] Underwood, "Unreviewable Discretionary Justice."
[173] Underwood.
[174] Taylor, "What Happened to Non-LPR Cancellation."

freedom in interpretation.[175] This in and of itself constitutes evidence that the hardship requirement is subject to some level of ambiguity. The BIA's three published decisions – *Monreal, Andazola and Recinas* – further demonstrate the ambiguity of the standard.

In *Matter of Monreal,* the BIA examined the statutory language in depth in order to determine its meaning, but failed to fully resolve the issue of ambiguity. The Board stated that "the terms 'exceptional' and 'extremely unusual' seemingly have ordinary meanings."[176] Exceptional is defined as "forming an exception; not ordinary; uncommon; rare" and extremely unusual as "circumstances in which the exception to the norm is very uncommon."[177] However, the apparent "plain meaning" of these terms becomes less clear "when appended to the term hardship, which can have multiple manifestations and inherently introduces an element of subjectivity into this statutory phrase."[178] The court further noted that "if the past 50 years have demonstrated nothing else with regard to the phrases 'exceptional and extremely unusual hardship' and 'extreme hardship,' they have shown that reasonable people can agree that the meaning of these terms is 'clear,' but come to quite different conclusions as to their application in various factual situations."[179] Despite their seemingly clear definitions, the hardship standards are not terms of "fixed and inflexible content or meaning."[180] Indeed, the Board members in the decision itself could not come to an agreement, with Lory Rosenberg submitting an eight-page dissenting opinion.

Although the BIA in *Monreal* determined that Congress did intend to make this hardship standard higher than the last, it refrained from drawing on caselaw from the

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[175] Mary Donahue, "Non-LPR Cancellation of Removal: An Overview of Eligibility for Immigration Practitioners" (Immigrant Legal Resource Center, June 2018).
[176] *Matter of Monreal*.
[177] *Matter of Monreal*.
[178] *Matter of Monreal*.
[179] *Matter of Monreal*.
[180] *Matter of Monreal*.

previous "exceptional and extremely unusual hardship" standard, arguing that the standard was different yet again. Furthermore, the Board stated that "although guidance as to this term's meaning can be provided, each term must be assessed and decided on its own facts."[181] The Board outlined a variety of factors that might be relevant in making the determination and did not foreclose any particular consideration of what can be considered in a hardship determination. As a result, the concept of hardship is open to change depending on the arguments made and evidence offered in each individual case.

In *Matter of Andazola*, there was even more debate between Board members as to whether the hardship presented rose to the necessary level. The majority determined that the case could not be "meaningfully distinguish[ed]" from *Matter of Monreal* and denied relief.[182] They argued that it was clearly Congress' intent to narrow the class of noncitizens eligible for relief, and therefore that this hardship standard must do that. In the dissent, Board members recognized that the "challenge" of interpretation – stating that "reasonable persons can differ on whether a set of circumstances rise to the requisite hardship" and then criticizing the majority's determination.[183]

Both dissenting opinions questioned the majority's interpretation of Congress' intent. In the first dissent, Cecelia Espenoza and Lory Rosenberg argued that the likely outcome of this decision – that "no respondent from Mexico will qualify" without a relative who has "severe medical problems" – was not in line with Congress' intent.[184] In the second dissent, several more Board members argued that Congress did not intend to "make the standard so demanding that it becomes a bar to all but the rarest of cases."[185]

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[181] *Matter of Monreal*.
[182] *Matter of Andazola*.
[183] *Matter of Andazola*.
[184] *Matter of Andazola*.
[185] *Matter of Andazola*.

The dissenting Board members argued that Congress accomplished its goal of narrowing the class of noncitizens eligible in several other ways, including the added 10-year physical presence requirement and the cap of 4,000 grants per year.

In *Matter of Recinas*, the BIA further elaborated on the hardship standard, and, despite its extremely restrictive application of the standard in the two previous published decisions, found room to grant relief. In fact, the Court's reasoning places it closer in line with the dissent in *Andazola,* stating that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief."[186] The Board's inability to agree on Congressional intent within and between these three decisions clearly illustrates that multiple interpretations are possible, that Congressional intent is not clear, and therefore that the standard is ambiguous.

VI. Conclusion

In summary, there is considerable evidence to suggest that the hardship standard under the non-LPR cancellation of removal statute is ambiguous. Previous caselaw on the CRC and "best interests" fails to make a determination on this issue, leaving room for future litigation. Evidence of ambiguity in the standard can be found in the history of the development of the standard and the three published BIA decisions. Because of this ambiguity, the hardship standard should be interpreted in a way that brings it in line with a "best interests of the child" determination. The following chapter analyzes the counter-argument that courts have made to this argument – that the hardship standard is already in line with the CRC – by examining the differences between the hardship standard and the best interests standard.

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[186] *Matter of Recinas*.

CHAPTER 3: HARDSHIP V. BEST INTERESTS: WHAT'S THE DIFFERENCE?

Because of the ambiguity of the hardship standard, the non-LPR cancellation statute should be interpreted, as far as possible, in a manner that accords with Article 3 of the Convention on the Rights of the Child. Some courts have argued that the hardship standard already does this: that the "hardship" standard is merely the converse of the "best interests" standard, and therefore involves a best interests analysis. However, this argument is superficial and flawed. It fails to understand that a best interests assessment, as developed in international jurisprudence, entails both substantive and procedural considerations which are absent from the way in which the hardship standard is currently assessed. This Chapter examines the considerable differences between the two standards. Part I outlines the existing caselaw which argues that the standards are the same. Part II provides an initial rebuttal to this argument through an examination of Canadian caselaw. Parts III and IV outline the key procedural and substantive differences between the standards.

I. Best Interests as the Converse of Hardship: Existing Caselaw

The Ninth and Sixth Circuit Courts have both argued that the hardship and best interests assessments are synonymous. In *Cabrera-Alvarez v. Gonzales*, the Ninth Circuit addressed the petitioner's claim that the court should consider the CRC's best interests standard in assessing hardship to his two U.S. citizen children. The case involved family separation: the petitioner's children would stay in the United States with their mother if their father were to be deported, because of the greater educational and economic opportunities.[187] The court did not reject the claim the best interests of his children should

[187] *Cabrera-Alvarez v. Gonzales.*

be considered, but argued that they *had* been considered under the hardship analysis. In assessing hardship, the court argued, the "child's 'best interests' are precisely the issue before the agency, in the sense that 'best interests' are merely the converse of 'hardship.'"[188] The court further contended that "the agency's entire inquiry focuses on the qualifying children, making their interests a 'primary consideration' in the cancellation-of-removal analysis."[189] As such, the petitioner "fail[ed] to demonstrate that the agency's interpretation or application of the statute is inconsistent with the Convention."[190]

Three later decisions followed the *Cabrera-Alvarez* reasoning. The Ninth Circuit cited *Cabrera-Alvarez* in *Torres v. Gonalez* (2005)[191] and *Vasquez v. Gonzales* (2009).[192] In both cases, the petitioners had sought relief based on the argument that the court should consider the best interests of the child, within or instead of the statutory hardship standard. In short decisions, both courts denied relief based on the argument that the court had already done so. In the 2016 decision, *Bamaca-Perez v. Lynch,* the Sixth Circuit relied on the same argument.[193] Citing *Cabrera-Alvarez,* the court argued that "best interests" are the converse of "hardship," and since the agency's inquiry focuses on the qualifying children, their best interests are a "primary consideration."[194]

These cases fail to conduct a thorough analysis of the factors involved in a best interests assessment, as required by international jurisprudence. A mere consideration of what might be (or not be) in the interests of a child does not amount to a best interests assessment under international law. In order to comply with the CRC, a best interests

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[188] *Cabrera-Alvarez v. Gonzales.*
[189] *Cabrera-Alvarez v. Gonzales.*
[190] *Cabrera-Alvarez v. Gonzales.*
[191] *Torres v. Gonzales.*
[192] *Vasquez v. Gonzales.*
[193] *Bamaca-Perez v. Lynch.*
[194] *Bamaca-Perez v. Lynch.*

assessment must follow specific procedural guidelines and address particular substantive considerations.

II. International Caselaw: Canada

An examination of the equivalent form of relief under Canadian immigration law provides an initial counter for the argument that "best interests" and "hardship" assessments are equivalent. Canada's courts use both standards in their equivalent statute, humanitarian and compassionate (H&C) relief. In assessing H&C considerations, courts assess the level of hardship on the applicant *and* take into account "the best interests of a child directly affected."[195] Jurisprudence clearly establishes that these are two separate forms of analysis. According to the Supreme Court decision, *Hawthorne v. Canada,* the best interests of a child must always be assessed in H&C applications. In the decision, the Supreme Court stated that "the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children" because "children will rarely, if ever, be deserving of hardship."[196]

The Canadian Federal Court has reaffirmed the importance of separating the hardship analysis from the best interests analysis several times. In *Williams v. Canada,* the court overturned the decision of an asylum officer after determining that the Officer applied the "wrong test" by analyzing whether the removal would have a negative impact on the child to the extent where he would suffer "undue and undeserved or disproportionate hardship" rather than conducting a best interests assessment.[197] In *Arulaj v. Canada,* the court held that it was an error in law to incorporate a hardship threshold

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[195] Government of Canada, "Humanitarian and Compassionate Assessment: Best Interests of a Child," March 2, 2016.
[196] *Hawthorne v. Canada* (Minister of Citizenship and Immigration, 297 N.R. 187 (FCA) (Federal Court of Appeal 2002).
[197] *Williams v. Canada (Citizenship and Immigration)*, FC 166 (Federal Court 2012).

into the best interests analysis.[198] Similarly, in *Mangru v. Canada,* the court determined that, because the application of the "hardship" threshold "permeates [the] analysis of the best interests of the children," the decision-maker reached an "inappropriate conclusion."[199] This caselaw demonstrates that the two forms of assessment are different and should not be conflated.

III. Procedural Differences

The Ninth Circuit's analysis of the best interests assessment in *Cabrera-Alvarez v. Gonalez* fails to recognize that a best interests assessment entails a specific procedure in the context of parental deportation, which has been developed by international jurisprudence. The primary procedural differences are summarized in Table 2. The best interests assessment involves a two-step process, in which the best interests of the child are considered independently of and prior to any other factors. The second stage of this assessment involves a balancing exercise in which the best interests, as a primary consideration, are balanced against other factors. This entire assessment is a pure analysis, in that it examines only the situation of the child and applicant. An integral part of the procedure is the consideration of the views of the child: the child is given a voice and the decision-makers are obliged to listen.

In contrast, under INA § 240A(b), the hardship analysis takes place *after* a consideration of countervailing factors. Although it contains a similar balancing exercise, the weight given to the best interests of the child is substantially less than in a best interests assessment. In contrast to the pure best interests analysis, the hardship assessment is comparative: adjudicators examine the hardship of the child *as compared to* that which would ordinarily be expected. The outcome of this comparative baseline

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[198] *Arulaj v. Canada (Minister of Citizenship and Immigration)*, FC 529 (Federal Court 2006).
[199] *Mangru v. Canada (Citizenship and Immigration)*, FC 779 (Federal Court 2011).

essentially means that any "typical" hardship experienced by a child upon the loss of their parent will not be enough to prevent deportation. Finally, the hardship analysis contains no particular mechanism for hearing and considering the views of the child.

	Best Interests (Article 3)	**Hardship**
Order of Analysis	1. Best interests of the child 2. All other factors	1. Situation of the applicant 2. Hardship to child (or other qualifying relative(s))
Weight of Child's Interests	Best interests is a *primary* consideration	Hardship is *a* consideration
Method of Analysis	Pure (fact-specific assessment)	Comparative (facts compared to "typical" case)
Incorporation of Views of the Child	Fundamental element of assessment	Not necessary

Table 2: Procedural Differences between Best Interests and Hardship Analysis

Order of Analysis

An Article 3 assessment involves a two-stage analysis: a consideration of the best interests of the child followed by a balancing of those interests against other relevant factors. The 2001 Australian Federal Court case, *Wan v. Minister for Immigration and Cultural Affairs*, first recognized the importance of separating the assessment into two stages. The court explained that the tribunal is required "to identify what the best interests of [the] children require […] *and then* to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweigh[s] the consideration of the best interests of the child understood as a primary consideration."[200] The reason for this is simple: without first determining what is in the child's best interests, a decision-maker cannot reasonably assess whether countervailing considerations outweigh those interests.[201] It is "imperative" that a decision-maker

[200] *Wan v. Minister for Immigration and Multicultural Affairs*, FCA 568 (Federal Court of Australia 2001).
[201] Jason M. Pobjoy, *The Child in International Refugee Law*, Cambridge Asylum and Migration Studies (Cambridge: Cambridge University Press, 2017), https://doi.org/10.1017/9781316798430.

consider the initial best interests determination as a "distinct and separate stage" to the secondary balancing exercise.[202] This first stage involves a consideration of all of the other rights in the Convention, as outlined in the following section. Only after the best interests have been assessed can the court take into consideration broader factors, including the situation of the parent(s).

A hardship analysis under non-LPR cancellation takes place in the opposite order: the situation of the applicant is assessed (at least in part) *before* the hardship of their child is considered. Under INA § 240A(b), the applicant must first provide evidence of a ten-year continuous period of residence, good moral character, and no convictions of certain listed crimes.[203] Only if the applicant fulfils these requirements is hardship to their child considered. If an applicant does not meet the first three factors, the impact of deportation on the child is irrelevant. The cases in the Chapter 2 illustrate this issue: in both *Oliva* and *Flores-Nova*, the children were never granted an opportunity to illustrate hardship because their parents failed to meet the physical presence requirement.[204]

Similarly, if an applicant has committed a certain crime, they will be statutorily barred from relief, and the interests of their children would never be considered. The crimes that bar an applicant from cancellation of removal include aggravated felonies, crimes of moral turpitude and falsification of documents.[205] In the U.K. Supreme Court decision, *ZH(Tanzania)*, the applicant had made two fraudulent asylum claims, crimes which on their own would likely have barred her from relief in the United States. However, in line with the requirements of a best interests assessment, the court first

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[202] Pobjoy. p. 255
[203] Immigration and Nationality Act § 240(A)(b)(A)-(C).
[204] *Flores-Nova v. AG of the United States, No. 652 F.3d 488 (Third Circuit 2011); Oliva v. United States DOJ, No. 433 F.3d 229 (2nd Circuit 2005).*
[205] Immigration and Nationality Act § 240(A)(b)(C).

considered the best interests of her children, before examining the crime. The court first determined that it was in the best interests of the children to remain in the United Kingdom with their mother, before weighing these against countervailing considerations, including their mother's "appalling immigration history."[206] As a result of this balancing exercise, the applicant was granted relief from deportation. Not all cases end this way, but every case which complies with the CRC involves a consideration of the child's best interests, regardless of any crimes their parent may have committed.

Weight of Child's Interests

A further key procedural difference between the best interests and hardship assessments is the weight given to the interests of the child in the analysis. The balancing exercise conducted in the second stage of the best interests assessment illustrates the primacy that is given the best interests of the child. Under Article 3, the best interests of the child must be a primary consideration and must be given significant weight in the balancing process. Article 3 does not require that the best interests of the child be *the* primary consideration, or that they necessarily determine the outcome. But it does require that no other consideration be treated as "inherently more significant" than the best interests of the child.[207]

In *ZH(Tanzania)*, the U.K. Supreme Court determined the weight that should be given to the best interests of children who are affected by the decision to deport one or both of their parents. The court examined the circumstances under which it might be permissible to deport a non-citizen parent where the effect will be that their child will also have to leave.[208] In its decision, the court drew upon caselaw from the European

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[206] *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* (UK Supreme Court February 1, 2011); *Wan v. Minister for Immigration and Multicultural Affairs.*
[207] *Wan v. Minister for Immigration and Multicultural Affairs.*
[208] *ZH (Tanzania)*.

Court of Human Rights (ECHR), recognizing that the Strasbourg court has become "more sensitive to the welfare of the children who are innocent victims of their parents' choices."[209] The court acknowledged that the best interests may be outweighed by the cumulative effect of other considerations, but emphasized that, since no single factor can be treated as more important than best interests, a general concern about maintaining immigration control will on its own usually be insufficient to justify an outcome inconsistent with the best interests of the child.[210] The court determined that the countervailing considerations were not strong enough to outweigh the best interests of the children, who "were not to be blamed" for their mother's decisions.[211]

Wider public interests, beyond the best interests of the child, can also weigh in the child's favor in the Article 3 balancing process. Courts have held that there is an independent public interest in promoting the best interests of children. A U.K. Supreme Court decision involving the extradition of a parent held that "[i]t is not just a matter of balancing the private rights of children against the public interest in extradition, because there is also a wider public interest and benefit to society in promoting the best interests of its children."[212] The Canadian Supreme Court has also held that there is an independent public interest in the preservation and protection of the family unit.[213] The primacy placed on the best interests of the child extends beyond even the particular child involved in the case.

In contrast, children in the hardship analysis are treated in the same way as other qualifying relatives. The statute makes no distinction between children, spouses or

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[209] *ZH (Tanzania)*.
[210] *ZH (Tanzania)*.
[211] *ZH (Tanzania)*.
[212] *HH v. Deputy Prosecutor of the Italian Republic, Genoa*, U.K.S.C. 25 (United Kingdom Supreme Court June 20, 2012).
[213] *Singh v. Minister of Employment and Immigratio*n (Supreme Court of Canada 1985).

parents. In *Matter of Monreal*, the hardship that the respondents' two U.S. citizen children would face is granted the same level of attention as the hardship that his two LPR parents would face. In its decision, the Board found that "the respondent's children will suffer some hardship, and likely will have fewer opportunities, should they go to Mexico, and … that the respondent's parents will suffer some hardship from having their son living father away" but found that the hardship did not rise to the necessary level.[214] The Board recognized that the children would accompany their father to Mexico, while the parents would remain in the United States, but failed to distinguish the former hardship as different to or greater than the latter.[215] Furthermore, the Board failed to make any distinction between the impact of separation on a child as compared to the impact of separation on an adult – a failure that is a common theme in cancellation cases.

Instead of emphasizing the importance of age of the relative, the cancellation statute emphasizes the immigration status of the relative: in order to qualify for a hardship assessment, the relative must be either a U.S. citizen or lawful permanent resident. As such, a child who is neither a citizen or LPR will not qualify and any hardship to that child will be irrelevant in the cancellation of removal decision. In *Matter of Recinas,* the respondent had four U.S. citizen children and two "minor respondents," aged 15 and 16. These two children were almost irrelevant to the decision – when they were mentioned, it was only to emphasize that their mother was the sole provider for "six children, four of whom are United States citizens."[216] The court is not required to analyze the hardship to any child who is not a citizen or LPR, making those children essentially invisible in the legal process.

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[214] *In re Francisco Javier Monreal-Aguinaga, Respondent (Board of Immigration Appeals May 4, 2001).*
[215] *Matter of Monreal.*
[216] *Matter of Recinas.*

Method of Analysis

The third main procedural difference between the best interests and hardship assessments is the method of analysis. An Article 3 assessment entails a pure analysis of the situation of the child, applicant, and other factors relevant to the particular case. The nature of a best interests assessment is such that it examines the interests of the child in question solely, and does not compare these to any typical case involving a child facing parental deportation. The first stage of the analysis entails an examination of the child's best interests in "isolation from other factors."[217] Even in the second, balancing, stage, the decision-maker must make a determination based purely on the "particular facts and circumstances of the particular case."[218]

In contrast, the hardship analysis is a comparative exercise. The hardship to the child is not balanced against countervailing considerations, but instead compared to a baseline level of hardship. According to *Matter of Monreal,* the applicant must demonstrate that the qualifying relative would suffer hardship "substantially beyond that which would ordinarily be expected to result from the alien's deportation."[219] The hardship analysis is essentially a hypothetical comparative exercise: the court must determine whether the hardship that would be suffered as a result of deportation is beyond a "typical" level of hardship. Because of this comparative baseline, hardship that is experienced by every child upon parental deportation will be insufficient to grant cancellation of removal. In *Matter of Andazola,* the Board found that "the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon

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[217] *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC).
[218] *ZH (Tanzania),* quoting *EB(Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41 [2009] AC 1159.
[219] *Matter of Monreal*.

removal to a less developed country."[220] This comparative exercise is far from the pure assessment of best interests required under the CRC.

Views of the Child

The final procedural difference between the two forms of analysis is the importance granted to the views of the child. The consideration of the views of the child is a fundamental element of the best interests determination, one which sets Article 3 apart from earlier conceptions of best interests.[221] Article 12 sets forth the right to have the child's views given "due weight in accordance with the age and maturity of the child."[222] In order to do this, the child must be "provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."[223]

In the immigration context, courts have held that the interests of the child are unlikely to conflict with those of the family, so separate representation is usually not necessary.[224] However, courts are careful to recognize that "while [children's] interests may be the same as their parents' this should not be taken for granted in every case."[225] As such, decision-makers should be "alive to the point and prepared to ask the right questions."[226] In *ZH(Tanzania),* a letter from the children's school and a report from a youth worker sufficed as representative of the children's views. However, the court

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[220] *In re Martha Andazola-Rivas, Respondent (Board of Immigration Appeals April 3, 2002).*
[221] John Tobin, "Justifying Children's Rights," *International Journal of Children's Rights* 21 (2013).
[222] The United Nations Convention on the Rights of the Child. Article 12(1)
[223] The United Nations Convention on the Rights of the Child. Article 12(2)
[224] *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198.
[225] *ZH (Tanzania)*.
[226] *ZH (Tanzania)*.

emphasized that "immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so."[227]

In contrast, under non-LPR cancellation, there is no statutory requirement, or interpretive guideline, which relates to considering the views of the child. U.S. Citizenship and Immigration Services (USCIS) guidelines on determining extreme hardship make no mention of the incorporation of the views of the child.[228] BIA caselaw makes some reference to the views of the child but fails to give their views due weight or consideration. In *Matter of Monreal,* the eldest child did testify in court regarding "his life in this country and his desire not to depart for Mexico."[229] However, this consideration is only weighed into the decision as evidence that the facts involved are de facto deportation rather than separation.

The remaining two decisions grant even less weight to the views of the child. In *Matter of Andazola,* the eldest child testified to her "very close relationship with her grandmother," but this was given no further consideration in the decision.[230] In *Matter of Recinas,* there is no evidence to suggest that any of the four children (aged 12, 11, 8, and 5) testified in court. INA § 240A(b) provides, at face value, a venue for testimony, but fails to give the views of the child due consideration. This failure to incorporate the views of the child sets the hardship analysis apart from the Article 3 assessment.

IV. Substantive Differences

The substantive considerations involved in the best interests and hardship assessments are also considerably different. The factors that are considered in each type

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[227] *ZH (Tanzania)*.
[228] "Extreme Hardship Considerations and Factors - Chapter 5, Part B, Volume 9," Policy Manual (U.S. Citizenship and Immigration Services).
[229] *Matter of Monreal*.
[230] *Matter of Andazola*.

of analysis are overlapping to some degree: all factors considered in the hardship assessment are also considered in the best interests assessment, but not vice versa. Under the first stage of an Article 3 assessment, the decision-maker must consider three sets of factors: the views of the child; the specific situation and vulnerabilities of the child, including age, maturity and particular vulnerabilities; and the extensive catalogue of rights protected under the CRC.[231]

In contrast to the specific set of rights that should be considered under an Article 3 analysis, a hardship analysis can – but is not compelled to – consider a range of indeterminate factors. In *Matter of Monreal*, the Board determined that the same hardship factors considered under the previous "extreme hardship" standard should be considered, but that they must be "weighed according to the higher standard required for cancellation of removal."[232] These factors, listed under the USCIS guidance on extreme hardship, are much more broadly defined than the rights listed in the Convention. Decision-makers can consider family ties and impact, social and cultural impact, economic impact, and country conditions.[233] Each one of these categories is encompassed by several rights in the Convention. More important, however, are the rights in the CRC that are absent from the hardship analysis.

The rights enshrined in the CRC, which must be considered in every best interests assessment, span a wide range of social, economic, health, civil, political and cultural factors. Some of the most fundamental rights in the immigration context, aside from Article 3, are the right to non-discrimination (Article 2), the right to a nationality (Articles 7 and 8), the right to life, survival and development (Article 6), and the right to

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[231] Pobjoy, *The Child in International Refugee Law*.
[232] *Matter of Monreal*.
[233] "Extreme Hardship Considerations and Factors - Chapter 5, Part B, Volume 9," Policy Manual (U.S. Citizenship and Immigration Services).

not be separated from family (Article 9). All of these rights are either completely absent from or given insufficient weight in the hardship analysis.

The right to non-discrimination (Article 2) is one of the most important rights in the CRC. Article 2 states that parties must ensure the rights in the Convention to each child "irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[234] The principle of non-discrimination provides that all rights are applicable to "each child within [the State Parties'] jurisdiction without discrimination of any kind."[235] Therefore, discrimination based on immigration status is prohibited. The statutory requirement that hardship to a child is considered only if that child is a U.S. citizen or LPR is clearly in violation of this requirement, discriminating against noncitizen and non-LPR children.

The right to non-discrimination does not mean that citizenship is irrelevant – indeed, courts have recognized that citizenship plays an important role in the balancing process. The CRC recognizes the right of every child to acquire a nationality (Article 7) and to preserve her identity, including nationality (Article 8). As such, courts have held that, although nationality is not a "trump card," it should be of particular importance in the balancing exercise.[236] However, Article 2 does require that a child should not be made invisible or irrelevant to the proceedings by virtue of lack of citizenship or lawful residence. Article 2, in combination with Article 7 and 8, provide that all children must have their best interests considered, and that their citizenship will either be neutral or act as a positive weight in favor of remaining in the country.

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[234] The United Nations Convention on the Rights of the Child. Article 2(1)
[235] Committee on the Rights of the Child, "The Rights of All Children in the Context of International Migration."
[236] *ZH (Tanzania)*.

A third fundamental right in the CRC which is absent from non-LPR cancellation is the right to life, survival and development (Article 6). This right goes beyond physical survival and includes the development of the child "to the maximum extent possible."[237] The Committee on the Rights of the Child has recognized that "decisions to repatriate" can "significantly impact a child's life and development."[238] Furthermore, the health conditions in the country to which a child may be deported can significantly impact a child's development. USCIS guidelines on hardship determination state that decision-makers should consider health conditions and care.[239] However, in practice, this will only make a difference if the child in question has a significant health issue which requires superior healthcare. In *Matter of Andazola*, two dissenting Board members stated that "under the interpretation announced today, it is more likely than not that no respondent from Mexico will qualify for cancellation unless the qualifying relative has severe medical problems."[240] Such an interpretation is clearly in violation of Article 6.

Finally, the CRC includes the right of a child to not be separated from their family, a right that is not recognized in cancellation of removal. Article 9 sets forth the principle that a child should not be separated from their family "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."[241] This kind of best interests assessment is the most strict type: best interests must be not simply *a* primary factor, but *the* "determining" factor for decisions that would leave to the separation of a child from their parents.[242] Although USCIS guidance states that decision-

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[237] The United Nations Convention on the Rights of the Child. Article 6(1)
[238] Committee on the Rights of the Child, "The Rights of All Children in the Context of International Migration."
[239] "Extreme Hardship Considerations and Factors - Chapter 5, Part B, Volume 9," Policy Manual (U.S. Citizenship and Immigration Services).
[240] *Matter of Andazola*.
[241] The United Nations Convention on the Rights of the Child. Article 9(1)
[242] *ZH (Tanzania)*.

makers should consider "family ties and impact," there is no particular emphasis on family unity or the impact of separation.[243] Furthermore, the fact that BIA decisions are not subject to judicial review suggests that, even if such a determination were made, the statute would remain in conflict with Article 9 of the CRC.

V. Conclusion

There are several key differences between the best interests and hardship assessment. Caselaw from the Canadian courts provides an initial rebuttal to arguments that the hardship standard is simply the "converse" of best interests. There are key procedural and substantive differences between the best interests and hardship analyses, which demonstrate that – contrary to the Ninth Circuit's superficial interpretation of the best interest standard – the two standards are entirely different forms of assessment. As a result of these differences, the interpretation of the statute in its current form does not comply with the CRC and Article 3. Because of the ambiguity of the hardship standard, demonstrated in Chapter 2, the statute may be construed in a way that complies with the CRC. The concluding chapter outlines possibilities for re-interpretation of the statute in a way that is in line with the CRC.

[243] "Extreme Hardship Considerations and Factors.

CONCLUSION

I. Summary

This thesis argued that the United States is failing to fulfill its obligations under customary international law to consider the best interests of the child under non-LPR cancellation of removal. Through an analysis of theories of customary law, the first chapter demonstrated that the UN Convention on the Rights of the Child and the "best interests" principle are customary international law. The United States' commitment to international law, enshrined in the *Paquete Habana*, illustrates that the U.S. immigration law should accord with the Convention. Furthermore, there exists already some cancellation of removal caselaw to support the conclusion that the CRC has risen to the level of customary international law.

The second chapter analyzed whether the non-LPR cancellation statute should be interpreted in accordance with customary international law. Through an analysis of scholarship and caselaw on statutory ambiguity, it argued that the hardship standard, section (D) of INA § 240A(b), is ambiguous. The BIA's published decisions illustrate the ambiguity present in the language of the statute and in Congress's intent. According to the *Charming Betsy* canon, this ambiguity means that the statute must be interpreted in a way that accords with customary international law.

The final chapter tested whether the statute is already in accordance with the CRC and best interests principle. Drawing on international jurisprudence and a close examination of procedural and substantive considerations required in each type of analysis, it found that the best interests and hardship assessments are fundamentally different. It concluded that, because of these differences, the hardship statute is currently

in conflict with customary international law and should therefore be re-interpreted in a way that ensures it complies – as far as possible – with the "best interests" standard.

II. Implications: How to Incorporate a Best Interests Analysis

In order to comply with the Convention, the non-LPR cancellation statute should be re-interpreted in a way that minimizes, and preferably eliminates, the differences identified in Chapter 3. First and foremost, the assessment of hardship must be interpreted to incorporate a best interests assessment when the qualifying relative is under the age of 18, and in such cases should follow the precedent of international jurisprudence. Some of the procedural differences may require a broader legislative change since they relate to the entire statute and not simply the hardship requirement. However, the majority of the substantive requirements can be altered through re-interpretation of the statute, which can be conducted through litigation.

The procedural and substantive changes which would bring the hardship analysis in line with the CRC and Article 3 are as follows:

1. **Reverse the order of analysis**: assess the best interests of the child before the situation of the parent. (This would require a change to INA § 240A(b) sections (A), (B), and (C), as well as (D) the hardship requirement, so may only be possible with a legislative change.)
2. **Treat the best interests of the child as a primary consideration**. This means that, although other cumulative considerations may outweigh the best interests of the child, no other consideration can inherently be more important.
3. **Remove the comparative baseline**. The best interests of the child and the particular facts of the particular case should be considered without comparison to a "typical" fact pattern.

4. **Grant children the right to be heard**. Invite children to express their views through testimony and require decision-makers to grant these views due consideration and weight.
5. **Incorporate a best interests assessment for every child**, regardless of immigration status, in line with Article 2 of the CRC, the right to non-discrimination.
6. **Place greater emphasis on the importance of nationality**, and the right of a United States citizen child to remain in their country of citizenship, in line with Articles 7 and 8 of the CRC.
7. **Place greater emphasis on the right to life, survival and development** for every child, in line with Article 6 of the CRC.
8. **Place greater emphasis on the right to family unity** and the right of a child to not be separated from their family, in line with Article 9 of the CRC.

These recommended changes could bring the hardship statute into compliance with the CRC and the best interests principle. However, they are ambitious changes which may not be practical in the short-term and may face significant barriers in court. A more moderate change would be to re-interpret the current standard so that it incorporates some level of best interests assessment for qualifying relatives who are under the age of 18. This assessment would include a consideration of the child's views and their rights under the Convention, including a consideration of the traumatic impacts that deportation has on a child, and their increased vulnerability due to age.

If Congress' intent was to narrow the category of applicants eligible for this type of relief, as the BIA has held, this more moderate interpretation would not necessarily have to stray from that intended outcome. The main difference in outcome would be that

applicants with children are more likely to gain relief, whereas applicants without children may be less likely to. The comparative exercise (whereby hardship must be beyond "typical" hardship) would compare the situation of children with that of adults: due to increased vulnerability, their hardship would generally be higher than that which an adult might ordinarily be expected to experience. In this framing, a parent facing deportation who has a child under the age of 18 could be at a much lower risk of deportation than a parent without a child.

Although this outcome is far from ideal, it could act as a short-term solution that brings the non-LPR cancellation of removal statute closer to the CRC and the "best interests" principle. There are elements of the Article 3 assessment, particularly procedural considerations, which may be challenging to incorporate into the hardship standard without a complete change in the statute, such as the order of analysis. This moderate re-interpretation could act as a short-term solution with the long-term goal of adhering to the recommended long-term changes listed above. This long-term goal must begin with small steps: the recognition that the hardship statute is not in compliance with the Convention on the Rights of the Child and that it must undergo some kind of change in order to incorporate a best interests assessment for all children who face parental deportation.

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