

Children's Asylum Claims

CGRS Practice Advisory
Updated March 2015

CENTER FOR
Gender & Refugee
STUDIES

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Introduction

Thank you for contacting the Center for Gender & Refugee Studies (CGRS), based at the University of California Hastings College of the Law, about your asylum case. At CGRS, we are playing a central role in advising attorneys on children's asylum claims and tracking children's cases to inform national policy work on the issue. We encourage you to keep us up-to-date regarding the outcome of your case and any interesting developments along the way at <http://cgrs.uchastings.edu/assistance>.

This advisory provides an overview of the law related to children seeking asylum in the United States, including requirements for establishing a valid claim and relevant case law and advice regarding legal theories and evidence. It includes an appendix outlining the types of evidence that should be submitted in children's asylum cases where available. Although the focus of the advisory is on asylum, it briefly discusses applications for withholding of removal and protection under the Convention Against Torture. Please also note that CGRS has extensive country conditions packets, research memos, and expert declarations on relevant conditions in dozens of countries as well as sample briefs and pleadings, some of which are available on our website and others of which can be provided upon request.

CGRS engages in technical assistance and country conditions research support free of charge. We appreciate that many lawyers represent asylum seekers for little or no fee. However, we hope that you will consider supporting our work in whatever way possible so that we are able to continue to provide critical assistance to you and your clients. Our website has more information about ways to get involved.

General Asylum Overview & Advice

The advice and information provided by CGRS assumes a familiarity with basic asylum law principles. Below is a selection of recommended sources for general information on asylum:

UNHCR guidelines and notes on a range of issues related to refugee status

<http://www.unhcr-centraleurope.org/en/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines.html>

AILA's *Asylum Primer*

<http://agora.aila.org/Product/List/Publications>

The ILRC's *Asylum and Related Immigration Protections*

<http://www.ilrc.org/publications>

The Ninth Circuit's *Immigration Outline*

http://www.ca9.uscourts.gov/guides/immigration_outline.php

The NIJC's *Asylum Training Materials*

<https://www.immigrantjustice.org/attorney-resources>

Kurzban's *Immigration Law Sourcebook*

<http://agora.aila.org/Product/Detail/1848>

Detained Children

If your client is in the custody of the Office of Refugee Resettlement, s/he may be released to a sponsor—usually a family member or family friend—while pursuing his or her claim for immigration relief. For information on how a sponsor can seek release of an unaccompanied child, see <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>.

For a sponsor release packet, see <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services#FamilyReunificationPacketforSponsors>.

Contact the Office of Refugee Resettlement at: (202) 401-9246

I. Children Seeking Asylum: Jurisdictional Issues

A. Which agency has jurisdiction over the asylum claim

Below is a summary of the key information on jurisdictional issues that arise in asylum claims involving unaccompanied children. For a detailed analysis of the substantive and procedural hurdles children face in seeking asylum and other forms of protection in the United States, we encourage you to read *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), co-authored by CGRS and Kids in Need of Defense (KIND), available at <http://cgrs.uchastings.edu/publications>.

In December 2008, the Trafficking Victims Protection Reauthorization Act (TVPRA) was signed into law, providing a number of protections for “unaccompanied alien children” (UAC), including asylum protections. For purposes of the TVPRA, the term “unaccompanied alien child” is defined under the Homeland Security Act (HSA) of 2002 as a child who (1) has no lawful immigration status in the United States; (2) has not attained 18 years of age; and (3) has no parent or legal guardian in the United States who is available to provide care and physical custody.¹

Under the TVPRA, the Asylum Office—housed within the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS)—has initial jurisdiction over *all* asylum claims of UACs. Even if a child is placed in removal proceedings, the Asylum Office has initial jurisdiction over his or her asylum case, and the child should have his or her claim heard in the non-adversarial setting of the Asylum Office. In addition to the jurisdictional asylum provisions, the TVPRA exempts UACs from two of the statutory bars to asylum—the safe third country bar and the one-year bar.²

Until June 2013, USCIS made its own determination of UAC status for every child in removal proceedings who claimed to benefit from the protections under the TVPRA, even when DHS had already determined that a child was a UAC. USCIS also took the position that in order to benefit from the protections under

¹ 6 U.S.C.A. § 279(g) (2).

² See below for more information on the one-year bar. This advisory does not address the safe third country agreement; please visit USCIS’s website for more information on this bar at: <http://www.uscis.gov/uscis-tags/unassigned/us-canada-safe-third-country-agreement> (last visited March 15, 2015).

the TVPRA, an individual must have been a UAC at the *time of filing* the asylum application, even if his or her status later changes. After much criticism, USCIS revised its policy in June 2013 and decided to accept DHS's determination of whether a child is a UAC and to continue to treat an individual as a UAC unless and until DHS formally terminates the child's UAC status.³ USCIS currently applies TVPRA's jurisdictional clause to these different categories of asylum seekers as follows:

Individuals who Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) has previously determined to be a UAC

USCIS will treat as unaccompanied any individual who CBP or ICE has determined to be a UAC, unless and until CBP, ICE or Health and Human Services (HHS) has taken affirmative action to terminate UAC status. In other words, USCIS will consider an asylum seeker unaccompanied based on a prior UAC determination, even if the asylum seeker has turned 18 or has been reunified with a parent(s). Any individual who was in the custody of the Office of Refugee Resettlement was previously determined to be a UAC. The following forms prove that a prior UAC determination was made by CBP or ICE: Office of Refugee Resettlement Initial Placement Form, Office of Refugee Resettlement Verification of Release Form, Form I-213 (Record of Deportable Alien), and Form 93 (CBP UAC screening form).

Individuals for whom no prior UAC determination was made

USCIS will make a UAC determination for children in removal proceedings who file for asylum with USCIS under TVPRA's initial jurisdiction clause, who have not received a prior UAC determination. A child may not have received a UAC determination either because s/he entered the United States undetected or because s/he entered accompanied and only later became unaccompanied. When making a UAC determination, USCIS looks to whether the child satisfies the statutory definition of a UAC at the time s/he filed the asylum application. USCIS conducts the jurisdictional and asylum interviews at the same time. If USCIS decides it does not have jurisdiction because the applicant was not a UAC at the time of filing the asylum application, it will refer the asylum case back to the immigration court.

USCIS also determines UAC status for children not in removal proceedings. USCIS unquestionably has jurisdiction over the claims of individuals not in removal proceedings, but whether the child is a UAC is relevant to the application of the one-year filing deadline.

Individuals with claims pending before the immigration courts, BIA, or federal Courts of Appeals who were UACs when they filed their asylum claims but did not benefit from TVPRA's protections

USCIS has jurisdiction over cases of individuals with pending asylum applications before the immigration courts, Board of Immigration Appeals (BIA) and federal Courts of Appeals who were UACs when they filed their asylum applications, but who did not at the time of filing benefit from TVPRA's initial jurisdiction clause. Individuals in this situation are eligible to have their asylum petitions sent to USCIS for an asylum determination.⁴ For cases pending before the BIA, attorneys should approach the local DHS Office of the Chief Counsel trial attorney assigned to

³ USCIS Q&A Memo.

⁴ See "Questions and Answers, USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum New Laws Allows Children in Removal Proceedings to Begin Asylum Process in Non Adversarial Setting," USCIS, March, 25, 2009. See also "Questions and Answers, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children," USCIS, June 10, 2013 ["USCIS Q&A Memo"].

the case about getting the case before the USCIS Asylum Office. For cases pending at the Courts of Appeals, attorneys should speak with the attorney from the Office of Immigration Litigation (OIL) assigned to the case about filing a joint or unopposed motion to remand the case to the agency.

Individuals who USCIS previously found not to be a UAC

USCIS will not reconsider claims of individuals who the agency previously determined *not* to be a UAC, even if they were previously determined to be a UAC by CBP or ICE. In other words, individuals who USCIS determined did not qualify as UACs under its prior policy—because they were no longer a UAC at the time they filed for asylum (because they had turned 18 or were reunified with a parent)—cannot now benefit from USCIS’s revised policy. Individuals in this group must pursue their asylum claims in removal proceedings.

B. How to get an asylum application before USCIS while in removal proceedings

Transferring asylum cases to USCIS should be a straightforward, uncontroversial process. Attorneys should inform the immigration judge and DHS trial attorney that the client is a UAC and intends to file for asylum with USCIS. The DHS trial attorney should provide attorneys with a “UAC Instruction Sheet” to include in the filing to USCIS along with the asylum application. Attorneys should indicate “UAC I-589” or “UAC asylum application” on the envelope, as well as the cover sheet. UAC asylum applications should all be filed with the USCIS Nebraska Service Center. Once filed, attorneys should receive a notice of receipt of the application and should provide the court a copy.

Attorneys can file a motion to administratively close or, in the alternative, to continue immigration court proceedings while the asylum application is pending before USCIS. Some judges agree to administratively close proceedings upon a showing that an individual is a UAC. Others only agree to administratively close once they have received proof that the asylum claim was filed with USCIS. Some judges prefer to grant long continuances rather than to administratively close cases, which is why styling a motion in the alternative is beneficial.

II. Alternative Forms of Relief

Attorneys representing children in their asylum claims should always consider alternative forms of relief that may be more appropriate or preferable to pursue in lieu of, or simultaneously with asylum. In some cases, the facts that form the basis of an asylum claim give rise to other forms of relief for which a child may be eligible in addition to asylum, such as: Special Immigrant Juvenile Status (SIJS) for abused, abandoned, or neglected children, a T- visa for victims of human trafficking, a U- visa for victims of certain crimes that take place in the United States, an S- visa for material

Defending Against Removability

A child in removal proceedings can defend against removal without seeking relief. It is DHS’s burden to prove “alienage” and removability. Attorneys can deny the allegations and charges against clients and hold DHS to its burden. In some cases, DHS’s evidence of alienage may have been obtained under duress or questionable circumstances. In other cases, DHS may have failed to give proper notice of removal proceedings, or the Notice to Appear (NTA) may contain errors or deficiencies. Attorneys may seek to suppress evidence DHS obtained from child clients and to terminate proceedings based on these types of errors or mistreatment by DHS.

witnesses in criminal investigations or prosecutions, or protection under the Violence Against Women Act (VAWA). Other forms of relief for which children may be eligible that have no bearing on their asylum claims include: family-based immigration, cancellation of removal, Temporary Protected Status (TPS), Deferred Action for Childhood Arrivals (DACA), Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and possibly more.⁵

Attorneys should also consider requesting prosecutorial discretion for child clients in removal proceedings who lack a claim for relief or who have a weak claim for relief. ICE may exercise discretion to administratively close removal proceedings in cases of principal child asylum applicants.⁶

Prosecutorial discretion does not provide a path to permanency, but it can provide temporary relief for children not otherwise eligible for long-term or permanent relief. DHS issued a memorandum in November 2014 revising its enforcement priorities and making the category of individuals who entered the United States after January 1, 2014 the second highest priority for removal.⁷ At the same time, DHS made clear in its memorandum that individuals who entered after January 1, 2014 who are not actually a threat to national security, border security, or public safety should not be prioritized for removal. Among the factors to consider for prosecutorial discretion, DHS included “compelling humanitarian factors” such as age, having or being a young child, health, and pregnancy. Prosecutorial discretion is not easy to obtain for children who entered the United States after January 1, 2014, but it is an important option to consider pursuing.

III. Guidelines on Children’s Asylum Cases

Both the United States and the United Nations High Commissioner for Refugees (UNHCR) have issued guidelines on children’s asylum cases, which CGRS recommends reviewing and submitting in filings at the Asylum Office and/or immigration court.⁸ While neither the U.S. nor the UNHCR Guidelines are binding on immigration judges, the BIA, or federal judges, the First Circuit Court of Appeals, for example, remanded a case to the BIA for failure to consider the U.S. Guidelines, and other Courts of Appeals have

⁵ For a thorough explanation of each of these forms of relief, please see the materials available on the Immigrant Legal Resource Center’s website at <http://www.ilrc.org/> (last visited March 15, 2015).

⁶ A principal is considered the lead individual applying for asylum. Occasionally a principal is accompanied by derivatives—the principal’s spouse and/or children—who are not applying for asylum in their own right but are seeking to benefit from the application of the principal. Children can apply for asylum as a principal (in their own right) or as a derivative, depending on the situation.

⁷ See Policies for Apprehension, Detention, and Removal of Undocumented Immigrants, Jeh Johnson, November 20, 2014, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (last visited March 15, 2015).

⁸ See Guidelines for Children’s Asylum Claims, U.S. Department of Justice, Immigration and Naturalization Service, Office of International Affairs, File 120/11.26, December 1, 1998 [“U.S. Guidelines”]; *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, HCR/GIP/09/08, December 22, 2009 [“UNHCR 2009 Guidelines”]; Guidelines and Procedures in Dealing with Unaccompanied Children Seeking Asylum, Office of United Nations High Commissioner for Refugees Geneva, February 1, 1997 [“UNHCR 1997 Guidelines”]; Field Handbook for the Implementation of UNHCR BID Guidelines, United Nations High Commissioner for Refugees, November 2011.

cited to the Guidelines.⁹ Moreover, the U.S. Supreme Court considers UNHCR to be a guiding authority in interpreting the definition of the term “refugee.”¹⁰ USCIS also has publicly available training materials for Asylum Officers on adjudicating children’s claims, which are worth reviewing and submitting when a case is proceeding in immigration court—these are known as the Asylum Office Basic Training Course materials (AOBTC).¹¹

The TVPRA requires the government to issue regulations that take into account the “specialized needs” of unaccompanied children and address both substantive and procedural aspects of UAC asylum claims. These regulations have not issued to date. We recommend that advocates keep an eye out for the regulations, which would bind adjudicators in children’s cases at all levels. In the meantime, the Executive Office for Immigration Review (EOIR), which houses both the immigration courts and the BIA, has issued an operating policies and procedures memorandum (OPPM) for UAC cases, which we recommend reading for cases proceeding in immigration court.¹² The OPPM provides little guidance on substantive analysis of children’s claims, but it is still helpful in the absence of binding regulations.

IV. Application of the Refugee Definition to Children’s Cases

There is no separate “refugee” definition for children; thus, children seeking asylum must satisfy the same refugee definition as adults found in Immigration and Nationality Act § 208, 8 U.S.C. § 1158. As noted by the UN Committee on the Rights of the Child, however, the refugee definition “must be interpreted in an age and gender sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children.”¹³ The UNHCR recommends a child-sensitive application of the refugee definition and advises that in addition to age, “factors such as rights specific to children, a child’s stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability” should be considered to ensure appropriate application of the refugee definition.¹⁴ In addition to considering the above factors, decision makers applying a child-sensitive analysis should give children the liberal benefit of the doubt when deciding whether the evidence in a case satisfies the elements of the refugee definition and should only expect detail and consistency that is appropriate to the child’s age and development.¹⁵

⁹ See *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010) (vacating panel decision upholding asylum denial and remanding to BIA based on agency’s failure to consider children’s guidelines); *Zhang v. Gonzales*, 408 F.3d 1239, 1247 (9th Cir. 2005) (citing to U.S. Guidelines).

¹⁰ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 n.22 (1987) (recognized that UNHCR provides significant guidance in constructing 1967 Protocol, to which the 1980 Refugee Act sought to conform).

¹¹ USCIS’s training materials are available on its website at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last visited March 15, 2015).

¹² Office of the Chief Immigration Judge, Executive Office for Immigration Review, U.S. Department of Justice, “Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children,” May 22, 2007, available at <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> (last visited March 15, 2015).

¹³ UN Committee on the Rights of the Child, *General Comment*. No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6 Sept. 2005.

¹⁴ UNHCR 2009 Guidelines at ¶ 4-5.

¹⁵ See 1998 INS Children’s Guidelines at 26; Asylum Officer Basic Training Course, *Guidelines for Children’s Asylum Claims* 41 (Sep. 2009) [“AOBTC Children’s Guidelines”] at 33-34; 2009 UNHCR Guidelines at 27; ABA Standards, VIII(B)(5)(b).

As mentioned below and in our report, *A Treacherous Journey*, a child-sensitive analysis has been applied by some courts, but not consistently because of the non-binding nature of the UNHCR Guidelines. However, combined with the U.S. guidelines, attorneys should advocate for a child-sensitive analysis in all asylum cases involving child applicants or applicants who were children at the time they endured past persecution.

V. Well-Founded Fear of Persecution

An asylum applicant can establish a well-founded fear of persecution by showing past persecution, which gives rise to a rebuttable presumption of a well-founded fear of future persecution, or by showing objective evidence indicating a risk of future persecution.¹⁶ This section focuses on the level of harm required to constitute persecution and the standard to establish the well-foundedness of one's fear.

A. Whether harm rises to the level of persecution

Persecution is not defined by statute and, as a result, has slowly developed through case law. The BIA and federal courts have found that persecution may be physical, sexual, emotional, or psychological.¹⁷ A range of harms that have been recognized as persecution in cases involving adults should also constitute persecution in cases of children; these include harms such as female genital cutting (FGC), trafficking, domestic abuse, and severe physical harm and torture.¹⁸ However, harms not rising to the level of persecution in the case of an adult may still qualify as persecution of a child, as discussed below.

The level of harm required to constitute persecution is reduced in children's cases. According to the UNHCR and U.S. Guidelines, and as upheld by several U.S. Courts of Appeals, "[t]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution."¹⁹ The applicable question is whether the harmful act(s) constitute persecution *when considered from the perspective of a child*.²⁰ Whether harm suffered or feared by the child

Common Forms of Persecution of Children

- Exploitative labor (forced, unsafe conditions, long hours, no or very low pay, may involve physical abuse)
- Human trafficking (prostitution of a child, labor trafficking)
- Forced marriage (coercion or duress involved, underage/early marriage)
- Female genital cutting
- Deprivation of education
- Serious neglect
- Child abuse
- Gang recruitment
- Threats

¹⁶ 8 C.F.R. § 208.13(b).

¹⁷ See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Makhoul v. Ashcroft*, 387 F.3d 75, 80 (1st Cir. 2004); *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004); *Kovac v. INS*, 407 F.2d 102, 106-7 (9th Cir. 1969).

¹⁸ *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (female genital cutting); *Cece v. Holder*, 733 F.3d 662, 671-72 (7th Cir. 2013) (en banc) (trafficking); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014) (domestic abuse); *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000) (noting that "[p]hysical harm has consistently been treated as persecution"); *Salaam v. INS*, 229 F.3d 1234, 1240 (9th Cir. 2000) (holding torture sufficient to establish past persecution); see also UNHCR 2009 Guidelines at ¶ 35.

¹⁹ U.S. Guidelines at 19; UNHCR 2009 Guidelines at ¶ 10; see also *Hernandez-Ortiz*, 496 F.3d 1042 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Abay v. Ashcroft*, 369 F.3d 634, 640 (6th Cir. 2004).

²⁰ See, e.g., *Jorge-Tzoc*, 435 F.3d at 150. This is the case even if the applicant is no longer a child at the time of applying for asylum; the age of the applicant at the time the persecution occurred is what matters.

constitutes persecution should be assessed with regard to the “individual circumstances of the child,” including age, developmental stage, vulnerability, psychological factors, and more.²¹ For example, inappropriate sexual touching, not involving rape, of an eight-year-old girl should rise to the level of persecution given her young age and any lasting psychological impact, even though such acts *might* not constitute persecution in the case of an adult.

Persecution can encompass serious human rights violations.²² In the case of child asylum seekers, attorneys should argue that violation of an internationally recognized child-specific right amounts to persecution.²³ The UNHCR has taken the position that forced recruitment and “recruitment for direct participation in hostilities” of a child under the age of 18 by either armed forces of the State or an armed non-state group constitutes persecution, as does punishment for avoiding or deserting the armed forces.²⁴ Violation of a child’s core economic, social, or cultural rights could rise to the level of persecution in some situations.²⁵

Indirect harm, such as harm committed against a child’s parents or other family members, may also constitute persecution to a child.²⁶ Several Courts of Appeals have recognized that children suffer deeply when their parents or other close family members—especially caregivers—suffer physical and/or mental trauma that compromises their ability to care for children. Attorneys should therefore explore whether other family members have been harmed (especially if on account of the same protected ground as the child) and whether the child was forced to witness such harm. Finally, case law requiring adjudicators to view the effect of multiple acts of harm cumulatively is particularly compelling and useful in arguing that such harm rises to the level of persecution in a child’s case.²⁷

²¹ UNHCR 2009 Guidelines at ¶ 15–16.

²² See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979 (re-edited, Geneva, Jan. 1992 and reissued, Geneva, Dec. 2011) [“UNHCR Handbook”] ¶ 51-52.

²³ The Convention on the Rights of the Child (CRC) sets forth a range of rights intended to protect children from harm and promote their development. While the United States has not ratified the CRC, the United States is a signatory to it and therefore is bound in good faith not to act in a way that would defeat its purpose. See *Vienna Convention on the Law of Treaties* (1969), Article 18a. The U.S. Supreme Court has also cited to the CRC in *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (referencing an express prohibition on capital punishment for crimes committed by juveniles under 18). The AOBTC materials acknowledge that violations of the fundamental rights of children listed in the CRC may rise to the level of persecution, including the rights to be registered with authorities upon birth and acquire a nationality, to remain with one’s family, to receive an education, and to be protected from economic exploitation. AOBTC Children’s Guidelines.

²⁴ UNHCR 2009 Guidelines at ¶ 21.

²⁵ UNHCR 2009 Guidelines at ¶ 35.

²⁶ *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012) (holding an infant can be the victim of persecution even if s/he has no present recollection of the events that constituted the persecution); *Hernandez-Ortiz*, 496 F.3d at 1046 (holding injuries to parents must be considered in asylum cases where the persecutory events occurred when petitioner was a child); see also *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005) (discussing asylum for a child when persecution is aimed at the parents); UNHCR 2009 Guidelines at ¶ 17.

²⁷ See *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998); *Kholjavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).

B. Establishing objective and subjective well-founded fear

A well-founded fear involves both subjective and objective elements: an applicant must have a genuine fear of persecution and that fear must be objectively reasonable.²⁸ Both elements are discussed below.

Evidence that may establish a child's well-founded fear of persecution

- Testimony from the child about fear of return, harm or threats suffered in the past, etc.
- Mental health expert's affidavit/testimony about symptoms or behavior in child that are consistent with fear, anxiety, and worry about difficulty expressing actual fear, and testimony about propensity for re-victimization based on compromised mental health and developmental stage
- Testimony (or declarations) from family members, community members, teachers, friends, about harm child suffered in past, risks to the child in future, and harm suffered by similarly situated individuals
- Proof of past persecution of child (by witnesses, medical evidence, police records, *can include examination by doctor in U.S. regarding injuries consistent with claimed harm, etc.)
- Country conditions evidence about persecution of individuals similarly situated to child
- Expert testimony about risks to child and persecution of individuals similarly situated to child

(See Appendix for further guidance on evidence)

Subjective fear:

The U.S. and UNHCR Guidelines recognize that children may not be able to articulate a subjective fear as well as adults and that, as a result, adjudicators may need to rely on objective evidence to determine whether the child has a well-founded fear.²⁹ They should evaluate the child's fear "in light of [the child's] personal, family and cultural background."³⁰ Some federal courts have also focused on the objective risk of persecution to a child.³¹

Objective fear:

An objective fear is a reasonable possibility—or a 10% chance—of persecution.³² Attorneys can argue that the standard in children's cases is whether a reasonable *child* in their client's circumstances would fear persecution. UNHCR's 2009 Guidelines suggest considering a range of factors to determine whether the child's fear is well-founded. These factors include any expressed fear by the child, parent, or caregiver, "economic and social characteristics" of the child—such as family background, class, etc. that may increase the likelihood of harm or exacerbate its effects—and child-specific country of origin information, including the availability of child protective services.³³

²⁸ *Matter of Acosta*, 19 I. & N. Dec. 211, 224 (BIA 1985); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987); see also AOBTC Children's Guidelines at 40.

²⁹ See, e.g., UNHCR 1997 Guidelines at ¶ 12-13; see also "Child Refugee Claimants: Procedural and Evidentiary Issues," Canadian Immigration and Refugee Board, September 30, 1996 at 2-3 (stating that a child "may not be able to express a subjective fear of persecution in the same manner as an adult.").

³⁰ AOBTC Children's Guidelines at 41.

³¹ See, e.g., *Abay*, 368 F.3d at 640 (rejecting the agency's denial of a child's claim due to her "ambiguous" fear and concluding that "[s]hould Amare be returned to Ethiopia, a country where the practice is 'nearly universal' with 90% of females having been subjected to some form of [FGM], it is probable that she would be subjected to that painful practice should she marry.").

³² *Cardoza-Fonseca*, 480 U.S. at 430.

³³ UNHCR 2009 Guidelines at ¶ 11.

Any evidence that a child will be singled out for persecution can establish a well-founded fear. For example, proof that a child has been threatened in the past may be evidence of past persecution, as well as evidence that a child has a well-founded fear of persecution. Immigration judges have sometimes held that a child threatened, but not beaten, by a gang in the past did not suffer past persecution but has a well-founded fear of persecution in the future. The fact that gang members have searched for the child since s/he fled to the United States also evidences a well-founded fear of persecution.

Evidence of persecution of individuals similarly situated to the child can also establish a child's well-founded fear of persecution. For example, evidence of persecution of LGBT youth can support an LGBT child's well-founded fear of persecution even if the child did not suffer harm while in his or her country and only came out once in the United States. Evidence of high levels of violence against women and femicide/feminicide (gender motivated killings of women/girls) in a particular country could support a girl's claim that there is a 10% chance she would be targeted for persecution in her country.³⁴

VI. Protected Grounds

Children's cases may arise under any of the asylum grounds, though particular social group (PSG) and political opinion (actual and/or imputed) tend to be the most common grounds for children's claims. This section addresses the five protected grounds, with emphasis on membership in a particular social group.

A. Particular social group

Claims based on membership in a particular social group should proceed in two steps. First, the social group must be defined. Second, it must be established that the applicant is a member of the group. A particular social group, according to the BIA, must be (1) comprised of members who share a common immutable or fundamental characteristic (the *Matter of Acosta* framework), (2) socially distinct within the society in question and (3) defined with particularity (see discussion below fleshing out the social distinction and particularity requirements and their applicability in certain jurisdictions that have rejected the BIA's interpretation).³⁵

We recommend that attorneys proffer *several* alternative groups depending on the facts and circumstances of the case. Arguing more than one social group does not harm your client; rather, doing so provides an adjudicator with more than one way to grant the case and preserves issues and arguments for appeal. Note that the social group for past persecution may be distinct from the social group for future persecution depending on the facts. For example, a child may have been harmed by gang members in the past based on resistance or refusal to join. Once in the United States he may become an active member of an Evangelical church and begin proselytizing and recruiting youth to join the church and leave the gang. If he goes back to his country he may be at risk of persecution based both on his prior resistance to joining the gang *and* his membership in a religious group that proselytizes against gangs. Additionally, the social group articulated to account for the persecution inflicted by one persecutor may be distinct from the social group articulated for persecution inflicted by a second persecutor, since their reasons to target the child could differ.

³⁴ See, e.g., *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010).

³⁵ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014); *Matter of Acosta*, 19 I. & N. Dec. at 214.

1. Immutable/fundamental characteristics

A social group should be defined by reference to the specific immutable or fundamental characteristic(s) that motivated/motivates the persecutor to target the applicant or on account of which the State failed/fails to protect the applicant. An immutable characteristic is one that an individual cannot change (i.e. race, ethnicity, family membership, nationality, past experience). A fundamental characteristic is one that an individual should not be required to change because it is fundamental to identity or conscience (i.e. sexual orientation, gender identity, religion, deeply held belief). Gender is a characteristic that can be said to be both immutable and fundamental.

Characteristics that have been held to be immutable or fundamental include:

Immutable

- ✓ Gender
- ✓ Family membership
- ✓ Childhood (at the time of persecution)
- ✓ Domestic relationship
- ✓ Ethnicity
- ✓ Mental illness
- ✓ Witness status
- ✓ Former status or occupation
- ✓ Former membership
- ✓ Former enslavement

Fundamental

- ✓ Having intact (uncut) genitalia
- ✓ Refusal to conform to societal norms
- ✓ Sexual orientation
- ✓ Gender identity
- ✓ Land ownership

Children or subsets of children such as “children with disabilities” or “abandoned children” may constitute a particular social group.³⁶ The fact or status of being a child is immutable at any given moment in time, i.e. it is not something that can be changed.³⁷ Therefore, age-defined social groups may be relevant in past persecution cases, even if the applicant is now an adult.³⁸

Breadth of a social group

When formulating a particular social group, note that the group need not be small to be cognizable. However, the group is **overbroad** if it is defined by traits that are not the characteristics targeted by the persecutor. If girls of a particular tribe in a particular country are at risk of female genital cutting because the tribe believes in the practice, then the social group should be defined by their gender, nationality, and tribal membership. A group defined solely by gender and nationality would be appropriate if the vast majority of girls in the country are at risk of FGC, regardless of tribal membership.

³⁶ UNHCR 2009 Guidelines at ¶ 50.

³⁷ *Id.* at ¶ 49.

³⁸ *Matter of S-E-G-*, 24 I. & N. Dec. at 583-84 (BIA 2008); Asylum Officer Basic Training Course, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics* 45 (Mar. 2009).

But if there are numerous tribes known not to practice FGC, then a group defined by gender and nationality alone would be overbroad. Breadth of a particular social group is discussed further in the particularity section below.

Country Experts

CGRS recommends that attorneys consider seeking an expert opinion to establish the social distinction and particularity of the proffered social group(s). CGRS can suggest country-specific experts where necessary to tailor testimony to your case, and CGRS also maintains some general expert declarations on file that have been accepted and considered by adjudicators in a range of cases, which are available on our website. As stated, CGRS is available to help on defining the social group and identifying country conditions to establish the social distinction and particularity of the group in the given society. To get started, please request assistance on our website.

(See Appendix for further guidance on evidence)

Defining the group by the harm suffered or feared

Attorneys should generally avoid defining the social group solely or primarily by the harm suffered or feared. For example “abused children,” which is defined by past harm, and “children at risk of child abuse,” which is defined by risk of future harm are not cognizable groups. They are **circularly defined**; that is, rather than setting out the characteristics targeted (e.g. childhood and lack of parental protection, childhood and status in the family, etc.), they focus on the fact that the child was or will be targeted. A child may be abused because of the child’s status in a family or because of societal views regarding children, but s/he is not abused *because* s/he is abused. This type of social group is likely to encounter resistance by the government attorney and the adjudicator. Even if granted, a case approved on the basis of a circularly defined social group would be vulnerable to reversal on appeal.

Sometimes, it is appropriate to reference the harm suffered or feared in the social group definition, but again, the group should never be defined *solely* by the harm. The experience of having suffered past harm is an immutable characteristic. When the fact of having experienced that harm makes an individual vulnerable to future harm, then the past harm is relevant to the characteristics targeted, and courts have recognized social groups of individuals who have escaped imprisonment or enslavement and are at risk of future persecution as a result.³⁹ A victim of trafficking may, for example, on return to her home country, face persecution because she worked as, or is perceived as having worked as, a prostitute abroad, and/or for having escaped her traffickers. Refer to the UNHCR’s guidelines on social group and trafficking claims for more guidance.⁴⁰ Relatedly, one’s opposition or resistance to a practice can be a fundamental characteristic if it is based on deeply held belief. When opposition or resistance to

³⁹ See, e.g., *Gomez Zuluaga v. Att’y Gen.*, 527 F.3d 330 (3d Cir. 2008); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003).

⁴⁰ See Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, May 2002, available at <http://www.unhcr.org/3d58de2da.pdf> (last visited March 15, 2015). See also Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, UNHCR, April 2006, available at <http://www.unhcr.org/443b626b2.html> (last visited March 15, 2015).

a practice (such as female genital cutting) places an individual at risk of persecution, then it may be appropriate to define a social group in part by opposition to that practice. In the gender violence context, social groups defined in part by resistance or opposition to a practice have been approved.⁴¹

2. Social Distinction and Particularity

According to BIA precedent issued in February 2014, a social group must be socially distinct and particular. This section provides a brief summary of the evolution of the particular social group standard at the BIA and then addresses the meaning of social distinction and particularity.

From 1985-2006, the standard for particular social group was based on the BIA's decision in *Matter of Acosta*, which required that group members share a common immutable or fundamental characteristic. Starting with its decision in *Matter of C-A-* in 2006, the BIA looked to the additional factors of the "social visibility" and "particularity" of a group to determine its cognizability. By 2008, these additional "factors" became "requirements" to establish social group membership.⁴² Two Courts of Appeals, the Third and Seventh Circuits, rejected the social visibility and particularity requirements as unreasonable interpretations of the statute.⁴³ The Courts declined to defer to the agency's interpretation, for example, because they found that the added requirements are inconsistent with prior BIA decisions and that the BIA failed to explain its shift.⁴⁴ As a result, the Third and Seventh Circuits continued to follow the social group standard set out in *Matter of Acosta*. The Ninth Circuit has also called the validity of the requirements into question, although it has not explicitly rejected them.⁴⁵ Remarkably, the BIA did not find any proposed social groups to be cognizable in a published decision after it imposed these two new requirements in 2006 until its August 2014 decision in the domestic violence case of *A-R-C-G*.⁴⁶

In February 2014, the BIA issued the companion decisions *Matter of M-E-V-G-* and *Matter of W-G-R-*, in which it purported to explain its addition of requirements beyond the *Acosta* framework and to clarify the standard for particular social group claims. Commentators question the cogency and genuineness of such post-hoc rationalization. As of the time of writing, neither the Third Circuit nor the Seventh Circuit has had occasion to rule on the continued validity of the social distinction and particularity

⁴¹ See, e.g., *Matter of Kasinga*, 21 I. & N. Dec. at 357; *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009); See also *Cece*, 733 F.3d at 671 (explaining that while a social group cannot be defined only by persecution, defining a social group in part by the harm suffered or feared "does not disqualify an otherwise valid social group[,]") citing *Escobar v. Holder*, 657 F.3d 537, 547 (7th Cir. 2011)).

⁴² *Matter of S-E-G-*, 24 I. & N. Dec. 579.

⁴³ See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011).

⁴⁴ Social visibility was heavily criticized because it had been interpreted to require ocular (or on-sight) visibility, such that a group member's characteristics were identifiable to a stranger on the street, which is antithetical to individuals who would likely go to great lengths to avoid being visible to avoid persecution and torture.

⁴⁵ See *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

⁴⁶ The BIA has rebuffed the position of UNHCR, which the U.S. Supreme Court has said provides persuasive guidance. See *Matter of W-G-R-*, 26 I. & N. Dec. at 220. UNHCR has clearly stated that it does not consider social distinction to be a separate independent requirement for establishing a cognizable social group. Rather, UNHCR considers social perception to be an alternative approach to establishing particular social group membership if a group does not possess any immutable or fundamental characteristics but is nevertheless cognizable in the society in question. Neither approach according to UNHCR requires that members of a particular social group be visible to society at large in the literal sense. See Brief of UNHCR as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Holder*, No. 08-4564 (3d Cir. Apr. 14, 2009), available at <http://www.unhcr.org/refworld/category,LEGAL,UNHCR,AMICUS,,49ef25102,0.html> (last visited March 15, 2015).

requirements, as newly articulated by the BIA, and whether the Courts would now defer to the BIA's interpretation. We recommend that attorneys representing individuals whose claims arise in those jurisdictions argue that social distinction and particularity are not required, and that prior circuit law upholding the *Acosta* test still applies.⁴⁷ In the alternative, attorneys in those jurisdictions (as well as attorneys in jurisdictions that have not explicitly ruled on the validity of social distinction and/or particularity) should argue that the requirements constitute a significant departure from the *Acosta* analysis, are inconsistent with prior precedent, and are unreasonable interpretations of the asylum statute, and should not be accorded deference.⁴⁸ And, out of caution until the law is settled, we recommend that *all* attorneys submit ample country conditions evidence to establish the social distinction and particularity of a particular social group and argue in the alternative that the requirements have been met in any event.

⁴⁷ See NATIONAL IMMIGRANT JUSTICE CENTER, *PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF M-E-V-G- AND MATTER OF W-G-R-* (2014), available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf (last visited March 15, 2015).

⁴⁸ Although the BIA sought to clarify these requirements in *W-G-R-* and *M-E-V-G-*, in our view, those decisions do not clarify the confusion surrounding the terms, nor do they convincingly establish that the particularity and social distinction requirements are a natural evolution of the BIA's case law or were considered or applied in earlier BIA precedent as the BIA claims. Contrary to the BIA's contention, the social distinction and particularity requirements are inconsistent with what is required to prove the other grounds for asylum and therefore violate the principle of *ejusdem generis*. Although renamed, social distinction continues to focus on external perception of a group in society, which would deny protection to members of a group so marginalized that society refuses to recognize their existence (*e.g.*, homosexuals in Iran). Different in name only, particularity is essentially the same thing as social distinction. Particularity is an unnecessary filter, as a group must be clearly defined in order to be cognizable. In addition, to the extent that particularity as explained in *M-E-V-G-* and *W-G-R-* requires that a social group must be narrowly defined, homogenous, or cohesive, the decisions are inconsistent with BIA and federal precedent in numerous circuits. See, *e.g.*, *Perdomo*, 611 F.3d 662. The BIA's hyper focus on the precise definition of a particular social group, as well as the evidence required to prove social distinction and particularity significantly disadvantage *pro se* litigants. Finally, social distinction and particularity are inconsistent with the object and purpose of the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees, and Congress's clear intent to bring the United States into compliance with its international obligations.

Social Distinction: Social distinction considers whether a group is “perceived within the given society as a sufficiently distinct group.”⁴⁹ Formerly known as social visibility, the BIA renamed the requirement in *M-E-V-G-/W-G-R-* to clarify that social distinction does not require an individual group member to have ocular visibility or, in other words, be recognizable on sight.⁵⁰ Some characteristics that define a particular social group may be visible to the eye but, according to the BIA, they do not have to be in order to satisfy social distinction.

Evidence showing that the group is perceived as a group by society, or indicating that group members are treated distinctly by society—such as the targeting of group members for persecution, societal acceptance of violence or other harm against group members, and lesser protection or lack of protection for group members from the State—helps establish the group’s social distinction.⁵¹ A history of discriminatory treatment of group members shows the group’s social distinction.⁵² Evidence of special laws directed at the group also establishes the group’s distinction, by indicating the need for special protection of group members (e.g. because general laws do not adequately protect members).⁵³ Although the BIA stressed in *M-E-V-G-* that the persecutor’s perception of the group is alone not sufficient to establish a cognizable social group, it explained that a persecutor’s perception “can be indicative of whether a society views a group as distinct.”⁵⁴

Proving social distinction

For the group of “street children” look to these types of evidence:

- ° Country reports (by the State Department, NGOs, UN agencies), newspaper articles, academic publications talking about street children or violence against street children, indicating lower status of street children (e.g. Casa Alianza Honduras publishes reports on death of street children)
- ° Popular literature, movies, shows, radio interviews about street children
- ° Expert testimony that street children are recognized or perceived as a group, violence against street children is accepted by society and by the State, etc.
- ° Low prosecution and conviction rates for crimes against street children (indicating the State’s disinterest in protecting)
- ° Laws directed at street children (e.g. banning them from certain areas)
- ° Laws designed to protect street children (e.g. indicating they are at heightened risk)
- ° Testimony/declarations from lay people about societal perception of street children

(See Appendix for further guidance on evidence)

⁴⁹ *M-E-V-G-*, 26 I. & N. Dec. at 238.

⁵⁰ *Id.* at 228; *W-G-R-*, 26 I. & N. Dec. at 212.

⁵¹ See *Matter of A-R-C-G-*, 26 I. & N. Dec. at 394 (discussing high rates of domestic violence, accepted and widespread machismo attitude, and failure to enforce laws regarding domestic violence in finding social distinction of the PSG); DHS 2009 *Matter of L-R-* brief at 17-18. While the *L-R-* brief discusses social visibility rather than social distinction of a group, DHS’s discussion of social distinction in the brief is clearly based on societal perception of a group rather than ocular visibility of the group’s members, and so remains relevant to the social distinction test.

⁵² *M-E-V-G-*, 26 I. & N. Dec. at 244.

⁵³ See *Henriquez-Rivas*, 707 F.3d at 1092 (“It is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable, because of their group perception by gang members, than that a special witness protection law has been tailored to its characteristics.”).

⁵⁴ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242.

Particularity: The requirement of particularity considers whether a group is “defined by characteristics that provide a clear benchmark for determining who falls within the group,” and whether “the terms used to describe the group have commonly accepted definitions in the society of which the group is a part.”⁵⁵ Attorneys should be careful to define social groups by terms that are clear and not ambiguous or vague, that can be determined based on objective measures (i.e. birth certificate) rather than subjective measures, and that have outer limits.

Laws or policies of a particular country that define terms included in the social group indicate that there are clear boundaries or benchmarks for determining who is a group member within the society in question. For example, the laws of most countries likely define the concept of childhood or the age of majority, thus making childhood or age—if part of the social group—a sufficiently particular term. Laws regarding special education or health care benefits may define terms like “disability,” and the terms “orphan,” “family,” or “parent,” are likely defined under the relevant country’s law as well.

Proving that a social group is particular

To prove the particularity of the social group of “street children” look to:

- Laws defining who is a street child or designed to protect street children (what benchmarks, limits, requirements do they use to determine who is a street child?)
- Policies or initiatives directed at street children (e.g. national plan to reduce number of street children)
- Organizations that serve street children (how do they define their target population)
- Expert testimony explaining how within the society in question one can determine who is a street child
- Lay testimony explaining how within the society in question one can determine who is a street child

(See Appendix for further guidance on evidence)

Note: the size of the proposed group is irrelevant to the particularity analysis. To reject a group based on size alone would be contrary to BIA and Courts of Appeals precedent recognizing a range of particular social groups as cognizable without concern for the size of the group.⁵⁶ Moreover, rejecting a group because it is too large or numerous would violate the principle of *ejusdem generis*, as the other enumerated grounds (race, religion, nationality, political opinion) are not so limited. For example, although there are 1.5 billion Muslims in the world, the fact that Islam is a religion would not be contested in an asylum claim based on persecution of Muslims in a particular society. Establishing membership in a cognizable social group does not entitle an applicant to asylum protection; rather, s/he must prove the other elements of the refugee definition—that s/he has a well-founded fear of persecution, his/her fear is on account of such group membership, the State is unable/unwilling to protect her, and she cannot relocate to avoid persecution.

⁵⁵ *Id.* at 239; *Matter of W-G-R-*, 26 I. & N. Dec. at 214.

⁵⁶ *See, e.g., Cece*, 733 F.3d at 673; *Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010); *Perdomo*, 611 F.3d at 669; *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748 (7th Cir. 2004); *Yadegar-Sargis*, 297 F.3d 596; *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Matter of Kasinga*, 21 I. & N. Dec. at 357; *see also Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 n. 2 (2d Cir. 2007) (clarifying in a non-gender case that the BIA’s particularity requirement “must not mean that a group’s size can itself be a sound reason for finding a lack of particularity,” but rather, “indeterminacy is a relevant consideration”).

Practice Pointer

Social group determination should be considered on a *case-by-case* basis. See *Matter of Acosta*, 19 I. & N. Dec. at 233; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251. The fact that a social group was found not to be cognizable in one case does not mean that it cannot be valid in another case. Whether a group is cognizable depends on the record submitted in an individual case. Be sure to submit a strong record that establishes that the social group articulated satisfies all of the requirements for social group membership.

(See Appendix for further guidance on evidence)

3. Potential social groups for children’s claims

Few precedential decisions rule on social groups defined in part by childhood. The majority of those that do are cases involving violence by street gangs in which the social group was defined primarily by childhood and resistance to gang recruitment, which have been rejected by the BIA and Courts of Appeals based on social visibility (or distinction) or particularity.⁵⁷ As mentioned above, however, the fact that records in these cases did not establish the cognizability of the groups does not necessarily mean that a social group defined by childhood and resistance to gangs cannot succeed on a record that establishes the social distinction and particularity of the group. Apart from the gang context, the Third Circuit rejected the group of “Honduran street children” in *Escobar v. Gonzales*, because—in the Court’s view—the characteristics of poverty, homelessness, and youth were “far too vague and all encompassing to be characteristics that set the perimeters for a protected group,”⁵⁸ but no other Courts of Appeals have ruled on street children as a social group in a published decision.

Other published Courts of Appeals decisions have approved social groups defined in part by childhood or youth. Most recently, in *Cece v. Holder* the Seventh Circuit approved the social group of “young Albanian women living alone.”⁵⁹ Additional groups found cognizable include former child soldiers;⁶⁰ disabled children;⁶¹ and young women who have not undergone and who oppose female genital cutting as practiced by their tribe.⁶² Courts have also recognized the potential viability of the following social

⁵⁷ See, e.g., *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012); *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010); *Ramos-Lopez v. Holder*, 563 F.3d 885 (9th Cir. 2009); *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Santos Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008); *Matter of S-E-G-*, 24 I. & N. Dec. 579; *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003); but see *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011) (remanded to BIA).

⁵⁸ 417 F.3d 363, 368 (3d Cir. 2005).

⁵⁹ *Cece*, 733 F.3d 662; but see *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005) (rejecting a similarly defined group).

⁶⁰ *Lukwago*, 329 F.3d 157.

⁶¹ *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005) (Russian disabled children and their parents) *vacated and remanded on other grounds* by *Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006).

⁶² *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

groups: hei-haizi (“illegal” children in China, born in violation of the one-child policy);⁶³ and “young girls in the Benadiri clan.”⁶⁴

In addition to published decisions, CGRS has on-file numerous immigration judge (IJ) and BIA decisions ruling on social groups in children’s asylum cases, some positive and some negative.⁶⁵ Approved social groups have been defined by characteristics including: childhood, orphan status, gender, family membership, indigenous status, disability, abandonment, perceived LGBT status, perceived illegitimacy, street child status, and others. CGRS has a copy of a positive unpublished BIA decision ruling that “children who have been abandoned by their parents and who have not received a surrogate form of protection constitute a particular social group.”⁶⁶ **For copies of IJ or BIA decisions CGRS has on file, please request assistance on our website.** UNHCR also gives a few examples of groups of children it believes may form a particular social group. These include: “street children,” “children affected by HIV/AIDS,” and children singled out for recruitment or used by an armed force or group.⁶⁷

We suggest that attorneys define the social group in children’s cases by immutable or fundamental characteristics such as:

Age/Childhood/ Youth	<ul style="list-style-type: none"> • <i>Cece v. Holder</i>, 733 F.3d 662 (7th Cir. 2013) (recognizing the PSG of “young Albanian women living alone who were targeted for prostitution” because the group was not only identified by the persecution it suffered, but also by other common and immutable characteristics); <i>but see Rreshpja v. Gonzales</i>, 420 F.3d 551 (6th Cir. 2005) (rejecting the PSG of “young, attractive Albanian women who are forced into prostitution” reasoning that the group is “circular” and is merely a sweeping demographic) • <i>See Matter of S-E-G-</i>, 24 I. & N. Dec. 579, 583 (BIA 2008) (“We agree with the Immigration Judge that ‘youth’ is not an entirely immutable characteristic but is, instead, by its very nature, a temporary state that changes over time . . . In saying this, however, we acknowledge that the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described [PSG], or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable.”) • <i>Lukwago v. Ashcroft</i>, 329 F.3d 157 (3d Cir. 2003) (approving case based on PSG of former child soldiers who have escaped) • <i>But see Escobar v. Gonzales</i>, 417 F.3d 363 (3d Cir. 2005) (holding “Honduran street children” not a valid social group)
Gender + (nationality and other characteristics)	<ul style="list-style-type: none"> • <i>Matter of A-R-C-G-</i>, 22 I. & N. Dec. 388 (BIA 2014) (holding married women in Guatemala that are unable to leave the relationship is a valid social group) • <i>Cece v. Holder</i>, 733 F.3d 662 (7th Cir. 2013) (recognizing the PSG “young Albanian women living alone who were targeted for prostitution”)

⁶³ *Chen v. Holder*, 604 F.3d 324 (7th Cir. 2010) (remanding to BIA).

⁶⁴ *Mohammed*, 400 F.3d 785 (granting motion to reopen based on likelihood of success on merits).

⁶⁵ CGRS Case #10146 (IJ Dec. 2007) (finding PSGs of “young Salvadoran students who expressly oppose gang practices and values and wish to protect their family against such practices” and “young female students who are related to an individual who opposes gang practices and values” to be valid); *see also* CGRS Case #8960 (IJ Dec. 2012) (approving PSG based on family membership), CGRS Case #8831 (IJ Dec. 2009) (same), CGRS Case #10138 (IJ Dec. 2007) (same).

⁶⁶ CGRS Case #216 (IJ Dec. 1998).

⁶⁷ UNHCR Children’s Guidelines at ¶ 52.

	<ul style="list-style-type: none"> • <i>Sarhan v. Holder</i>, 658 F.3d 649 (7th Cir. 2011) (recognizing the PSG of Jordanian women who, in accordance with social and religious norms in Jordan, were accused of being immoral criminals and at risk for honor killing) • <i>Perdomo v. Holder</i>, 611 F.3d 663 (9th Cir. 2010) (remanding because the BIA erred in determining that women in Guatemala could not be a cognizable social group) • <i>Ngengwe v. Mukasey</i>, 543 F.3d 1029 (8th Cir. 2008) (holding the BIA erred in rejecting PSG of “Cameroonian widows” because the group shares the immutable characteristics of gender and the past experience of having lost a husband and fact that group is discriminated against in society shows visibility) • <i>Hassan v. Gonzales</i>, 484 F.3d 513 (8th Cir. 2007) (recognizing Somali females as a PSG) • <i>Niang v. Gonzales</i>, 422 F.3d 1187 (10th Cir. 2005) (recognizing females in the Tukolor Fulani tribe as a PSG) • <i>Mohammed v. Gonzales</i>, 400 F.3d 785 (9th Cir. 2005) (recognizing female members of the Benadiri Clan likely to succeed on the merits—in the context of motion to reopen) • <i>Yadegar-Sargis v. INS</i>, 297 F.3d 596 (7th Cir. 2002) (recognizing Christian women in Iran who do not wish to adhere to the Islamic female dress code as a PSG) • <i>Matter of Kasinga</i>, 21 I. & N. Dec. 357 (BIA 1996) (recognizing “gender plus” may be a cognizable PSG; there, young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice) • <i>Fatin v. INS</i>, 12 F.3d 1233 (3rd Cir. 1993) (recognizing Iranian women opposing certain gender-related laws could as a PSG; however, finding applicant did not establish herself as a member of the group)
Family	<ul style="list-style-type: none"> • <i>Crespin-Valladares v. Holder</i>, 632 F.3d 117, 125 (4th Cir. 2011) (recognizing PSG of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses) • <i>Al-Ghorbani v. Holder</i>, 585 F.3d 980, 995 (6th Cir. 2009) (recognizing PSG of “their family, who, as members of a less valued social class, i.e. traditionally meatcutters . . . have defied the norms of Yemeni society by getting married despite being forbidden to”) • <i>Ayele v. Holder</i>, 564 F.3d 862, 869 (7th Cir. 2009) (recognizing PSG of applicant’s family, where the family is minority Amhara and every member of her family either is in exile, has disappeared, has been imprisoned and tortured, or is under house arrest) • <i>Lin v. Ashcroft</i>, 377 F.3d 1014, 1028 (9th Cir. 2004) (recognizing nuclear family is PSG where family was persecuted as a result of parents’ resistance to mandatory family planning) • <i>Lwin v INS</i>, 144 F.3d 505 (7th Cir. 1998) (parents of Burmese dissidents) • <i>Gebremichael v. INS</i>, 10 F.3d 28, 36 (1st Cir. 1993) (stating that “[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family”) • <i>Matter of Acosta</i>, 19 I. & N. Dec. 211 (BIA 1985) (recognizing that kinship ties are an immutable characteristic that may form the basis of a PSG claim) • <i>In re H-</i>, 21 I. & N. Dec 337 (BIA 1996) • DHS 2009 brief in <i>Matter of L-R</i>.⁶⁸
Shared past experience	<ul style="list-style-type: none"> • <i>Cece v. Holder</i>, 733 F.3d 662 (7th Cir. 2013) (accepting “young Albanian women living alone who were targeted for prostitution”); <i>but see Rreshpja v. Gonzales</i>, 420 F.3d 551

⁶⁸ In April 2009, DHS headquarters filed a brief in a case known as *Matter of L-R* in which the agency took the position that several viable social groups could be advanced in claims based on domestic violence. DHS explained how the groups could satisfy the immutability, social visibility, and particularity tests. More information about *Matter of L-R*-, including DHS’s brief, is available at <http://cgrrs.uchastings.edu/our-work/domestic-violence>.

	<p>(6th Cir. 2005) (rejecting “young, attractive Albanian women who are forced into prostitution”)</p> <ul style="list-style-type: none"> • <i>Ramos v. Holder</i>, 589 F.3d 426 (7th Cir. 2009) (recognizing former Salvadoran youth gang members as a valid PSG because members share immutable characteristics); <i>Martinez v. Holder</i>, 740 F.3d 902 (4th Cir. 2014) (approving former gang membership as basis of PSG); <i>Urbina-Mejia v. Holder</i>, 597 F.3d 360 (6th Cir. 2010); <i>but see Claros-Cantarero v. Holder</i>, 734 F.3d 82 (1st Cir. 2013) (former gang members is not a valid PSG); <i>Matter of W-G-R-</i>, 26 I. & N. a208, 221 (BIA 2014) (same) • <i>Gatimi v. Holder</i>, 578 F.3d 611 (7th Cir. 2009) (rejecting BIA's requirement of social visibility and ruling that defectors of the Mungiki or former Mungiki is a particular social group) • <i>Ngengwe v. Mukasey</i>, 543 F.3d 1029 (8th Cir. 2008) (recognizing PSG of “Cameroonian widows” shares the immutable characteristics of gender and the past experience of having lost a husband) • <i>Gomez Zuluaga v. Att’y Gen.</i>, 527 F.3d 330 (3d Cir. 2008) (recognizing “Colombian women who escaped involuntary servitude after being abducted and confined by a guerrilla group” as a PSG) • <i>Lukwago v. Ashcroft</i>, 329 F.3d 157 (3d Cir. 2003) (approving case based on PSG of former child soldiers who have escaped)
Marital status or status in domestic relationship	<ul style="list-style-type: none"> • <i>Matter of A-R-C-G-</i>, 22 I. & N. Dec. 388 (BIA 2014) (holding married women in Guatemala that are unable to leave the relationship is a valid PSG) • <i>Qu v. Holder</i>, 618 F.3d 602, (6th Cir. 2010) (recognizing PSG of “women in China who have been subjected to forced marriage and involuntary servitude”) • <i>Sibanda v. Holder</i>, 778 F.3d 676, 681 (7th Cir. 2015) (while not ruling, noting that “married women subject to the bride-price custom” in Zimbabwe “appears to easily fall within this court’s established definition of a particular social group” and remanding to BIA to rule on the group) • DOJ proposed regulations of 2000⁶⁹ • DHS 2009 brief in <i>Matter of L-R-</i> • <i>Ngengwe v. Mukasey</i>, 543 F.3d 1029 (8th Cir. 2008) (“Cameroonian widows”)
Lack of parental or familial protection	<ul style="list-style-type: none"> • CGRS Case #5194 (IJ Dec. 2009) (approving “Westernized women returning to Afghanistan where they have no family or friends to protect them”) • CGRS Case #3821 (IJ Dec. 2007) (approving “young poor females in Guatemala without the support of immediate family”) • CGRS Case #216 (IJ Dec. 1998) (approving “children whose parents have abandoned them and who lack a surrogate form of protection”)
Refusal to conform or submit, or opposition to enshrined custom	<ul style="list-style-type: none"> • <i>Sarhan v. Holder</i>, 658 F.3d 649 (7th Cir. 2011) (recognizing PSG of women in Jordan who have (allegedly) flouted repressive social norms) • <i>Al Ghorbani v Holder</i>, 585 F.3d 980 (6th Cir. 2009) (recognizing PSG of “young, westernized people who have defied traditional Islamic values by marrying without parental permission”) • <i>Matter of Kasinga</i>, 21 I. & N. Dec. 357 (BIA 1996) (granting asylum based on fear of FGC, recognizing PSG of “young women who are members of Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice”) • <i>Safaie v. INS</i>, 25 F.3d 636 (8th Cir. 1994) (recognizing PSG of Iranian women who advocate for women’s rights or who oppose Iranian customs relating to dress and behavior)

⁶⁹ 65 Fed. Reg. No. 236 (Dec. 7, 2000).

	<ul style="list-style-type: none"> • <i>Fatin v. INS</i>, 12 F.3d 1233 (3rd Cir. 1993) (recognizing that Iranian women opposing certain Iranian laws, facing high risk of honor killing as a result)
Former status or occupation	<ul style="list-style-type: none"> • <i>Sepulveda v. Gonzales</i>, 464 F.3d 770 (7th Cir. 2006) (recognizing former employees in the AG's office in Colombia as a PSG) • <i>Matter of Fuentes</i>, 19 I. & N. Dec. 658 (BIA 1988) (recognizing former members of Salvadoran police as a PSG)
Disability or mental illness	<ul style="list-style-type: none"> • <i>Temu v. Holder</i>, 740 F.3d 887 (4th Cir. 2014) (approving PSG of "individuals with bipolar disorder who exhibit erratic behavior")
Sexual orientation, gender identity	<ul style="list-style-type: none"> • <i>Hernandez-Montiel v. INS</i>, 225 F.3d 1084 (9th Cir. 2000) (recognizing gay men with female sexual identities in Mexico as a PSG) • <i>Karouni v. Gonzales</i>, 399 F.3d 1163 (9th Cir. 2005) ("alien homosexuals" is a PSG) • <i>Amfani v. Ashcroft</i>, 328 F.3d 719 (3d Cir. 2003) (imputed homosexuality as PSG ground) • <i>Matter of Toboso-Alfonso</i>, 20 I. & N. Dec. 819 (BIA 1994) (recognizing homosexuals as PSG)
Ethnicity	<ul style="list-style-type: none"> • <i>Malonga v. Mukasey</i>, 546 F.3d 546 (8th Cir. 2008) (Lari ethnic group of Kongo tribe in Republic of Congo) • <i>Matter of V-T-S-</i>, 21 I. & N. Dec. 792 (BIA 1997) (Filipinos of mixed Chinese-Filipino ancestry) • <i>Matter of H-</i>, 21 I. & N. Dec. 337 (BIA 1996) (members of the Marehan subclan in Somalia)
Witnesses	<ul style="list-style-type: none"> • <i>Henriquez-Rivas v. Holder</i>, 707 F.3d 1081 (9th Cir. 2013) (en banc) (noting testifying witnesses against a gang could be a PSG) • <i>Garcia v. Att'y Gen.</i>, 665 F. 3d 496 (3d Cir. 2011) (same)
Land ownership (or landowning family)	<ul style="list-style-type: none"> • <i>Tapiero de Orjuela v. Gonzales</i>, 423 F.3d 666 (7th Cir. 2005) (recognizing educated, land-owning class of cattle farmers in Colombia as a PSG) • <i>Cordoba v. Holder</i>, 726 F.3d 1106 (9th Cir. 2013) (reversing BIA rejection of social groups defined in part by landownership)

Claims involving child abuse

Analyses applied in the intimate partner violence context can be relevant to cases involving child abuse. The BIA's decision in *Matter of A-R-C-G-* holds that "married women in Guatemala who are unable to leave their relationship" is comprised of immutable characteristics, and the DHS's 2009 brief in *Matter of L-R-* recognizes that being assigned a subordinate status in a domestic or familial relationship may be immutable. The BIA decision and DHS brief should be helpful in child abuse cases, regardless of the child's gender, since a child's status within the family is also an immutable characteristic—for example, being the biological child of one's parents or belonging to a family is not a familial relationship that a child can change. The DHS brief in *L-R-* also takes the position that being "viewed as property" because of one's position in a domestic relationship can be immutable. Similarly, children may be viewed as property because of their status in the family, supported by societal views of children—which they are powerless to change.

On a related note, a child who has witnessed the abuse of his or her mother may have a claim based on the theory that witnessing abuse of one's mother and its effects on the mother is persecution of the child. A child in this situation could argue that s/he is a member of the social group of children of women in a domestic or marital relationship they cannot leave. We recommend that you read BIA's decision in *A-R-C-G-* and DHS brief in *L-R-* for guidance, particularly on social group and nexus issues. They also give a good sense of the sort of documentation you will need in the record to support your legal arguments. See Appendix for further guidance on evidence to submit.

B. Political opinion

Often social group claims can be presented alternatively as political opinion claims. For example, a gang recruitment claim could be presented either way, as could an escaped child soldier claim. The reason to present more than one ground is that adjudicators differ, and attorneys should be prepared to give them various ways to grant. An adjudicator may prefer to grant a case under one of the other established grounds for asylum over the social group ground. Arguing cases based on more than one ground also preserves issues for appeal.

The U.S. Guidelines and AOBTC materials affirm that a child may have a political opinion and be persecuted for it regardless of the child's age, and recognize that the political activity of children varies in different countries.⁷⁰ These sources explain that the age and maturity of the child should be considered when determining whether a child has articulated a political opinion.⁷¹

Political opinion is understood to be broader than electoral politics or formal political ideology or action.⁷² UNHCR advises that political opinion should be understood broadly to include "any opinion on any matter in which the machinery of state, government, society, or policy may be engaged."⁷³ A child, for example, may have the political opinion that the education system is corrupt or that it should change. A child may be active in a youth movement that advocates for anti-violence, or may be involved in a rights-based movement (e.g. for indigenous rights, women's rights, LGBT rights, land ownership rights, immigrants' rights) as an expression of his or her political opinion.

A political opinion may be actual or imputed, meaning that asylum law protects both individuals targeted for their actual belief, as well as those targeted based on a belief the persecutor thinks they hold—regardless of their actual belief.⁷⁴ Imputed political opinion is an important argument to consider in children's cases. A child may be targeted because of his or her family's political activities or opinion or because of the activities or opinion of some other group with which the child is affiliated.⁷⁵ Asylum

Political opinions relevant to cases involving violence by organized criminal groups:

- Belief in rule of law
- Non-violence, anti-violence
- Anti-corruption
- Feminism, belief in women's rights
- Resistance to gangs or organized crime in a context where gangs/organized crime are quasi government
- Imputed opinion based on resistance of family member
- Refusal to be recruited based on actual opinion, or resulting in opinion being imputed
- Participation in youth group, soccer league, etc. with anti-gang/crime/violence tenet

⁷⁰ See U.S. Guidelines at 22; AOBTC Children's Guidelines at 44; see also *Salaam*, 229 F.3d 1234 (overruling adverse credibility determination based on BIA finding it implausible that the petitioner had been vice president of a branch of an opposition movement at age 18).

⁷¹ See U.S. Guidelines at 22; AOBTC Children's Guidelines at 44.

⁷² See "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," United Nations High Commissioner for Refugees HCR/GIP/02/01, May 7, 2002 at ¶ 32 ["UNHCR Gender Guidelines"]; *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2001); *Fatin*, 12 F.3d at 1242 (feminism is a political opinion).

⁷³ See UNHCR Gender Guidelines at ¶ 32.

⁷⁴ See, e.g., *Matter of N-M-*, 25 I. & N. Dec. 526, 528 (BIA 2011) (explaining that expressing opposition to state corruption may be a political opinion or may lead a persecutor to impute such opinion to an individual).

⁷⁵ See U.S. Guidelines at 22; AOBTC Children's Guidelines at 44.

jurisprudence recognizes claims based on imputed political opinion.⁷⁶ The Ninth Circuit, for example, has found that a parent's political opposition to the one-child policy may be imputed to the child applicant.⁷⁷ Frequently imputed political opinion and family membership are argued as alternative grounds.

Several Board decisions, such as *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008), fail to recognize that in the context of particular country conditions, refusing to join a gang in the face of forced recruitment may be construed as a political act/opinion, even if the applicant's actual opinion is one of neutrality. Resistance to forceful recruitment or participation can be based on deeply held beliefs. As the Ninth Circuit has held, however, a conscious choice not to side with a political faction can be an expression of political opinion,⁷⁸ as can opposition to the use of violence.⁷⁹ Several Courts of Appeals have found persecution on account of political opinion in cases involving **refusal to be recruited or to cooperate**.⁸⁰

In cases involving child soldiers, note that in 2008 the U.S. Congress enacted the Child Soldiers Accountability Act, providing criminal and immigration penalties for individuals who recruit or use child soldiers. Attorneys can argue that the government's readiness to prosecute on this basis should be met by a willingness to protect children fleeing forced recruitment as child soldiers or gang members.

C. Race and nationality/ethnicity

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* recommends that race be understood in its widest sense "to include all kinds of ethnic groups that are referred to as 'races' in common usage."⁸¹ According to the UNHCR Handbook, nationality includes citizenship, as well as membership in an ethnic or linguistic group, and persecution based on nationality may be directed at either a minority group or the majority group.⁸²

Examples of children's claims that may be based on race or nationality (ethnicity) include: "policies that deny children of a particular race or ethnicity the right to a nationality or to be registered at birth," or that deny such children the right to an education or health care.⁸³ For example, a Mam Mayan child from Guatemala may have a claim for asylum based on systematic human rights violations—such as denial of a right to education—based on his/her race. Children of a particular race or ethnicity may be targeted for human trafficking or other types of harm. A gang, for example, might target an indigenous

⁷⁶ See, e.g., *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004).

⁷⁷ *Zhang*, 408 F.3d at 1245-46 (parent's political opposition to the one-child policy may be imputed to a child applicant).

⁷⁸ See *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997).

⁷⁹ See *Regalado-Escobar v. Holder*, 717 F.3d 724 (9th Cir. 2013).

⁸⁰ See, e.g., *Jabr v. Holder*, 711 F.3d 835 (7th Cir. 2013) (refusal to be recruited by Islamic Jihad organization established political opinion); *Martinez-Buendia v. Holder*, 616 F.3d 711, 716-17 (7th Cir. 2010) (applicant's refusal to cooperate with FARC was based on political opinion and FARC interpreted [her] repeated refusal to cooperate as her expressing an anti-FARC political opinion"); *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000) (guerrillas imputed political opinion to applicant based on her work teaching adult literacy on behalf of government and resistance to joining guerrillas).

⁸¹ See UNHCR Handbook at ¶ 68.

⁸² See UNHCR Handbook at ¶ 74, 76.

⁸³ UNHCR 2009 Guidelines at ¶ 41.

youth based on race. In one case on file with CGRS, an IJ granted asylum to a Maya Quiche girl based on her race. The girl had endured ongoing rape by a Ladino man who made comments about her race and how the police would not protect her.⁸⁴

In some countries, members of a particular race, nationality or ethnicity may be deemed to have a particular political opinion based on actions of certain subgroups. In such cases, a child of that particular race, nationality, or ethnicity may also have a claim based on political opinion.

D. Religion

According to UNHCR, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide for the right to freedom of “thought, conscience, and religion,” including the right to change one’s religion and to practice or demonstrate one’s religion in public or private, through teaching, worship, and observance.⁸⁵ The UNHCR Handbook describes various scenarios of persecution

based on religion, including prohibition of worship or teaching and serious measures of discrimination because of one’s practice or religious belief.⁸⁶ Moreover, the UNHCR’s Guidelines on religion-based claims⁸⁷ explain that such claims may involve: “a) religion as belief (including non-belief); b) religion as identity; or c) religion as a way of life;” and are not limited to traditional religions.⁸⁸

UNHCR’s Children’s Guidelines also recognize that children may be expected to fulfill particular roles or behaviors in certain religions. A child’s failure or refusal to follow the prescribed religious code may therefore result in persecution.⁸⁹ Similarly, some religions assign strict gender roles, duties, and rites—such as the expectation that all females undergo FGC—and a girl’s failure or refusal to conform could

Gang Claims: Viable Arguments

As has been emphasized throughout this advisory, the viability of a claim depends on the evidence of record and the arguments advanced. Despite challenging case law in the area of claims based on violence by criminal gangs, the following types of arguments have been met with success in either published cases or cases in CGRS’s database:

Social group claims

- ° Family-based social groups
- ° Testifying witnesses against gangs
- ° Children without effective parental protection
- ° Actual or imputed sexual orientation (e.g. gang imputes LGBT status based on resistance to joining)
- ° Gender defined social groups (e.g. girls viewed as property of gang)

Political opinion claims (look to political opinion practice pointer on page 24)

Religion claims

- ° Evangelicals
- ° Catholics

⁸⁴ CGRS Case #5183 (IJ Dec. 2007).

⁸⁵ See UNHCR Handbook at ¶ 71.

⁸⁶ *Id.* at ¶ 71-72.

⁸⁷ UNHCR’s Guidelines on International Protection No. 6: Religion-Based Refugee under Article 1(A)(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06 (2004) [“UNHCR Religion Guidelines”].

⁸⁸ See UNHCR Religion Guidelines at ¶ 4.

⁸⁹ UNHCR 2009 Guidelines at ¶ 43.

give rise to an asylum claim based on religious persecution.⁹⁰ Children may be targeted by family or community members who share their religion, but differ in belief or practice of that religion. In *Matter of S-A-*, for example, the BIA found that a Muslim Moroccan daughter who did not share her Muslim father's strict views regarding gender was persecuted on account of her religious beliefs.⁹¹

A child may lack knowledge of religious doctrine or tenets, but still hold religious beliefs or be religiously affiliated, or have religious beliefs or affiliation imputed to him/her. A number of federal courts have ruled that lack of doctrinal knowledge should not undermine a religious persecution case, where the applicant is credible.⁹² In addition, UNHCR advises that an individual need not “know or understand anything about the religion, if s/he has been identified by others as belonging to that group and fears persecution as a result.”⁹³ Furthermore, it is sufficient for a child to be perceived as having particular religious beliefs or belong to a particular religion because of his or her parents' beliefs or affiliations.⁹⁴

Religious persecution based on conversion in the United States can qualify as a basis for asylum and is relevant in some children's cases.⁹⁵ However, it should be recognized that a child may lack access to a formal conversion process.

Attorneys representing children/youth in claims based on violence by street gangs should explore whether there is a viable religion-based claim. For example, a child who is actively involved in a religious youth group or church and who refuses to join a gang, or who proselytizes to youth in the community, or who leaves the gang based on deeply held religious beliefs, may have a claim based on religion.⁹⁶ CGRS has several IJ decisions on file granting claims involving persecution by gangs based on religion.

VII. Nexus

In addition to establishing cognizability of a group and an applicant's membership in that particular social group, possession of an actual or imputed political opinion or nationality, or belonging to an actual or imputed religion or race, the applicant must prove the nexus element—that s/he was or would be targeted *because of* the enumerated ground. Nexus can be established through the submission of direct or circumstantial evidence.⁹⁷ Additionally, nexus can be found in cases involving mixed motives, but under the REAL ID Act of 2005, the enumerated ground must be at least “one central reason” for the persecution.⁹⁸

⁹⁰ *Id.* at ¶ 44; *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000) (granting asylum based on religious persecution to a Moroccan daughter who did not share her Muslim father's strict views on gender).

⁹¹ *Id.*

⁹² *See, e.g., Jiang v. Gonzales*, 485 F.3d 992, 995 (7th Cir. 2007); *Mezvrishvili v. Att'y Gen*, 467 F.3d 1292, 1295-97 (11th Cir. 2006); *Rizal v. Gonzales*, 442 F.3d 84, 90-94 (2d Cir. 2006).

⁹³ *See* UNHCR Religion Guidelines at ¶ 9.

⁹⁴ UNHCR 2009 Guidelines at ¶ 41.

⁹⁵ *See, e.g., Doe v. INS*, 867 F.2d 285 (6th Cir. 1989).

⁹⁶ At the time of this writing no Federal Court of Appeal has issued a precedential decision granting asylum based on religion in the context of persecution by a gang. A few federal courts have rejected such claims, but the decisions were based on a negative nexus finding—that persecution was not on account of religion—rather than a rejection of the protected ground. *See, e.g., Bueso Avila v. Holder*, 663 F.3d 934 (7th Cir. 2011).

⁹⁷ *See INS v. Elias-Zacarias*, 502 U.S. 478 (2002).

⁹⁸ Courts of Appeals have different standards for the “one central reason” test. The Third Circuit, for example, does not require the protected characteristic to be the dominant or a dominant reason for persecution, and recognizes that the “one central reason” standard can be fulfilled even if the protected ground is subordinate to a non-

Direct evidence of nexus:

- Persecutor’s words (about applicant, about individuals similarly situated to applicant etc.)
- Persecutor’s actions (i.e. burning political leaflet)
- Location, timing, and circumstances of persecution (e.g. persecutor waits for applicant outside of church or takes applicant to church and harms her there)
- Laws that punish the protected ground (e.g. banning homosexuality)

Circumstantial evidence:

- Evidence that persecutor has harmed individuals who share the applicant’s protected characteristic (e.g. race, family)
- In gang cases, expert testimony explaining gang dynamics and perspective
- Evidence of widespread persecution of individuals similarly situated to the applicant
- Evidence that legal and social norms tolerate persecution against individuals similarly situated to the applicant
- Country conditions articles and expert testimony showing the above

(See Appendix for further guidance on evidence)

In cases of persecution by non-State actors, adjudicators have often ruled that the protected characteristic is not one *central* reason for persecution and that a persecutor is primarily motivated by “personal” or “criminal” intent. Attorneys need to be prepared to respond to the argument that the case is merely one of an unfortunate crime, not persecution on account of a statutorily protected ground. Indeed, most harms rising to the level of persecution are in fact crimes, but this does not necessarily mean that the persecutor was not motivated by a protected ground. Moreover, criminalization of certain acts only further corroborates the practice in the home country and the distinction and particularity of the groups the laws seek to protect.

The nexus element must be evaluated in “**the context of the culture of the country of origin.**”⁹⁹ Attorneys need to be zealous in arguing the correct standard for nexus, that mixed motives are acceptable and that the protected characteristic must merely be *one* central reason for persecution, not *the* central reason, and that the societal context is critical. Also, even if the protected characteristic did not motivate the initial act of persecution, it can later become a motive for persecution.¹⁰⁰ A child may be told to pay *renta* to a gang on his or her way home from work simply because s/he has a source of income. If, however, the extortion continues over time and the child begins to resist or refuse to pay, the gang may begin to view the child as an opponent, for example, as someone who supports the government or possibly a rival gang, and harm the child on that basis.

Nexus may be especially difficult to determine in a child’s case because a child may express a fear or have been harmed without knowing or understanding the reason, yet U.S. law requires evidence of the

protected reason for persecution. *See Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 129-30 (3d Cir. 2009). Unlike the Third Circuit, the Ninth Circuit requires that the protected ground is not a subordinate reason to a non-protected reason for persecution, although the Ninth Circuit does not require proof that the protected ground is the dominant reason for persecution. *See Parussimova v. Mukasey*, 555 F.3d 734, 741-42 (9th Cir. 2009). CGRS believes that the Ninth Circuit’s approach is wrong and that proof that the protected ground is one reason for persecution should satisfy the requirement.

⁹⁹ See Refugee, Asylum and International Operations Directorate (RAIO), USCIS, “Nexus and the Protected Grounds, Training Module” at 21 (2012), available at <http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/nexus-protected-grounds.pdf>, last visited March 23, 2015.

¹⁰⁰ See, e.g., *Aquino-Cordova v. Holder*, 759 F.3d 332 (4th Cir. 2014).

persecutor's motive.¹⁰¹ As the U.S. Guidelines, AOBTC materials, and UNHCR advise, however, children may not understand the reasons for persecution and may have limited knowledge of societal conditions in their country of origin.¹⁰² For instance, racial and ethnic relations can be extremely complicated and a child's inability to understand or articulate information about, or lack of consciousness with regard to, such concepts should not weigh against a finding that persecution is on account of race when objective evidence supports such a finding. Consequently, Asylum Officers are instructed to consider "all possible grounds for asylum," as well as the child's age and maturity in determining whether nexus to a protected ground has been established.¹⁰³

Country Conditions Documentation and Experts

CGRS strongly recommends providing detailed country conditions evidence and in some cases expert declarations in children's cases to bolster nexus arguments. CGRS can suggest country-specific experts where necessary to tailor testimony to your case, and CGRS also maintains some general expert declarations on file that have been accepted and considered by adjudicators in a range of cases, which are available on our website. Whenever possible, adult family members, family friends, or others (e.g. neighbors) who are aware of the persecution should testify or submit affidavits because they may have a more complete picture of the factors and circumstances involved than the child.

(See Appendix for further guidance on evidence)

Because of children's limited knowledge and/or ability to articulate information regarding nexus, the U.S. Guidelines and the AOBTC materials allow for nexus to be established through objective evidence.¹⁰⁴ UNHCR's 1997 Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum call for greater reliance on objective factors in children's cases.¹⁰⁵ In addition, the UNHCR recommends that adjudicators have a good understanding of the child applicant's "history, culture, and background" in reaching a determination.¹⁰⁶

In thinking about objective factors that might establish the nexus element, attorneys should look to the preamble to the Department of Justice's Proposed Asylum and Withholding Regulations of 2000, which acknowledges that circumstantial evidence showing that "patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society" supports a finding of nexus on account of a protected ground.¹⁰⁷ This position is in line with DHS's position in its *Matter of L-R*- brief, and attorneys should raise such arguments in children's cases, where relevant. For example, evidence showing that certain countries accept violence against street children, that some members of society engage in "social cleansing" of street children, and that police tolerate—and in some cases perpetrate—violence against such children

¹⁰¹ See *Elias-Zacarias*, 502 U.S. 478.

¹⁰² See U.S. Guidelines at 21, 27; AOBTC Children's Guidelines at 43-44; UNHCR 2009 Guidelines at ¶ 74.

¹⁰³ See AOBTC Children's Guidelines at 42.

¹⁰⁴ See U.S. Guidelines at 21; AOBTC Children's Guidelines at 43.

¹⁰⁵ See UNHCR 1997 Guidelines at ¶ 8.6; see also *Matter of Kasinga*, 21 I. & N. Dec. at 366-67 (relying on country conditions evidence regarding the practice of female genital cutting and women's role in society to find that applicant's fear of cutting was on account of social group membership).

¹⁰⁶ UNHCR 1997 Guidelines at ¶ 8.10

¹⁰⁷ See 65 Fed. Reg. No. 236 (Dec. 7, 2000) at 76593.

should support a finding of nexus to a child-defined social group. Social norms accepting such violence and impunity for violence against street children may embolden persecutors to harm them.

In many children's cases, the child's status in the family or society is a clear reason that the child was or would be targeted for harm by a non-state actor. Attorneys should use circumstantial evidence such as country conditions evidence and expert testimony to support this argument.

Note regarding gender-based claims: gender-based violence such as domestic violence, FGC, forced marriage, rape, and honor killings are generally motivated in significant part by gender. Forced and early marriage, FGC, and honor killing for example, are typically motivated by deeply held beliefs regarding the proper role of women in society and in the family. Domestic partner violence generally happens because of gender and status in a relationship. And rape is about power and control and is often gender-motivated. Frequently the government might argue or judges might believe that gender-based persecution is motivated by the fact that the persecutor is violent, crazy, criminally driven, financially driven, or a substance abuser, or wants revenge on the applicant for some personal reason. This analysis completely misses the critical gender aspect involved in violence against women. One federal Court of Appeals has criticized this analysis for failing to recognize the relevance of societal attitudes about women and violence against women to the persecution.¹⁰⁸ Attorneys should contact CGRS for assistance if the government attorney, judge, or Asylum Office takes this position.

VIII. Government Inability or Unwillingness to Protect

Persecution may be either at the hands of the State or a private actor who the State is unable *or* unwilling to control. The unable or unwilling to control test is **disjunctive—meaning that only one of the two prongs needs to be established**; thus, even if a State shows its *willingness* to control persecution (e.g. by enacting legislation to address it—though, even this often falls short), it may be *unable* to effectively enforce its own laws. In children's cases, the persecutor is most often a non-State actor, such as immediate or extended family; neighbors; members of the child's tribe, clan, or religious or ethnic group seeking to ensure compliance with tradition or gender roles or norms; human traffickers; or gangs, drug traffickers, or other armed groups. However, in some cases the persecutor may have some connection to the State for example, the persecutor may be a police officer or a soldier acting in his individual capacity.¹⁰⁹

The standard: While a State cannot be expected to stop any and all risk of harm, it has a duty to provide *effective* protection.¹¹⁰ According to USCIS, in evaluating this element Asylum Officers should consider

¹⁰⁸ See *Sarhan v. Holder*, 658 F.3d at 656-57 (BIA erred in finding honor killing was purely personally motivated and failed to consider broader societal context in which honor killing occurs).

¹⁰⁹ Note that there is a difference between acts committed by a State actor acting within his normal duties and acts committed outside his normal duties. The Ninth Circuit long ago rejected the argument that harm perpetrated by a soldier did not amount to persecution because it occurred in the context of the "personal" relationship between the soldier and his victim. See *Lazo-Majano v. INS*, 813 F.2d 1432, 1435-36 (9th Cir. 1987), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

¹¹⁰ See *Matter of Konanykhine et al.*, File No. A74-361-122, 28 Immig. Rptr. B1-49 (BIA Nov. 20, 2003) (considering whether persecution is "'knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection'") (quoting UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 65 (1979, rev. 1992); *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (holding inability or unwillingness to control violence by private parties can be established by "demonstrating that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection").

whether the government takes “reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection.”¹¹¹ Reasonable steps, in USCIS’s view, are measures that “reduce the risk of claimed harm below the well-founded fear threshold.”¹¹² Some federal Courts of Appeals have articulated the standard in different terms and we strongly advise attorneys to research the language for the standard within the circuit where their case is proceeding and demonstrate how your case meets such a standard. However, we also encourage attorneys to continue to make the argument that the standard must be interpreted such that a State is not able/willing to protect unless it has reduced a fear to below a 10% chance to remain consistent with U.S. Supreme Court law on the likelihood of persecution necessary to establish asylum eligibility.¹¹³ CGRS is concerned that some Courts of Appeals precedent can be read to increase the threshold required to prove a State’s inability or unwillingness to protect to a standard beyond a well-founded fear of persecution, and we encourage you to contact us about strategies in those circuits.

Failure of State to respond to request for help or information about harm to child: Attorneys should document any and all attempts to obtain State protection if past persecution is alleged. A child or a family member (parent, grandparent, etc.) may have sought protection from persecution by the police, through the courts or through some other government agency. In those cases, whether the State responded and how the State responded are critical to the question of its willingness and ability to protect the child.

Evidence that the State *offered* protection might include: the police took a report, investigated the crime, and/or arrested the persecutor; charges were filed; and a fair trial was held. In cases involving child abuse, State protection might also include placing the child into protective custody. The grant of a stay away order indicates some willingness and ability to protect, but only if the government actually enforces it. A stay away order is meaningless if an abuser can violate it without consequence.

Evidence that the State *failed to offer* protection might include: a teacher, hospital employee, or other State employee who is aware of the persecution and took no action to protect; police abused the applicant (verbally, sexually, physically); police refused to offer protection (e.g. told the child that if s/he listened better then s/he would not be abused); police told the child or family member that they cannot protect the child; police took no report; police took a report but failed to investigate the crime;¹¹⁴ no charges were filed; the case was not taken to court; a stay away order or protective order was not granted; or a persecutor was arrested but released within hours or days.¹¹⁵ We have seen some cases involving extortion by police or judges, where protection is offered in exchange for money or sex, which is clear evidence of the State’s unwillingness to control persecution. Proof that State agents are colluding with persecutors also evidences the State’s unwillingness to protect *and* in some cases may indicate persecution by the State itself.¹¹⁶

¹¹¹ Asylum Officer Basic Training Course, *Female Asylum Applicants and Gender-Related Claims* 25 (Mar. 12, 2009).

¹¹² *Id.*

¹¹³ See *Cardoza-Fonseca*, 480 U.S. 421.

¹¹⁴ See *Mashiri*, 383 F.3d at 1121 (failure of police to make arrests after beating of applicant, coupled with police quickly closing their investigation as simple theft when evidence clearly showed it was a hate crime, established unwillingness to protect); *but see Beck v. Mukasey*, 527 F.3d 737, 740 (8th Cir. 2008) (unsuccessful investigation of skinhead assaults and harassment did not establish State unable or unwilling to protect).

¹¹⁵ See, e.g., *Sarhan v. Holder*, 658 F.3d at 658-61 (Jordan was unable or unwilling to protect against honor killings even though some cases were prosecuted, where sentences for honor killings amounted to a “slap on the wrist”).

¹¹⁶ This evidence would also be very relevant to a claim for protection under the Convention Against Torture.

In addition to submitting evidence regarding the State’s response to reports of violence or calls for help, evidence regarding the State’s willingness and ability to protect against the type of persecution your client has experienced or fears is very relevant. For examples of the types of evidence that support a finding of a State’s inability or unwillingness to control persecution, see below.

Showing State unable or unwilling to protect in absence of a report: Proving that the government is unable or unwilling to protect a child from persecution by non-State actors is often a challenge because the persecutor may be the child’s family member, or because a child may not report acts of persecution to anyone—including family—due to shame, a desire to protect the family, or simply the lack of maturity and confidence to do so. Reporting persecution to, or seeking protection from, the State is not required.¹¹⁷

Where no report to authorities has been made, it is critical to show that requesting the State’s intervention would have been futile or placed the child in danger.¹¹⁸ For example, it may be dangerous for a child to report abuse where the persecutor has threatened retaliation if the child were to tell anyone.¹¹⁹ Inability to access authorities to make a report can help show that attempts to make such a report are futile. The UNHCR has taken the position that a child’s access to State protection depends on whether the child’s parent or caregiver is able and willing to seek protection on behalf of the child because children may be unable to approach law enforcement or may be dismissed by law enforcement and returned to an abusive situation.¹²⁰ In the case of an abused or unaccompanied child, there may be no parent or caregiver to seek protection for the child, which would support the argument that the child cannot access help. Obtaining an expert evaluation by a mental health professional can often help explain the child’s lack of psychosocial maturity and how this impacted the child’s ability to seek and obtain help in the home country. Additionally, a country conditions expert may also help show that it would be dangerous or futile for a child in certain scenarios to report his or her abuse to authorities.

Attorneys can also argue that the State’s track record shows that reporting would have been futile. Evidence that can establish that the State would have been unable or unwilling to protect includes:

- ✓ absence of child welfare services or child welfare services that are ineffective and/or underfunded
- ✓ high rates of violence against children, such as statistics regarding rates of child abuse or murder of street children, female genital cutting, domestic violence, or femicide/femicide
- ✓ frequent rights violations, such as high child labor rates
- ✓ the existence or lack of laws controlling the form of persecution (e.g. no laws banning child abuse, FGC, rape, hate crimes, discrimination against LGBT individuals and other groups, etc.)
- ✓ the existence or lack of laws granting rights (e.g. the right to gay marriage, the right for women to own property, etc.)

¹¹⁷ See *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057-58 (9th Cir. 2006) (noting that there is nothing in the Refugee Act or implementing regulations requiring that an applicant seeking relief based on private persecution must have reported that persecution to authorities); *Matter of S-A-*, 22 I. & N. Dec. at 1335 (holding that the applicant satisfied the unable or unwilling requirement even though she had not requested protection from the government).

¹¹⁸ See *Matter of S-A-*, 22 I. & N. Dec. at 1328 (holding that reporting not required where it would be futile or increase danger to applicant and that it would have been futile or increased danger for Moroccan girl to report abuse by father).

¹¹⁹ See, e.g., *Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011).

¹²⁰ UNHCR 2009 Guidelines at ¶ 39.

- ✓ lack of enforcement of protective and/or rights based legislation, including lack of clear enforcement mechanism¹²¹
- ✓ low rates of prosecution and/or conviction for harming children¹²²
- ✓ expert testimony

IX. Internal Relocation to Avoid Persecution

An applicant does not have a well-founded fear of persecution if s/he could avoid future harm by relocating to another part of the country of nationality *and* it would be reasonable to expect him/her to do so.¹²³ This is a two-part test: first, relocation to safety must be possible; second, relocation must be reasonable. If relocation is deemed possible, the inquiry becomes whether it is reasonable. The reasonableness inquiry considers whether, based on the totality of the circumstances, it would be reasonable for the applicant to relocate. This is an applicant-specific inquiry; while it may be reasonable for individual A to relocate under a given set of circumstances, it may be unreasonable for individual B to relocate under those same circumstances.

There is a strong argument that it is never reasonable for a child to relocate on his or her own, and the Asylum Office generally agrees with this position.¹²⁴ UNHCR concurs that relocation is unreasonable in cases of unaccompanied children who would be relocated on their own without State care and aid.¹²⁵ Whether a child can safely relocate with family, and whether it would be reasonable to do so depends on the circumstances of the case.

The regulations require consideration of the following factors, in addition to any other relevant factors, when ruling on the reasonableness of relocation: whether the applicant would face other serious harm upon relocation; social and cultural constraints such as age, gender, health, and social and family ties; civil strife in the country; administrative, economic, or judicial infrastructure (or lack thereof); and geographical limitations.¹²⁶ At least one federal Court of Appeals has found relocation to be unreasonable based in part on age.¹²⁷ Although not listed in the regulations, there is an argument that the best interests of the child should be considered in determining whether relocation is reasonable.¹²⁸

¹²¹ See *Castro-Martinez*, 641 F.3d at 1108.

¹²² UNHCR 2009 Guidelines at ¶ 38.

¹²³ 8 C.F.R. § 1208.13(b)(2)(ii).

¹²⁴ AOBTC Children's Guidelines at 42, stating that "[i]t is generally not reasonable to expect a child to internally relocate by himself or herself."

¹²⁵ UNHCR 2009 Guidelines at ¶ 55.

¹²⁶ 8 C.F.R. § 1208.13(b)(3).

¹²⁷ See *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214-15 (9th Cir. 2004) (analyzing age—in that case, elderly applicants—in the reasonableness inquiry and finding relocation unreasonable due to civil strife and elderly age of applicants).

¹²⁸ UNHCR 2009 Guidelines at ¶ 56. The best interests of the child principle is the cornerstone of child welfare law and is recognized and applied in state child welfare and juvenile justice proceedings throughout the United States. It is also a key principle in the CRC, the primary international treaty on the rights of children. The CRC requires primary consideration of the best interests of the child in all actions and decisions affecting a child. Although the U.S. has not ratified the CRC, it has a duty not to undermine its principles.

Evidence that relocation would be unsafe/is not possible:

- Applicant has attempted to relocate but persecutor found him/her
- Gangs and other organized criminal syndicates can locate victims throughout the country
- In cases involving intrafamilial violence the abuser may be able to find the child through other family
- Availability of public records online—such as school registration records
- Very small country—nowhere to hide

Evidence that relocation would be unreasonable:

- Child’s family is too impoverished to move
- Child is on his or her own and has no family to care for him/her in other part of the country
- The family to whom child could relocate cannot provide safe or suitable living situation, or cannot afford to care for child
- Child suffers from medical condition and cannot obtain needed care if relocates
- Child suffers from psychological condition or disorder and will not have needed care if relocates
- Child has special education needs that will not be met if relocates
- Child has a physical disability and accommodations are lacking in country
- Lack of employment and educational opportunities for child or for family upon relocation
- Gang violence, civil strife, gender-based violence, other dangers exist throughout country
- Child is from a marginalized group and would suffer discrimination upon relocation
- Child does not have the language skills to relocate
- Geographic limitations (e.g. unreasonable to relocate to remote, difficult geographical regions such as desert)

Mental health, medical, and country conditions experts can be very helpful in establishing the unreasonableness of relocation.

(See Appendix for further guidance on evidence)

X. Bars to Protection

This advisory provides a very brief introduction to bars to asylum. For more resources on bars to asylum and their application in children’s cases, please request assistance by visiting our website at: <http://cgrs.uchastings.edu/assistance>.

U.S. law bars individuals from asylum who have: persecuted others on account of a protected ground; been convicted of a particularly serious crime; committed a serious non-political crime; engaged in terrorist activity or provided material support for terrorist activity; been deemed a serious danger to U.S. security; firmly resettled in another country prior to arriving in the United States; previously been denied asylum; or failed to file within one year of arrival from their most recent entry date. In addition, an individual can be barred from asylum pursuant to the Canada-U.S. Safe Third Country Agreement. **The TVPRA exempts unaccompanied children from the Safe Third Country and one-year bars**, but these bars still apply in cases of “accompanied” principal child applicants.

An individual barred from asylum may still be eligible for withholding of removal or protection under the Convention Against Torture (discussed below); although the following bars also apply to withholding of removal: persecutor of others, serious non-political crime, threat to national security, conviction for particularly serious crime.

A. One-year bar

Cases before the Asylum Office

As discussed above, the TVPRA of 2008 exempted UACs from the one-year filing deadline. Since USCIS's June 2013 change in policy regarding jurisdiction (discussed above), the Asylum Office treats those asylum applicants it considers to be UACs for jurisdictional purposes as UACs for purposes of the one-year filing deadline. In other words, the Asylum Office considers an individual a UAC (and therefore exempt from the one-year bar) even if s/he has turned 18 or has reunified with a parent, so long as DHS has not formally terminated UAC status. This means that an asylum seeker who entered the United States as a UAC does not need to file his or her asylum application with USCIS within one year of arrival. Note, however, that USCIS previously applied a more restrictive policy regarding who qualified as a UAC, and could shift its policy again in the future.

Principal child applicants who are not UACs are not exempt from the one-year filing deadline. However, USCIS has taken the position that principal child applicants who are not UACs are under a "legal disability" (an exception to the one-year filing deadline) and therefore do not need to file the asylum application within one year of arrival. USCIS adopted this policy based on the agency's recognition that the same logic that applies to exempting unaccompanied children from the deadline should apply to accompanied children, as "minors are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults."¹²⁹ An accompanied 14 year old, for example, can file her asylum application with USCIS when she is 17.5 without being time-barred. However, USCIS believes that the legal disability ends at age 18, so principal child applicants should file for asylum by their 18th birthday or within six months of turning 18.

Cases before the Immigration Court

USCIS's policies regarding the application of the one-year filing deadline to children does not bind immigration judges; thus, immigration judges may apply the filing deadline to individuals who entered the United States as UACs, but have turned 18 prior to filing the asylum application. This issue should generally only arise in cases that the USCIS Asylum Office refers back to the immigration courts, because, as discussed in the jurisdictional section of this advisory, USCIS has initial jurisdiction over

Practice Pointer

In cases involving children close to the age of 18 attorneys should strive to file the asylum application within one year of the child's arrival. Attorneys should argue that UACs are exempt from the filing deadline regardless of their age (if one is exempt then the deadline never applies in the first place). Still, filing within one year of arrival insulates your client from any subsequent change in USCIS policy, arguments by DHS trial counsel in cases before the immigration courts, and a restrictive reading of the TVPRA or of the statutory definition of a UAC by an immigration judge. If filing within one year of arrival is not feasible, attorneys should aim to file within 6 months of the child's 18th birthday because 6 months is considered a "reasonable" delay.

¹²⁹ Asylum Officer Basic Training Course, *One-Year Filing Deadline* 15 (Mar. 2009).

claims of individuals who entered the United States as UACs even if they file for asylum after turning 18. Some attorneys have successfully argued before immigration judges that the one-year bar should never apply in a case involving a former UAC as long as the individual was a UAC at the *time of entry*, as opposed to the *time of filing* the asylum application, based on principles of statutory construction. We encourage you to contact us if you find yourself in such a position and need assistance preparing your argument.

The one-year filing deadline may also be an issue for accompanied principal child applicants before the immigration court. The regulations state that a legal disability such as being an “unaccompanied minor” during the one-year period following arrival is as an extraordinary circumstance that can justify waiving the filing deadline. Similar to the Asylum Office’s approach, numerous immigration judges have found that being a child is a legal disability, regardless of unaccompanied status, and do not apply the filing deadline to accompanied children’s claims. Some judges, however, read the regulatory exceptions narrowly, as applying only to unaccompanied children, and require accompanied children to either file for asylum within one year of arrival, or be able to establish that they qualify for an exception, other than being under a legal disability.

Exceptions to the one-year filing deadline

Where the one-year bar may apply, first and foremost, attorneys should seek to file the asylum application within the one-year deadline to avoid potential problems with the bar. For applications not filed within one year of arrival, the bar may be waived due to changed circumstances that materially affect the applicant’s eligibility for asylum, or extraordinary circumstances related to the delay in filing.¹³⁰

Examples of **changed circumstances** in a child’s case might include: deportation of an abusive parent or caretaker to the child’s home country; violence against the child’s family member or other similarly situated person in the child’s home country that occurred or became worse after the one-year period; enactment of a law that would harm the child based on a protected ground (i.e. law banning the practice of the child’s religion); family member’s recent participation in association or activity that may place the child at risk (e.g. joins a gang, becomes active in church or land rights movement); changed country conditions that give rise to a well-founded fear of persecution; child coming out as LGBT; child converting to a religion that places him or her at risk of persecution; child becoming pregnant or having a baby out of wedlock; and child developing condition that may lead him or her to be targeted (i.e. HIV/AIDS, mental illness, physical disability).¹³¹ The change often constitutes an entirely new condition, for example, enactment of a discriminatory law that would harm the child based on a protected ground. However, at least one Court of Appeals has held that the changed circumstances exception to the bar applies to situations involving the material worsening of previously existing conditions.¹³²

Examples of **extraordinary circumstances** that may relate to the child’s delay in filing include: legal disability due to one’s status as a child; serious physical disability or illness that limited the child’s ability to file for asylum; mental disability such as Post Traumatic Stress Disorder (PTSD) that affected the child’s ability to seek asylum; death or serious illness or “incapacity” of an immediate family member; and ineffective assistance of counsel.¹³³

¹³⁰ INA § 208(a)(2)(D).

¹³¹ 8 C.F.R. §208.4(a)(4).

¹³² See, e.g., *Vahora v. Holder*, 641 F.3d 1038, 1044-45 (9th Cir. 2011).

¹³³ 8 C.F.R. §208.4(a)(5).

Exceptions to the bar must be well documented. Thus, to establish that changed circumstances justify the delay in filing, evidence of the changed conditions, when they occurred, and how they materially affect the child's eligibility for asylum should be submitted. To establish extraordinary circumstances sufficient to waive the bar, proof of the extraordinary circumstance itself, as well as proof that it relates to the delay in filing must be filed. If the extraordinary circumstance is based on a mental disability, a report by a mental health professional, diagnosing and explaining the disability and how it affected the child's ability to file for asylum, should be submitted. Individuals suffering from PTSD, for example, typically attempt to avoid any reminder of their past trauma ("avoidance of stimuli") and often have a difficult time planning ahead because they are so focused on day-to-day survival ("foreshortening"). Both of these symptoms make filing for asylum difficult.

Attorneys should file the asylum application within a "reasonable period" of the extraordinary or changed circumstances, or within six months of learning about the change in circumstances.¹³⁴ Six months is generally considered a reasonable period within which to file.¹³⁵ Therefore, attorneys should generally aim to file within six months of the child's 18th birthday if relying on the child's minor status as the excuse for the filing delay.

B. Others bars

The most common bars applied to children's asylum cases are the persecutor of others bar and the serious nonpolitical crime bar. The particularly serious crime bar also arises sometimes. The terrorism bars may arise, most often in cases of former child soldiers or former gang members. Attorneys should prepare clients to respond to questions related to the bars and should themselves be prepared to argue why a particular bar does not apply.

The UNHCR Children's Guidelines recommend that the bars be applied with "great caution" in children's cases, considering the child's individual culpability, developmental stage, factors that may negate the child's culpability, such as duress, coercion, self-defense or protection of others, and whether the "consequences of exclusion from refugee status are proportional to the seriousness of the act committed."¹³⁶ For example, UNHCR stresses the importance of recognizing that children who have been involved in armed groups may themselves have been victims of human rights violations¹³⁷ and may have been ordered to commit the acts in question at a time when they lacked capacity to refuse. The Guidelines provide excellent background on the issue and arguments against application of the bars.

Law and science recognize that children are distinct from adults and this warrants different analysis of the bars in their cases. Attorneys can turn to domestic jurisprudence that recognizes children as developmentally distinct from adults. For example, attorneys can argue that the bars should be applied consistent with the body of literature and case law acknowledging: (1) that children are less mature and act more impulsively than adults; (2) that children are more susceptible to coercion and peer pressure

¹³⁴ 8 C.F.R. 208.4(a)(4)(ii).

¹³⁵ See *Al-Ramahi v. Holder*, 725 F.3d 1133, 1135 (9th Cir. 2013) (explaining that a delay of less than six months is presumptively reasonable).

¹³⁶ UNHCR 2009 Guidelines at ¶ 59-64.

¹³⁷ *Id.* at ¶ 59.

than adults; and (3) that their personalities are not yet fully formed, thus making them more amenable to rehabilitation or change than adults.¹³⁸

Criminal bars: There is a good argument that the “criminal bars” (bars based on conviction of a particularly serious crime and commission of a serious nonpolitical crime) do not apply to juvenile delinquencies. This argument is consistent with BIA precedent that clearly treats adult convictions—and thus culpability—fundamentally differently from juvenile delinquency dispositions.¹³⁹ It is also in harmony with the purpose of the Federal Juvenile Delinquency Act, which distinguishes juvenile delinquency dispositions from adult crimes.

CGRS has written a more detailed practice advisory on the applicability of statutory bars in children’s asylum cases. To receive a copy, or to discuss the application of a bar to a specific case, please fill out a request for assistance form on our website at: <http://cgrs.uchastings.edu/assistance>. Attorneys should also consider seeking an advisory opinion from UNHCR when the government argues in favor of applying a bar to a child asylum seeker. While UNHCR does not frequently provide advisory opinions, it has in some cases and its perspective can influence adjudicators. To request an advisory opinion, contact UNHCR’s Washington DC office at: usaw@unhcr.org or (202) 296-5191.

XI. Exercise of Discretion

A. To grant asylum

The exercise of discretion is a balancing of the fact that the applicant qualifies as a refugee, along with any positive and adverse factors.¹⁴⁰ The BIA has held that a well-founded fear of persecution weighs heavily in favor of a positive exercise of discretion to grant asylum.¹⁴¹ Even when negative factors are present, “the danger of persecution should generally outweigh all but the most egregious of adverse facts.”¹⁴² This principle should apply with even greater force to children’s cases.

The AOBTC module on mandatory bars and discretion provides a list of non-exhaustive positive and negative factors to be considered in weighing discretion.

Positive discretionary factors include: family/business/employment ties in the United States; evidence of hardship to the applicant and his/her family if deported to any country; evidence of good moral character/value/service to the community, including proof of rehabilitation if there is a criminal record; general humanitarian reasons such as age or health and evidence of severe past persecution, including consideration of whether other relief has been granted or denied.¹⁴³ Because the list of factors is non-

¹³⁸ See, e.g., *Roper*, 543 U.S. 551; *In re Gault*, 387 U.S. 1, 15-17 (1967); UNHCR 2009 Guidelines at ¶ 3; *A Treacherous Journey* at 8-9.

¹³⁹ See *Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 1365-66 (BIA 2000) (“[w]e have consistently held . . . that acts of juvenile delinquency are not crimes”); *Matter of De La Nues*, 18 I. & N. Dec. 140, 144 (BIA 1981) (holding adjudication of juvenile delinquency is not conviction of a crime for immigration purposes); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (BIA 1981) (same). See also the Immigrant Legal Resource Center’s Guide on Juvenile Delinquency, available at <http://ilrc.org/files/documents/n.15-delinquency.pdf> (last visited March 15, 2015).

¹⁴⁰ See *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

¹⁴¹ See *Matter of Pula*, 19 I. & N. Dec. at 474.

¹⁴² See *Matter of Pula*, 19 I. & N. Dec. at 474.

¹⁴³ See Asylum Officer Basic Training Course, *Mandatory Bars to Asylum and Discretion* 34 (Mar. 2009).

exhaustive, evidence of any other positive discretionary factors should be included (e.g. evidence that deportation would not be in the best interests of the child).

Negative discretionary factors include: nature and underlying circumstances of the exclusion ground; significant violation of immigration laws; criminal record and the nature/seriousness of the record, as well as whether recidivism has occurred; lack of candor with immigration officials, including an adverse credibility finding; and other evidence indicating “bad character or undesirability for permanent residence in the United States.”¹⁴⁴

Because a well-founded fear of persecution should generally outweigh negative discretionary factors, and because childhood or age is considered a positive discretionary factor, children should not be denied asylum on the basis of discretion. Where negative discretionary factors are present, arguments against the application of the bars to asylum are relevant, particularly those regarding the reduced culpability and greater rehabilitation of children as compared to adults. CGRS’s advisory on the application of bars to children’s claims for asylum includes a section with arguments on the exercise of discretion. Contact us to request a copy: <http://cgrs.uchastings.edu/assistance>.

B. To grant humanitarian asylum

An individual who has suffered past persecution on account of a protected characteristic, but who has been determined *not* to have a well-founded fear of persecution,¹⁴⁵ may be eligible for humanitarian asylum if s/he establishes “compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,” or “a reasonable possibility that s/he may suffer other serious harm upon removal to that country.”¹⁴⁶

The lead case on humanitarian asylum based on the severity of past persecution is *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989). The fact that the petitioner was persecuted *during childhood*, as well as evidence of long-lasting impact of the persecution, significantly influenced the BIA’s determination that the persecution was severe enough to warrant humanitarian asylum. In *Matter of S-A-K- and H-A-H-*, the BIA held that a mother and daughter who suffered female genital cutting in Somalia should be granted humanitarian asylum based on the severity of their FGC, even if they could not establish a well-founded fear of future persecution.¹⁴⁷ The daughter was nine years old when she was cut. Attorneys can use these cases to argue that persecution is particularly devastating to children—given the developmental process—and leaves a lasting mark on them to warrant a humanitarian grant. In addition, attorneys should argue that just as the level of harm required to establish persecution must be evaluated from a child-specific lens, so should the severity of the past persecution and the seriousness of potential future harm for purposes of humanitarian asylum.

Courts of Appeals have held that humanitarian asylum based on the severity of past persecution should be reserved for cases involving the most atrocious forms of persecution, but have recognized eligibility

¹⁴⁴ *Id.* at 35.

¹⁴⁵ A showing of past persecution on account of a protected ground entitles an asylum applicant to a rebuttable presumption that s/he has a well-founded fear of future persecution. The government can rebut the presumption either by showing a fundamental change in circumstances that eliminates the well-founded fear, or that the applicant can reasonably relocate to avoid persecution. 8 C.F.R. § 208.13(b)(1)(i).

¹⁴⁶ 8 C.F.R. § 208.13(b)(1)(iii).

¹⁴⁷ 24 I. & N. Dec. 464 (BIA 2008).

for humanitarian asylum in some cases.¹⁴⁸ Despite the high showing generally required, CGRS has immigration judge decisions on file finding eligibility for humanitarian asylum based on past persecution of a child.

The main case discussing humanitarian asylum based on other serious harm grounds is *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012). The BIA explained in *L-S-* that the “other serious harm” does not need to be on account of one of the five statutory grounds, but “such harm must be so serious that it equals the severity of persecution.”¹⁴⁹ The BIA compared harm such as “mere economic disadvantage” or the inability to practice one’s chosen profession—which it stated would not qualify as “other serious harm”—to conditions related to civil strife, extreme economic deprivation, or severe mental or emotional harm or physical harm, which might suffice.¹⁵⁰ The focus of the “other serious harm” inquiry is on current conditions in the home country and the potential for new physical, psychological, or other harm in the future, which may be wholly unrelated to the past harm.¹⁵¹ Although very few Courts of Appeals have addressed “other serious harm,” several Courts have remanded cases to the BIA for consideration of whether the risk of FGC to one’s child satisfies the test.

XII. Withholding of Removal

If an applicant is denied asylum, for example, for failure to file within one year of her arrival, she may still be eligible for withholding of removal. Withholding requires a similar showing to asylum (e.g. persecution, nexus to a protected ground, inability/unwillingness of government to protect), and thus the advice provided above is applicable, but it differs in one key respect—the threshold likelihood of fear. Withholding requires that an applicant establish that it is more likely than not (i.e. a greater than 50% chance) that her life or freedom would be threatened in her country on account of race, religion, nationality, membership in a particular social group, or political opinion. For asylum, an applicant need only show a reasonable likelihood (i.e. a 1 in 10 chance) of persecution.¹⁵² The likelihood of future harm

Evidence of severe and atrocious past persecution:

- Mental health professional’s report and testimony about developmental and psychological impact of persecution on the child
- Medical evidence documenting long-term or permanent injury stemming from persecution
- Whether the type of harm suffered has been found by any bodies to constitute torture (i.e. rape, FGC)
- Details of the heinousness of the harm
- Details of the impact on the child—in the child’s words, if possible

“Other serious harm” to a child could include:

- Harm by gangs or other organized crime
- Deprivation of education
- Neglect
- Homelessness
- Exploitative labor
- Severe discrimination
- Lack of access to prescription medication
- Lack of access to critical services (medical, psychological)
- Harm to family members

¹⁴⁸ See, e.g., *Sowe v. Mukasey*, 538 F.3d 128, 1285-86 (9th Cir. 2008) (remanding for BIA to consider humanitarian asylum where applicant witnessed murder of his parents, kidnapping of sister, and amputation of brother’s hand); *Mohammed*, 400 F.3d at 801 (FGC constitutes severe and atrocious past persecution and may support grant of humanitarian asylum).

¹⁴⁹ *Matter of L-S-*, 25 I. & N. Dec. at 714.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *Cardoza-Fonseca*, 480 U.S. 421.

can either be established through evidence of past persecution or evidence that the applicant will more likely than not be targeted in the future. Like an asylum applicant, a withholding applicant who has been persecuted in the past is entitled to a rebuttable presumption of future harm. The presumption arising from past persecution in withholding cases is that the applicant's life or freedom would be threatened in the future.¹⁵³ A withholding applicant found not to have suffered past persecution can prove the requisite likelihood of harm through evidence regarding personal circumstances (e.g. past threats, past targeting of applicant, current threats, persecution of applicant's family), as well as country conditions documentation (e.g. showing targeting of similarly situated individuals) and expert testimony. Unlike asylum, which is a discretionary form of relief, withholding relief is mandatory for those found eligible.

XIII. Convention Against Torture (CAT) Protection

CAT can be an important form of relief when a child is deemed ineligible for asylum and withholding of removal, for instance because the adjudicator finds that the child has not established a nexus between the persecution suffered or feared and a protected ground.¹⁵⁴ CGRS has decisions on file granting CAT relief to individuals based on gang violence, who were found ineligible for asylum and withholding.¹⁵⁵ Where the facts support such a claim, attorneys should seek CAT relief as an alternative to asylum or withholding.

To establish eligibility for CAT relief, an applicant must demonstrate that it is more likely than not that s/he would be tortured upon removal and that the torture would either be by, or at the instigation of or with the consent or acquiescence of, public officials.¹⁵⁶ As in asylum cases, attorneys should argue that the threshold of what constitutes torture of a child can be relatively less than that of an adult. Under the statute, even a single, isolated act may suffice to constitute torture.¹⁵⁷ The regulations mandate that adjudicators consider *all* evidence relevant to the possibility of future torture, including evidence of past torture and relevant country conditions information.

One difficult aspect of establishing eligibility for CAT relief involves the requirement that the torture must be inflicted either by a government official acting in an official capacity, or with the consent or acquiescence of the government. Because persecution of children is often inflicted by private actors, many cases will need to establish acquiescence by the government. While similar (and sometimes conflated by the courts), the acquiescence test in CAT cases is a separate inquiry from the inability/unwillingness of a government to protect in asylum and withholding cases involving non-state actors. Like in the asylum context, failure to report torture is not fatal to a claim because CAT relief does not require actual knowledge on the part of the government in order to establish acquiescence—willful blindness is the standard in most jurisdictions.¹⁵⁸ Thus, evidence that the authorities have been especially slow and inadequate to end abuses against children or bring their perpetrators to justice is relevant to the acquiescence determination.

¹⁵³ See 8 C.F.R. § 1208.16 (b)(1)(i).

¹⁵⁴ CAT is also relevant when a child is deemed ineligible for asylum and withholding pursuant to a statutory bar.

¹⁵⁵ See, e.g., CGRS case #5874 (granting CAT to Guatemalan woman who witnesses murder of neighbor by gang member, reported it to police, and cooperated in police investigation of the murder, but denying asylum and withholding for failure to prove persecution on account of a protected ground). Note, however, that CGRS believe this case was wrongly decided in that the applicant had viable social group and political opinion claims and should have been granted asylum.

¹⁵⁶ 8 C.F.R. § 1208.16(c).

¹⁵⁷ 8 C.F.R. § 1208.18(a)(1).

¹⁵⁸ See, e.g., *W-G-R-*, 26 I. & N. Dec. at 226

XIV. Conclusion

We encourage attorneys to be in touch with CGRS regarding legal theories and issues in their cases, as well as questions they might have about developments in the law and how recent developments are being interpreted and applied at the various levels of adjudication. We hope that this information has proven useful.

Remember that specific country conditions packets and expert declarations that may be more tailored to the case at hand are available on our website. We hope that you will continue to keep CGRS apprised about the outcome of your cases and we welcome any feedback regarding our assistance. **Report an outcome in a case by visiting:** <http://cgrs.uchastings.edu/assistance>.

We also invite you to consider joining CGRS's listserv devoted to domestic violence and other gender asylum issues. To join the Gender-Based Asylum listserv, simply send an email to info@cgrs-hastings.org with "Asylum Listserv" in the subject line or body of your email. You can sign up to receive CGRS newsletters as well as information about advocacy campaigns, events and other important updates on our website. Or, you can stay in touch with us on Facebook <http://www.facebook.com/cgrs.uchastings>.

Appendix

Evidence in support of a child's asylum claim ideally includes the following:

1. Evidence of identity such as birth certificate, passport, identification card, baptismal certificate

2. Personal corroborating evidence

- Client declaration
- Declarations or letters by family members or friends corroborating claim and providing additional insight as known and relevant
- Hospital, doctor, clinic records for any medical care received in-country following the harm
- Records of any mental health care received in-country due to harm
- Police record of any reports made or of police action taken
- Court records and orders where relevant (e.g. petition filed, stay away order granted, etc.)
- Death certificates as relevant
- School records
- Records or letter from organizations in which child claims membership of self or of family (e.g. from church, youth group, political organization, etc.)
- Records of anything else claimed for which records are available (e.g. if claim is based on child being targeted because parents are landowners then proof of landownership is helpful)

3. Expert reports

- Reports by medical, dental, mental health professionals in the United States detailing any physical, medical, or psychological symptoms consistent with the claimed harm, as well as other elements of the claim they are qualified to comment on (see textbox below for more on how these experts can support claims).
- Report by a country conditions expert providing the context in which the child's claim arises. Country conditions experts can provide information to support arguments on all of the legal elements of the refugee definition.

Contact CGRS for advice on how to best use experts to support claims and for referrals:

<http://cgrs.uchastings.edu/assistance>.

Mental health experts can provide the following types of helpful information:

Information that bolsters the child's credibility (e.g. symptoms child is experiencing are consistent with the trauma child claims to have suffered, no evidence of malingering)

- Explain the level of detail, recollection, consistency, and understanding that can reasonably be expected from the child's testimony given the child's age/development/mental health status
- Explain cultural issues relevant to the case
- Provide detail that may not come out during the child's testimony (because of trauma, trust issues, fear, and shame)
- Help establish that the child has a subjective fear of return (e.g. symptoms child is experiencing indicate fear, anxiety)
- Help establish the impact of past persecution on a child (e.g. the psychological wounds are deep and long-lasting)
- Information to support arguments regarding why the one-year bar should be waived
- Information to support arguments regarding why relocation would be unreasonable (e.g. relocation would be harmful to child's mental health)
- Provide information to support arguments regarding other serious harm a child might face upon return (e.g. return to the country would be harmful to child's mental health)

4. Country conditions corroborating evidence

- News articles by IRIN, BBC, news agencies, in-country newspapers (translated if not in English, with certificate of translation)
- Reports:
 - Department of State human rights country reports
 - Reports by UN bodies (e.g. UNHCR, UN Special Rapporteurs on women’s rights, children’s rights, UN Population Fund, U.S. Committee for Refugees, etc.)
 - Reports by UN treaty monitoring bodies (e.g. Concluding Observations on the Convention to Eliminate all Forms of Discrimination Against Women (CEDAW), Concluding Observations on the Convention on the Rights of the Child (CRC), reports monitoring the Convention Against Torture, etc.)
 - Reports by Inter-American Commission on Human Rights
 - Reports by Canadian Immigration and Refugee Board
 - Reports by the Council of Europe, Committee for the Prevention of Torture, Commission Against Racism and Intolerance, Secretary General Reports, as well as reports by Organization for Security and Cooperation in Europe
 - Norwegian Refugee Council Internal Displacement Monitoring Centre
 - Reports by international NGOs or NGOs based in refugee receiving countries such as Amnesty International, Human Rights Watch, International Federation for Human Rights, Freedom House, World Organization Against Torture, Washington Office on Latin America (WOLA)
 - Reports and articles by in-country NGOs working on the issues involved in your case, such as Casa Alianza (Honduras), Centro de Derechos de Mujeres (Honduras), Asistencia Legal para la Diversidad Sexual (El Salvador), Grupo Guatemalteco de Mujeres (GGM) etc. *Please contact CGRS for information about additional in-country NGOs.*
- Academic publications such as articles and books by scholars in-country and out of country

Helpful Databases for Researching Country Conditions

UNHCR RefWorld
Asylumlaw.org
Immigration and Refugee Board of Canada
ReliefWeb
AllAfrica.com



The Center for Gender & Refugee Studies (CGRS) is a national organization that provides legal expertise, training, and resources to attorneys representing asylum seekers, advocates to protect refugees, advances refugee law and policy, and uses domestic, regional and international human rights mechanisms to address the root causes of persecution.

To request assistance in your asylum claim, please visit <http://cgrs.uchastings.edu/assistance/>.

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