

**UNHCR Asylum Lawyers Project**  
**November 2016**

## **UNHCR's Views on Child Asylum Claims**

### ***Using international law to support claims from Central American children seeking protection in the US***

The United Nations High Commissioner for Refugees (UNHCR) has long recognized the specific protection needs of children in asylum procedures. Children might have independent claims to refugee status separate from those of their parents or other family members. They might experience certain child-specific forms of persecution that may give rise to a claim for refugee protection. In addition, children have inherent vulnerabilities that mandate additional safeguards as they move through the asylum process.

At this particular time, UNHCR is aware of and has worked to understand the increasing numbers of unaccompanied and separated children arriving in the United States from Central America.<sup>1</sup> Recognizing that many of these children are in need of international protection, UNHCR has taken the view that the refugee definition, found in Article 1 of the 1951 Convention relating to the Status of Refugees and Article 1 of the 1967 Protocol relating to the Status of Refugees,<sup>2</sup> should be read to encompass claims from Central American children fleeing gang recruitment and/or gang related harms.

The purpose of this note is to summarize UNHCR's views on these topics as relevant to pursuing asylum claims in the U.S. The accompanying materials in this packet expand on this discussion.

### **I. Relevance of International Refugee Law in the United States**

The 1951 Convention and its 1967 Protocol are the key international instruments governing the protection of refugees. The U.S. is a party to the 1967 Protocol<sup>3</sup> and has incorporated the substantive provisions of the Protocol into U.S. domestic law.<sup>4</sup>

U.S. courts have relied on UNHCR interpretations and especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook)<sup>5</sup> in assessing refugee claims, and have recognized that UNHCR's "analysis provides significant guidance for issues of refugee law."<sup>6</sup> The U.S.

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<sup>1</sup> UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014), available at <http://unhcrwashington.org/children>.

<sup>2</sup> UN General Assembly, *Convention relating to the Status of Refugees*, GA Res. 429 (V), UN GAOR, 5th Sess., UN Doc. A/RES/429 (14 Dec. 1950) [hereinafter *1951 Convention*]; UN General Assembly, *Protocol relating to the Status of Refugees*, GA Res. 2198 (XXI), UN GAOR, 21st Sess., UN Doc. A/RES/2198 (6 Dec. 1966) [hereinafter *1967 Protocol*].

<sup>3</sup> The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to "refugees" as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol*, Art. 1, ¶¶ 1–2. The *1967 Protocol* universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical and temporal limitations. *Id.*, ¶¶ 2–3. The United States acceded to the *1967 Protocol* in 1968, thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*. H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160; H.R. Rep. No. 96–608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

<sup>4</sup> Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102.

<sup>5</sup> The UNHCR Handbook was prepared by this Office at the request of the Member States of the Executive Committee of the High Commissioner's Programme, including the United States, in order to provide guidance to governments in applying the terms of the Convention and Protocol. See Handbook, 1 para. IV.

<sup>6</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, N. 22 (1987).

Supreme Court has “consistently turned [to UNHCR] for assistance in interpreting our obligations under the Refugee Convention.”<sup>7</sup> In addition, under U.S. jurisprudence, U.S. courts have an obligation to construe U.S. statutes in a manner consistent with U.S. international obligations whenever possible.<sup>8</sup> UNHCR offers the following guidance when considering claims from asylum-seeking children,<sup>9</sup> which may be relevant to advocating on behalf of a child in the U.S.

International law can be used to support an individual’s claim to refugee status. However, in order for international law to be considered in U.S. courts, it must be part of the record. Therefore, please be advised to submit relevant materials, such as UNHCR’s *Guidelines on International Protection or Eligibility Guidelines*,<sup>10</sup> before the record when applicable to your client’s case.

## II. Guidance on Child Asylum Claims

The position of UNHCR concerning the asylum claims of children was first reflected in the UNHCR Handbook at paragraphs 213-219, which are devoted to the topic of “unaccompanied minors” and address some of the particular needs of children seeking refugee protection. The UNHCR Handbook, in calling for a more generous application of the standard of proof in the case of asylum-seeking children, reflects UNHCR’s understanding that children may experience greater difficulties than adults in articulating the basis for their fear, and may therefore require special assistance to ensure their interests are fully safeguarded.

More recently, recognizing the ever-growing number of children seeking protection and the increasing need for more specific guidance relating to the assessment of their claims, in 2009 UNHCR issued the *Guidelines on International Protection No. 8: 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* [hereinafter *UNHCR Guidelines on Child Asylum Claims*]. UNHCR began issuing *Guidelines on International Protection* in 2002 to complement the interpretive guidance in the Handbook. The *Guidelines on Child Asylum Claims* are part of this series and offer substantive and procedural guidance on carrying out refugee status determinations in a child-sensitive manner.<sup>11</sup>

### a. Substantive Analysis of Child Asylum Claims

Conducting refugee status determinations in a child-sensitive manner requires recognition of two central points: (1) children may have independent claims to refugee status; and (2) children may experience child-specific forms of persecution, giving rise to a claim for refugee protection. UNHCR has

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<sup>7</sup> *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing cases).

<sup>8</sup> *Murray v. The Charming Betsy*, 6 US 64, 80 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). See also *INS v. Cardoza-Fonseca*, 480 US 421, 436-7 (1987) (The U.S. Supreme Court found “abundant evidence” that Congress intended to conform the definition of refugee and the asylum law of the U.S. “to the United Nation’s (sic) Protocol to which the United States has been bound since 1968.”).

<sup>9</sup> The *UNHCR Guidelines on Child Asylum Claims* define “children” as “all persons below the age of 18 years.” UNHCR, *Guidelines on International Protection No. 8: 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*, ¶7, 22 December 2009, UN Doc. HCR/GIP/09/08, available at <http://www.unhcr.org/50ae46309.pdf> [hereinafter *UNHCR Guidelines on Child Asylum Claims*].

<sup>10</sup> See e.g., UNHCR, *Guidelines on Child Asylum Claims*; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, March 2016, available at <http://www.refworld.org/docid/56e706e94.html>.

<sup>11</sup> U.S. courts have expressly relied on these interpretations as “provid[ing] significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

taken the position that child-specific forms and manifestations of persecution must be recognized in assessing the asylum claims of children. Persecution in the context of a child-sensitive approach encompasses violations of child-specific rights such as protection from all forms of physical and mental violence, abuse, neglect and exploitation.<sup>12</sup> In addition, children may be more susceptible to harm than adults and may experience the harm differently. In this regard, it is essential that persecution be viewed from the child's perspective. "[T]o assess accurately the severity of the acts and their impact on a child, it is necessary to examine the details of each case and to adapt the threshold for persecution to that particular child."<sup>13</sup>

The *Guidelines on Child Asylum Claims* discuss several examples of child-specific forms of persecution, stating:

"UNHCR's Executive Committee has recognized that child-specific forms of persecution may include under-age recruitment, child trafficking and female genital mutilation (hereafter "FGM").<sup>14</sup> Other examples include, but are not limited to, family and domestic violence, forced or underage marriage,<sup>15</sup> bonded or hazardous child labour, forced labour,<sup>16</sup> forced prostitution and child pornography.<sup>17</sup><sup>18</sup>

#### **b. Procedural Safeguards and Best Interests of the Child**

International standards require that when the asylum applicant is a child, the refugee definition must be interpreted in a child-sensitive manner to ensure protection is not denied in error because of failure to take into account the child's unique experiences of persecution or to properly evaluate the child's account of the events that give rise to the asylum claim.<sup>19</sup> Other factors, such as "a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status."<sup>20</sup>

Because of the "extreme vulnerability of the child" a State must consider the "best interests of the child" when taking any action affecting a child. As articulated in the *Convention on the Rights of the Child*:

"In all actions concerning children, whether undertaken by public or private social welfare

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<sup>12</sup> *UNHCR Guidelines on Child Asylum Claims*, ¶13.

<sup>13</sup> *Id.* at ¶15.

<sup>14</sup> UNHCR, *Conclusion on Children at Risk*, ExCom Conclusion No. 107, para. (g)(viii) (5 Oct. 2001).

<sup>15</sup> UN General Assembly, *Convention on the Rights of the Child* (hereinafter "CRC"), Art. 24(3), 20 Nov. 1989, 1577 U.N.T.S. 3; UN General Assembly, *International Covenant on Civil and Political Rights* (hereinafter "ICCPR"), Art. 23, 16 Dec. 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Art. 10, 16 Dec. 1966, 993 U.N.T.S. 3.

<sup>16</sup> CRC, Arts. 32–36; International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, C182 (hereinafter "ILO Convention on the Worst Forms of Child Labour"), 17 June 1999; ILO, *Minimum Age Convention*, C138, (hereinafter "ILO Minimum Age Convention"), Arts. 2 (3), 2(4), 26 June 1973.

<sup>17</sup> CRC, Art. 34; UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 Mar. 2001, A/RES/54/263.

<sup>18</sup> *UNHCR Guidelines on Child Asylum Claims*, ¶20.

<sup>19</sup> *Id.* at ¶1, 2.

<sup>20</sup> *Id.* at ¶4.

institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**<sup>21</sup>

UNHCR has taken the position that the “best interests of the child” determination should facilitate adequate child participation without discrimination, involve decision-makers with relevant expertise, and balance relevant factors, such as the child’s wishes and feelings, the safety of the child and exposure or likely exposure to severe harm, and family or other close relationships, to assess what option is in the child’s best interest.<sup>22</sup>

Further, the presentation of the asylum claim must be assessed from the perspective of a child and, as in every case, the entire record must be considered. Children cannot be expected to provide adult-like accounts and may have difficulty articulating their fears.<sup>23</sup> They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult.<sup>24</sup> When persecution is experienced by a child at a young age, these difficulties are compounded because the memories of these experiences are formed at an innocent and impressionable stage of development.

Finally, it is a fundamental principle that an adjudicator must consider all evidence in the record. Although testimony alone can be sufficient to support a claim for asylum, where corroborating evidence is submitted, the claim must be assessed on the entirety of the record. This is especially critical in the context of a child applicant. Children may have limited knowledge of country conditions or family circumstances, may be unable to fully explain the reasons for the persecution or may not fully comprehend their vulnerability. In such circumstances, “a decision maker should make an objective assessment of the risk that child would face”, which requires consideration of evidence from a wide array of sources.<sup>25</sup>

### III. Types of Harms Faced by Children Fleeing to the U.S.

The United States became a party to the 1967 Protocol in 1968, and incorporated the substantive provisions into domestic US law in 1980.<sup>26</sup> Since that time, the US has granted asylum to children in a number of cases. The US has recognized children’s claims arising under a variety of circumstances and from a wide range of geographical locations, including:

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<sup>21</sup> CRC, Art. 3 (emphasis added). See also UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, Art. 3, Para. 1, 29 May 2013, CRC/C/GC/14. The United States has signed (but not fully ratified) the CRC. See U.N. Treaty Ratification Status, Convention on the Rts. of the Child, <<http://tinyurl.com/CRCStatus>> (showing United States signature on Feb. 16, 1995). As a signatory, the United States is bound not to “defeat” the CRC’s “object and purpose.” Vienna Convention on the Law of Treaties, Art. 18, 1155 U.N.T.S. 331, <<http://tinyurl.com/ViennaConvention>>. Moreover, the CRC is the world’s most ratified human rights treaty (ratified by all but one country), and its provisions are therefore considered customary international law. See, e.g., Inter-American Ct. of Hum. Rts., *Judicial Condition and Hum. Rts. of the Child*, Advisory Opinion OC-17/2002 (Aug. 28, 2002) (“The large number of ratifications shows a broad international consensus (opinio iuris communis) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter.”).

<sup>22</sup> UNHCR, *Guidelines on Determining the Best Interest of the Child*, May 2008, available at <http://www.unhcr.org/4566b16b2.pdf>.

<sup>23</sup> UNHCR *Guidelines on Child Asylum Claims*, ¶¶2, 72.

<sup>24</sup> *Id.* at ¶72.

<sup>25</sup> *Id.* at ¶11.

<sup>26</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

- Former Child Soldiers: The Third Circuit has found that the group “former child soldiers” fits within the definition of particular social group;<sup>27</sup>
- Cases involving Female Genital Mutilation: In *Matter of Kasinga*, the BIA found that “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” constituted a particular social group;<sup>28</sup>
- Family Membership: The Fourth Circuit found that “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” met the definition of particular social group;<sup>29</sup>
- Children who are witnesses or informants: In *Henriquez-Rivas v. Holder* the Ninth Circuit granted asylum to an El Salvadorian minor who testified against gang members for killing her father;<sup>30</sup>
- Domestic Violence: In an unpublished decision, an Immigration Judge granted asylum and found that “Children of women in El Salvador who were former domestic partners of gang leaders who are young and perceived as property” constituted a particular social group;<sup>31</sup>
- Religious grounds: The BIA has 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;<sup>32</sup>

Consistent with international law as discussed above, these cases highlight the fact that children may have independent claims to asylum, which may arise from child-specific forms of persecution, or a child’s claim may stem from that of a family member or close relative.

#### **IV. UNHCR Approach to Asylum Claims from Central American Children Fleeing Gang Violence**

In recent months and years, the U.S. has faced increasing numbers of claims from children affected by gang recruitment, gang violence, and other issues associated with non-state armed actors in El Salvador, Guatemala, and Honduras, a region known as the Northern Triangle of Central America, as well as Mexico.

In 2014, UNHCR conducted interviews with 404 unaccompanied or separated children from the Northern Triangle of Central America and Mexico who arrived in the U.S. during or after October 2011. The purpose of UNHCR’s research was to “ascertain the connection between the children’s stated reasons [for fleeing], the findings of recent studies on the increasing violence and insecurity in the region, and international protection needs.”<sup>33</sup> Based on the interviews, UNHCR found that “no less than

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<sup>27</sup> *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003).

<sup>28</sup> *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

<sup>29</sup> *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

<sup>30</sup> *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

<sup>31</sup> Defined by Immigration Judge Rodriguez de Jonghas as a particular social group in order granting asylum on June 5, 2015

<sup>32</sup> *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

<sup>33</sup> UNHCR, *Children on the Run*, at 5.

58%” of the children interviewed raised potential international protection needs. In regards to the types of harms children faced in their home countries, the study found:

“Two overarching patterns of harm related to potential international protection needs emerged: violence by organized armed criminal actors and violence in the home. Forty-eight percent of the displaced children interviewed for this study shared experiences of how they had been personally affected by the augmented violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors. Twenty-one percent of the children confided that they had survived abuse and violence in their homes by their caretakers. A third category of harm giving rise to potential international protection needs arose only among the children from Mexico: recruitment into and exploitation by the criminal industry of human smuggling – that is, facilitating others in crossing into the United States unlawfully. Thirty-eight percent of the children from Mexico fell into this category. Eleven percent of the children reported having suffered or being in fear of both violence in society and abuse in the home.”<sup>34</sup>

In regards to violence by organized criminal actors, children spoke of a range of harms, including “forced recruitment; physical violence, including rape and severe beatings; threats of violence; and extortion.”<sup>35</sup> Against this backdrop, UNHCR made several recommendations to the Governments of El Salvador, Guatemala, Honduras, Mexico and the United States, including the need to recognize the international protection needs of children displaced from this region.

#### **a. The 1951 Convention and 1967 Protocol**

The 1951 Convention and its 1967 Protocol are the principal means for providing international protection to individuals unable to receive protection in their countries of origin. To receive protection under these instruments, an individual must satisfy the definition of a “refugee,” and there must not be any reason, as articulated in the 1951 Convention, to exclude an individual from such protection. Article 1(A)(2) of the 1951 Convention and Article 1 of the 1967 Protocol define a refugee as a person who:

“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality, and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.”<sup>36</sup>

Under this definition, therefore, individuals seeking refugee status must demonstrate that: (1) they are outside of their country of nationality or former habitual residence; (2) they fear persecution (the “subjective element”); (3) such fear of persecution is well-founded (the “objective” element); (4) such persecution is “for reasons of race, religion, nationality, membership of a particular social group or political opinion”; and (5) owing to such fear, they do not wish to return to their country of nationality or former habitual residence.

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<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.* at 44.

<sup>36</sup> 1951 Convention, Art. 1(A)(2); 1967 Protocol, Art. 1.

Any of the Convention grounds may be applicable to children fleeing areas affected by gangs. For example, child asylum-seekers who resist gang recruitment or oppose gang practices may be seen as articulating a political opinion, or their resistance may be a manifestation of religious conviction. Thus, persecution in such settings might effectively be linked to religion or political opinion, actual or imputed. A large number of these claims fall under the “particular social group” ground, which poses several interpretative challenges discussed below. As stated in the *Handbook*, a social group claim, “may frequently overlap with a claim on other grounds,” such as political opinion or religion.<sup>37</sup>

### **b. Seeking Protection Based on “Membership in a Particular Social Group”**

Prior to 2008, the Board of Immigration Appeals (BIA) interpreted the term “particular social group” by reference to a “protected characteristic.” Under this approach, first articulated in the seminal decision *In Re Acosta*,<sup>38</sup> the court examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it; it may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status).

In 2008, however, the BIA issued two precedential decisions that made additional requirements to the *Acosta* test.<sup>39</sup> The “*Acosta* and” approach requires that members of social groups also demonstrate “social distinction” and “particularity”. The Board’s revised interpretation of the *Acosta* standard has been extensively litigated throughout U.S. Circuit Courts and has resulted in a Circuit split, with some Circuit Courts deferring to the BIA interpretation and others striking down and refusing to apply the additional requirements. The Board’s recent decisions upholding the additional requirements of “social distinction” and “particularity” conflict with the 1951 Convention, its 1967 Protocol, and the UNHCR Guidelines.<sup>40</sup>

In UNHCR’s view, children fleeing harms related to gangs may base their claims on membership in a particular social group, either through the “protected or immutable characteristic” or the “social perception” standard.<sup>41</sup> The group needs only to be identifiable through one of the approaches, not both.

### **b. “Protected Characteristics” Approach**

In certain cases, particularly in the context of Central America, children who are targeted by gangs and resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender, impressionability, poverty, lack of parental guidance and family ties. These characteristics set them apart in society and it is precisely because of these traits that they are generally more susceptible to recruitment attempts or other violent approaches by gangs.<sup>42</sup>

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<sup>37</sup> *Handbook* at para. 77.

<sup>38</sup> *In Re Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

<sup>39</sup> See *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

<sup>40</sup> UNHCR defines a particular social group as “A group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society.” UNHCR, Guidelines on International Protection No. 2: “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, 7 May 2002, (emphasis added) [hereinafter *Social Group Guidelines*].

<sup>41</sup> See UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (2010), available at <http://www.refworld.org/pdfid/4bb21fa02.pdf> [hereinafter UNHCR Gang Guidance Note].

<sup>42</sup> UNHCR *Gang Guidance Note* ¶ 36.

Vulnerability as a minor is recognized as an immutable characteristic that is unchangeable at any given point in time, notwithstanding that a child will grow into an adult.<sup>43</sup> As discussed in the *Guidelines on Child Asylum Claims* “A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared.”<sup>44</sup> Further, the characteristic of being a child is directly relevant to one’s identity. The Board itself has recognized the “immutable” nature of age, stating “[W]e acknowledge 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 particular social group, 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.”<sup>45</sup>

Although gang-related violence may be widespread and affect large segments of society, distinct groups have been specifically targeted because of certain shared characteristics such as their youth, gender, marginalization in society, lack of protection or other factors that make them more vulnerable.<sup>46</sup> Indeed, recent studies have found that the recruitment policies of Central American gangs often are age-driven and frequently target young people. For example, a U.S. Agency for International Development study found that youth within the age range of 8- 18 years may be particularly vulnerable to gang recruitment.<sup>47</sup> The Washington Office on Latin America *Transnational Study on Youth Gangs* also found that “the primary victims of youth gang-related violence are other youth, both gang and non-gang involved.”<sup>48</sup>

Similarly, although a social group cannot be “defined exclusively by the persecution that the members of the group suffer or by a common fear of being persecuted,”<sup>49</sup> the fact that members of a group have been or are being persecuted may serve as an aid to illustrate the potential relationship between persecution and a particular social group.<sup>50</sup>

In certain circumstances, past actions such as refusing to join a gang may also be considered immutable traits that cannot be changed.<sup>51</sup> The Board of Immigration Appeals (BIA) has recognized this argument, stating that “youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.”<sup>52</sup>

Resisting involvement in crime and criminal gangs by evading recruitment or otherwise opposing gang practices may, in some contexts, be considered a characteristic that is fundamental to one’s conscience, dignity and human rights.<sup>53</sup> At the core of gang-resistance is the individual’s insistence on rule of law, an

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<sup>43</sup> *UNHCR Guidelines on Child Asylum Claims*, ¶49-50.

<sup>44</sup> *Id.*

<sup>45</sup> *Matter of S-E-G-* at 583-84.

<sup>46</sup> *Id.* at ¶30.

<sup>47</sup> USAID Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development, *Central America and Mexico Gang Assessment*, 17 (Apr. 2006).

<sup>48</sup> *Transnational Study on Youth Gangs*, 2 (Mar. 30, 2007). See also UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014), available at <http://unhcrwashington.org/children>.

<sup>49</sup> *Social Group Guidelines* ¶ 14

<sup>50</sup> *UNHCR Gang Guidance Note* ¶ 35.

<sup>51</sup> *Id.* at ¶37.

<sup>52</sup> *Matter of S-E-G-*, at 584.

<sup>53</sup> *UNHCR Gang Guidance Note* ¶ 38.



internationally recognized human right,<sup>54</sup> as well as the right to freedom of association, including the freedom not to associate.<sup>55</sup> The values and beliefs at stake in refusing to give in to the demands of gangs and engage in criminal and violent conduct could be considered to be of such fundamental nature to one's conscience, dignity and human rights that a person should not be required to renounce them. This, in turn, underscores that such beliefs could constitute a fundamental characteristic shared by, and thereby distinguishing, members of a particular social group.

### c. The “Social Distinction” Approach

In addition to youth and gender, those targeted for gang recruitment or those who oppose gang practices may share other social characteristics such as their geographical origin, including a particular neighborhood or marginalized urban area.<sup>56</sup> They also may share the characteristic of being poor or from a lower socio-economic class.<sup>57</sup> Accordingly, youth who are targeted for recruitment may be set apart in society and recognized as a particular social group because of their age, vulnerability, social background or class.<sup>58</sup> For instance, it could be widely known in a given community that young people from marginalized neighborhoods or of a certain socioeconomic class are the common targets of gangs for recruitment, extortion or other purposes. Those who are targeted for, and resist, gang recruitment may stand out even further because of their very resistance, which may further set them apart in their community or society.

## V. Overview of other Issues and Materials

- For a discussion of child-specific rights, child-related manifestations of persecution, and child-specific forms of persecution, see:
  - *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 [UNHCR Guidelines on Child Asylum Claims]*, ¶¶19-36
- For a discussion of child asylum claims and the 1951 Convention grounds, see:
  - *UNHCR Guidelines on Child Asylum Claims*, ¶¶40-52
- For more discussion on the international legal basis for, and requirements of, a child-sensitive approach to asylum claims, see:
  - *UNHCR intervention before the United States Court of Appeals for the First Circuit in the case of Mejilla-Romero v. Holder*
- For a discussion of the reasons why children are fleeing El Salvador, Guatemala, Honduras, and Mexico, see:
  - *UNHCR Report, Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection (2014)*

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<sup>54</sup> *International Covenant on Civil and Political Rights*, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>55</sup> *Id.* at art. 22.

<sup>56</sup> *UNHCR Gang Guidance Note* ¶ 41.

<sup>57</sup> See, e.g., *USAID Central America and Mexico Gang Assessment*, at 17 (finding that youth within the age range of 8-18 years may be particularly vulnerable to recruitment).

<sup>58</sup> *UNHCR Gang Guidance Note*, ¶ 41.

- *UNHCR Report, Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico (2015)*
- For further discussion of the circumstances under which victims of criminal gangs may be in need of international protection, see:
  - *UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (2010)*