



Center for Gender & Refugee Studies

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Submission to the Committee on the Rights of the Child

Children's Rights to Access to Justice and Effective Remedies

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University of California College of the Law, San Francisco

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The Center for Gender & Refugee Studies (CGRS) is grateful for the opportunity to contribute this input for your draft general comment No. 27 on children's rights to access to justice and effective remedies. Specifically, we address the challenges and best practices of children's access to asylum.¹

This submission draws upon the following resources prepared by CGRS, individually and in collaboration with partners, which provide analyses and information relevant to the call for input. They are:

- "Screening for Asylum Eligibility in Children's Claims" (2024), available upon request;² and
- "[Making a Mockery of Asylum: The Proposed Asylum Ban, Relying on the CBP One App for Access to Ports of Entry, Will Separate Families and Deny Protection](#)" (2023), in collaboration with the Haiti Justice Partnership, University of California College of the Law, San Francisco; Haitian Bridge Alliance and École Supérieure Catholique de Droit de Jérémie, Haiti attached.

Part I illustrates the importance of adopting a child-sensitive approach in asylum proceedings and the legal standards that should be applied in such cases in the United

¹ The Committee on the Rights of the Child, *Call for submissions on draft general comment No. 27 on children's rights to access to justice and effective remedies* (accessed on June 25, 2024), <https://www.ohchr.org/en/calls-for-input/2024/call-submissions-draft-general-comment-no-27-childrens-rights-access-justice>. Questions No. 7 "Barriers preventing children from gaining access to justice and effective remedies," No. 8, "Enabling factors and strategies" and No. 11 "Contributions on lessons learnt from evidence and practice."

² By emailing CGRS@uclawsf.edu or through CGRS's [Technical Assistance Library](#).

States. Part II will elaborate on the unique challenges raised by CBP One — a smartphone application required to access asylum proceedings at the U.S. southern border — focusing on its impact on families and children. Part III offers recommendations to ensure effective access to remedies and protection for refugee children.

I. BEST PRACTICES AND STANDARDS IN CHILDREN’S ASYLUM CLAIMS

Asylum seekers often face cumbersome and complex procedures in their search for protection. However, it is especially difficult for children to navigate the process. To ensure access to effective remedies and protection, asylum officers and adjudicators should tailor the evaluation of asylum elements, particularly “persecution,” to consider the child’s age, opinions, feelings, and psychological makeup.³ It is important to be mindful that children are dependent on others for care and are prone to be affected more severely by trauma than adults. Considering this, a child-sensitive approach must be applied during the evaluation process, meaning:

- Consider the child’s age, maturity, and development;
- Recognize that children might be particularly vulnerable in certain situations and types of harm;
- Apply relaxed requirements regarding the elements of asylum; and
- Give children a liberal benefit of the doubt when assessing asylum eligibility.

Officials interviewing children in asylum proceedings should also apply child-sensitive measures, including:

- Allow a trusted adult to accompany the child;
- Be aware that the child may be less forthcoming than an adult and want to avoid talking about traumatizing experiences;
- Tailor the interview questions to the child’s age, stage of language development, and background;
- Make the interview as non-adversarial and comfortable as possible;
- Ensure access to an interpreter the child is comfortable with, if needed;
- Check for understanding of the process and the questions, offering clarification when necessary;

³ UNHCR, *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*, ¶10 (Dec. 22, 2009), available at <https://www.unhcr.org/us/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.unhcr.org%2Fus%2Fsite%2Fen-us%2Ffiles%2Flegacy-pdf%2F50ae46309.pdf?version1692773345#page=1&zoom=auto,-106,842> [hereinafter – *UNHCR*].

- Offer breaks.

Our Practice Advisory offers guidance on how a child-sensitive approach is applied to legal standards of asylum for unaccompanied children, with practical examples. Although the Practice Advisory focuses primarily on the United States, it can also be relevant in other contexts.

In the United States, all asylum seekers, including children, must meet the “refugee” definition established in the Immigration and Nationality Act, consistent with obligations under the Protocol Relating to the Status of Refugees (1967). A “refugee” is “*any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and . . . avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion*”⁴ (emphasis added). To establish eligibility, it is necessary to demonstrate every element.

A. Persecution

When evaluating children's asylum claims, it is important to determine if the harm they experienced or fear qualifies as “persecution,” meaning serious harm beyond mere harassment. Persecution is not limited to an exhaustive list and can include physical, psychological, and emotional harm, and threats. Notably, the threshold for persecution is lower for children than adults and should be assessed from the child’s perspective.⁵ The most common types of persecution children experience are physical abuse, sexual violence, severe economic deprivation, forced participation in hostilities, kidnapping, and abandonment, as well as witnessing these acts committed against their family members.

B. Well-Founded Fear

Besides the harm the child might have already experienced, a child might fear future harm that will occur if returned to their country of origin. Even without past harm, a child might be eligible for asylum based on fear. To meet a necessary threshold of “well-founded fear”, it is important to consider both its subjective and objective components. The former requires the child to feel genuinely afraid and be able to express that fear. The objective component imposes a reasonable possibility of future persecution standard, meaning there is at least a 10% chance a child will suffer harm upon return to their country of

⁴ INA § 101(a); 8 U.S.C. 1101(a).

⁵ UNHCR, *supra* note 2, at ¶10.

origin.⁶ Given a child's age and level of maturity, it can be challenging to evaluate the balance between subjective and objective circumstances. Very young children might not be able to grasp the danger of their situation or properly articulate their fears. In such cases, advocates and adjudicators should analyze the objective methods to determine the reasonable possibility of future harm. For example, they can seek information from family members or adult caregivers and research the conditions of similarly situated children in the child's country of origin. CGRS maintains a [Technical Assistance Library](#), where advocates can access many up-to-date country conditions resources.

C. Nexus

A critical aspect of assessing asylum eligibility is establishing whether a child suffered persecution or fears it based on the protected grounds. There could have been several motivations, but the legal standard requires at least "one central reason" for the harm.⁷ Sometimes, children are persecuted based on the imputed characteristics that they do not actually possess. However, asylum law provides protection for such children regardless.

It is important to consider the child's inherent vulnerability in their dependence on others. A caregiver might inflict harm that rises to the level of persecution, even when they believe that they are helping the child and have no punitive intent. For example, forcing "conversion therapy" on a child who expresses they are gay. To establish nexus, advocates should evaluate both direct and circumstantial evidence, including the child's social context.

D. Protected Grounds

To establish asylum eligibility, persecution must occur due to one or more of the following characteristics:

1. **Race** – if harm to a child was inflicted based on their ethnicity, linguistic group, membership in the Indigenous community, tribe, or clan. Some examples of race-based harm to children include denying children the right to a nationality, registration at birth, education, or health care. They can be targets of forms of violence such as rape, trafficking, or gang recruitment.
2. **Nationality** – harm to children based on their citizenship, stateless status, living in a third country, or being perceived to have a particular nationality. For example, if gangs extort money from a girl who used to live in the U.S. assuming she is a "rich American".

⁶ *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

⁷ *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

3. **Religion** – harm to children based on their religious affiliation, atheism, being too religious or not religious enough, converting to a different religion, or having a child’s parent’s religious beliefs imputed to them.
4. **Political Opinion** – children can express their political beliefs differently based on their age, education, maturity level, and ability to articulate their views. Persecutors can target children based on actions besides communicating their opinions and beliefs. For example, girls attending schools in a country that discourages girls’ education, standing up to family members who abuse children or hold patriarchal views, or refusing to join a gang.
5. **Membership in a particular social group (PSG)** – according to U.S. law, PSG’s have three elements: having an immutable or fundamental characteristic, the particularity of the group, and social distinction.
 - i. An immutable characteristic is a trait that cannot be changed, such as family ties, race, disability, or ethnicity. Fundamental characteristics are the traits that should not be required to change, like gender identity, religion, or deeply held beliefs.
 - ii. Particularity requires the PSG to have clear boundaries for who falls within the group. Such boundaries can consist of common policies, social and legal constructs of the group (e.g., patriarchal society), and identifiable traits (e.g, marital status).
 - iii. Social distinction assesses whether the individual’s society views the group as one, although they do not have to be necessarily visibly distinguishable from others in society (e.g., LGBTQ community).

Examples of child’s claims based on membership in the PSG are often defined by gender (forced marriage, sexual violence), and family relationship (domestic violence).

E. Failure of State Protection

Asylum law requires the applicant to establish that the government is either unable or unwilling to protect the individuals from persecution. A child may not know whether the government can adequately protect them, and they might not have the ability to report the harm due to their age, developmental, or other limitations. In addition, it may be dangerous and futile for a child to report the inflicted harm, fearing retaliation or retribution. At the same time, it is not required to report harm to the police in order to then be able to request

asylum.⁸ Advocates and adjudicators should evaluate the objective evidence of government laws and enforcement in their country of origin.

There are additional factors to consider when evaluating asylum eligibility, such as changes in the child's country of origin, the possibility of safe relocation and potential bars to asylum. For a more detailed explanation, please refer to our practice advisory.⁹ It is crucial to require being sensitive to their unique vulnerabilities and needs in order to protect children's rights.

II. THE "CBP ONE" APPLICATION RESTRICTS ACCESS TO ASYLUM TO CHILDREN AND FAMILIES

Refugee children face significant barriers when seeking protection at the U.S.-Mexico border. Starting in May 2023, the U.S. government implemented a [rule](#) that, in addition to establishing draconian bars to asylum eligibility, makes the CBP One smartphone app virtually the only way for countless asylum seekers, including families, to request asylum at the border. Individuals seeking protection must use the app to request an appointment to present themselves at a port of entry. However, problems with the app—including technical glitches, limited language access, and failure to recognize facial features of Black and other individuals with dark skin—preclude many from being able to seek asylum.

In addition to these issues, as detailed in our report, families with children face other challenges with the CBP One app, which requires users to upload photographs and provides very limited slots for appointments. After appointments become available in the app, they usually fill up quickly. Families often struggle to capture photos of all family members and upload them in time. Even parents who took additional measures, such as waking their young children up in the middle of the night to take the pictures, have reported not being able to do it fast enough to secure a slot.

Our report documents that "the app prevented families from adding their family members under one profile. Parents could add their own information, but the app would freeze or shut down after they did so, preventing them from adding their children and progressing further in the appointment process."

As a consequence, children were separated from their families. Many applicants reported being confused and not understanding that for an entire family to be able to cross the

⁸ *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051,1073-75 (9th Cir. 2017)

⁹ CGRS, *Screening for Asylum Eligibility in Children's Claims* (2024), pp. 23-30.

border, each member must be included under one individual's profile. When families arrived for their appointments, "officers consistently told parents that they had the 'option' of leaving their children behind, sending their children across the border unaccompanied, or attempting to get another appointment together."

In response, families had to make a difficult decision to separate out of desperation without knowing if they would be able to reunite. Our report documents that at least 18 out of 157 families interviewed stated that their families had to separate because of the CBP One app. Families that stayed in Mexico considered sending their children ahead unaccompanied, to remove them from dangerous border conditions. Moreover, people generally have challenges filling out the CBP One app, as it depends on their tech literacy level, language skills, high-quality cell service, and possession of the cellphone in the first place. These challenges can be insurmountable for adults, and even more so for children.

This demonstrates the profound impact the CBP One app has had on families, forcing them into heartbreaking decisions and highlighting the urgent need for policies that keep refugee children and their families together and safe.

III. RECOMMENDATIONS

In order to ensure effective access to asylum protection for children, we encourage the Committee on the Rights of the Child to include in general comment No. 27 the following considerations:

- When screening children for asylum it is important to implement a child-sensitive approach, ensuring the child feels comfortable throughout the process, which should be adjusted based on the child's level of maturity and development.
- In evaluating the legal standards of a child's asylum case, it is essential to consider child-specific vulnerabilities, such as dependency on adult caregivers, heightened sensitivity to trauma, and age limitations in the child's ability to fully understand the danger they face and the asylum process.
- Recommend that States review their asylum procedures, including by implementing UNHCR standards,¹⁰ to ensure effective access to remedies and protection for refugee children.

¹⁰ United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994), <https://www.unhcr.org/us/media/refugee-children-guidelines-protection-and-care>.