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# THE U.S. ASYLUM *PRO SE*-DURES FOR UNACCOMPANIED AND UNDOCUMENTED CHILDREN: COST AND FEAR V. CHILD’S BEST INTEREST

VIOLETA K. HARALAMPIEVA\*

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## I. INTRODUCTION

The recent sharp increase in the number of unaccompanied and undocumented children<sup>1</sup> coming across the U.S. southern border and the U.S. Government's response have raised concerns that many of the young migrants are not receiving a thorough asylum determination and a fair chance for U.S. protection according to their status as minors. International human rights law has recognized that children are a particularly vulnerable group in need of special protection.<sup>2</sup> The Convention on the Rights of the Child ("CRC") articulates this special need through the principle of "the best interest of the child," which requires what is best for the child to be a main consideration in all official decisions involving children.<sup>3</sup> Numerous countries, including the United States, have adopted the principle into their legal systems.<sup>4</sup>

The United States has incorporated the best interest of the child into some procedural determinations of children's asylum claims, such as asylum application filing deadlines,<sup>5</sup> credibility assessments,<sup>6</sup> and to a significant extent child-appropriate placements and conditions of detention.<sup>7</sup> Yet, many children with strong cases never get the chance to apply for asylum in the first place because the U.S. Customs and Border Patrol ("CBP") returns them to their countries of residence without a proper screening.<sup>8</sup> Many others fail to win asylum because they lack legal representation, which according to U.S. law is a privilege and not a right, even for children.<sup>9</sup> The lack of child-sensitive procedures during interviews and court hearings keeps many children from sharing traumatic details of their experiences with officials and judges. Such details are key to posi-

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<sup>1</sup> In this Note, the terms "children" and "minors" are used interchangeably.

<sup>2</sup> G.A. Res. 44/25, annex, Convention on the Rights of the Child, at 167 (Nov. 20, 1989).

<sup>3</sup> *Id.* at art. 3.

<sup>4</sup> *Id.* The Convention on the Rights of the Child is the most widely ratified United Nations Convention, with 140 signatories and 195 parties including Somalia (and possibly South Sudan) as of January 2015. Bridgette A. Carr, *Incorporating a 'Best Interest of the Child' Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124 (2009). The United States is a signatory but not a party. It might currently be the only country in the world that has not ratified the Convention. *See id.*; Cynthia Gentry, *Is South Sudan Ready to Ratify the CRC?*, INT'L PLAY ASS'N (Jan. 16, 2015), <http://ipaworld.org/uncategorized/is-south-sudan-about-to-ratify-the-crc/>.

<sup>5</sup> BETSY CAVENDISH & MARU CORTAZAR, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 28 (2011), <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border-1.pdf>; *see* 8 C.F.R. § 1208.4(a)(5)(ii) (2010).

<sup>6</sup> CAVENDISH & CORTAZAR, *supra* note 5; *see* *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).

<sup>7</sup> CAVENDISH & CORTAZAR, *supra* note 5, at 28.

<sup>8</sup> *Id.* at 40.

<sup>9</sup> 8 U.S.C. § 1158(a)(4)(A) (2005).

tive asylum determinations.<sup>10</sup> Finally, the best interest of the child principle is still largely absent from substantive asylum decisions.<sup>11</sup>

This Note examines the above problems in light of the tension between the competing interests of U.S. politics and human rights.<sup>12</sup> The Note's main focus is on the two parts of the asylum determination process that most directly impact a child's ability to win asylum: first, the voluntary withdrawal of application for admission<sup>13</sup> provision for minors from contiguous<sup>14</sup> countries, and second, the substantive determinations of children's asylum claims.<sup>15</sup> It argues that the current situation is the result of a flawed compromise between the best interest of the child and three public fears: spending tax money on someone other than the tax payer, opening the "floodgates" of illegal immigration, and letting in criminals and terrorists.<sup>16</sup> Each of these concerns has some legitimacy and must be considered when making prudent legislative decisions. Yet, politicians and the media have been "milking" these fears for years, blowing them out of proportion and giving them undue weight in policy determinations. The resulting asylum procedure for children tends to prioritize cutting costs and keeping undocumented immigrants out over what is best for the children involved.<sup>17</sup>

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<sup>10</sup> Jacqueline Bhabha, *"Not a Sack of Potatoes": Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 210 (2006).

<sup>11</sup> See, e.g., *In re S-E-G-*, 24 I & N Dec. 579, 585 (B.I.A. 2008).

<sup>12</sup> See discussion *infra* Part IV.

<sup>13</sup> 8 U.S.C. § 1232(a)(2)(B) (2013). Under U.S. immigration law, every person apprehended at or near the U.S. border who has not been formally admitted is viewed as "seeking admission" into the United States, regardless of the method of attempted entry. 8 U.S.C. § 1225(a)(1) (2013). The "voluntary withdrawal" procedure for children from contiguous countries is also known as "voluntary return." CAVENDISH & CORTAZAR, *supra* note 5, at 68. It allows the child to return to his or her country of origin without being placed in deportation proceedings and without facing bars to future admission. LISA SEGHEITTI ET AL., CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 8 (2014). While it is officially treated as a benefit, the informality of the process, including CBP's insufficient screening and record keeping for the children granted voluntary return, place many children back in the hands of human traffickers and gangs. CAVENDISH & CORTAZAR, *supra* note 5, at 9 (finding that "DHS [d]oes [n]ot [p]ublish, and [a]ppears [n]ot to [m]aintain" data about the unaccompanied children that CBP apprehends at the border).

<sup>14</sup> See *infra* note 52.

<sup>15</sup> The Discussion analyzes claims based on the asylum ground of a membership in a particular social group. See discussion *infra* Part IV.

<sup>16</sup> See discussion *infra* Part IV.

<sup>17</sup> See discussion *infra* Part IV.

## II. FACTUAL BACKGROUND

### A. *Overview of the Recent Influx of Unaccompanied and Undocumented Child Migrants*<sup>18</sup>

Before 2012, CBP agents apprehended<sup>19</sup> between six and seven thousand unaccompanied alien children (“UAC”)<sup>20</sup> per year.<sup>21</sup> In October of 2011, this number began to increase dramatically.<sup>22</sup> It climbed to 13,625 in fiscal year 2012, and by the end of fiscal year 2013 it had reached 24,668.<sup>23</sup> As of August 31, 2014, there were 66,127 UAC apprehensions, seventy-six percent of them of children from Guatemala, Honduras, and El Salvador.<sup>24</sup> Almost all of the remaining twenty-four percent came from Mexico.<sup>25</sup>

The reasons children make the long and dangerous journey often vary; yet, a threat of violence and deprivation underlies most of their stories.<sup>26</sup> In 2014, the United Nations High Commissioner for Refugees’ (“UNHCR”) Regional Office for the United States and the Caribbean published a report on the UAC

<sup>18</sup> The term “child migrants” is borrowed from a joint report from the Center for Gender and Refugee Studies and Kids in Need of Defense. *See generally* CTR. FOR GENDER AND REFUGEE STUD. & KIDS IN NEED OF DEF., *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* (2014), [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf). Since many of the children coming across the U.S. southern border are not yet immigrants by legal status, or asylum-seekers, the term “migrants” most accurately describes their status as a group. *See id.*

<sup>19</sup> To “apprehend” in the legal context most typically means to arrest. BLACK’S LAW DICTIONARY (10th ed. 2014), *available at* Westlaw BLACKS. However, CBP’s apprehensions of minors are more accurately described as CBP’s initial contact with the child, since, unlike adults, children are either repatriated to their home countries or taken into ORR custody rather than arrested. *See infra* Part III.A.

<sup>20</sup> The Homeland Security Act of 2002 defines the term as “a child who—  
has no lawful immigration status in the United States;  
has not attained 18 years of age; and  
with respect to whom—  
there is no parent or legal guardian in the United States; or  
no parent or legal guardian in the United States is available to provide care and physical custody.”

6 U.S.C. § 279(g)(2) (2013).

<sup>21</sup> CTR. FOR GENDER AND REFUGEE STUD. & KIDS IN NEED OF DEF., *supra* note 18, at i.

<sup>22</sup> *See* UNHCR REG’L OFFICE FOR THE U.S. AND THE CARIBBEAN, *CHILDREN ON THE RUN*, 4 (2014), [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf).

<sup>23</sup> *See* CTR. FOR GENDER AND REFUGEE STUD. & KIDS IN NEED OF DEF., *supra* note 18, at i.

<sup>24</sup> SEGHIETTI ET AL., *UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW*, *supra* note 13, at 3.

<sup>25</sup> *Id.*

<sup>26</sup> CTR. FOR GEND. AND REFUGEE STUDIES & KIDS IN NEED OF DEF., *supra* note 18, at i.

crisis in an attempt to better understand the causes of the flight.<sup>27</sup> The report was based on in-depth interviews with 404 children selected to be representative of the UAC—about 100 from each of the four largest sending countries.<sup>28</sup> Forty-eight percent of the interviewees reported feeling threatened by members of gangs, drug cartels, or agents of the state.<sup>29</sup> Twenty-one percent talked of experiencing domestic abuse.<sup>30</sup> Thirty-eight percent of the Mexican children stated an additional reason for their escape—recruitment by human traffickers.<sup>31</sup> The interviews revealed that at least fifty-eight percent of the children would likely qualify for international protection as refugees under existing legal frameworks.<sup>32</sup>

Many Central American and Mexican migrants, including children, enter the United States solely for economic or other reasons that do not qualify them for asylum; yet, it is mainly citizens of El Salvador, Guatemala, Honduras, and Mexico who are responsible for the recent rise in claims of fear to return to their home countries.<sup>33</sup> The increase in the number of asylum claims has corresponded with worsening human rights conditions in these countries, especially because of drug cartels and criminal gangs whose activities have been widely facilitated by corrupt government officials.<sup>34</sup> In the UNHCR study,<sup>35</sup> sixty-five percent of the interviewed unaccompanied children seeking asylum in the U.S. cited gang-related violence as a reason for leaving their countries.<sup>36</sup> Even though gangs terrorize those they come into contact with almost indiscriminately, gang members specifically target boys and young men for recruitment,<sup>37</sup> while girls and young women are especially vulnerable targets for gender-related crimes such as rape and sexual slavery.<sup>38</sup>

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<sup>27</sup> UNHCR REG'L OFFICE FOR THE U.S. AND THE CARIBBEAN, *supra* note 22.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 6–7.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGR. COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 8 (May 2014), [http://www.immigrationpolicy.org/sites/default/files/docs/asylum\\_and\\_credible\\_fear\\_claims\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf).

<sup>34</sup> *Id.*; HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE": U.S. BORDER SCREENINGS AND RETURN OF CENTRAL AMERICANS TO SERIOUS HARM 14 (2014), *available at* [http://www.hrw.org/sites/default/files/reports/us1014\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1014_web_0.pdf); *see* UNHCR REG'L OFFICE FOR THE U.S. AND THE CARIBBEAN, *supra* note 22, at 24.

<sup>35</sup> UNHCR REG'L OFFICE FOR THE U.S. AND THE CARIBBEAN, *supra* note 22, at 24.

<sup>36</sup> *Id.* at 26.

<sup>37</sup> *See* HUMAN RIGHTS WATCH, *supra* note 34, at 13.

<sup>38</sup> *See id.*; *see also* CTR. FOR GENDER AND REFUGEE STUD. & KIDS IN NEED OF DEF., *supra* note 18, at 18 (2014) (reporting the case of a girl who had come to the United States to escape a gang whose members had threatened and attempted to rape her; noting that the record "showed alarming rates of violence against women" in El Salvador).

In the past five years, the regional War on Drugs has pushed many cartels from Mexico and Colombia toward new trafficking routes through Honduras<sup>39</sup> and other Central American states.<sup>40</sup> These cartels have teamed up with gangs to recruit schoolchildren as young as six for drug sales and money extortion.<sup>41</sup> To maintain their operations, business owners are forced to pay exorbitant sums to gangs,<sup>42</sup> and gang members frequently torture and kill those who refuse to cooperate.<sup>43</sup>

In this generalized environment of lawlessness, many female asylum-seekers have experienced an additional level of abuse on account of their gender.<sup>44</sup> Girls and young women in particular frequently report fear of sexual violence by gang members as a reason for seeking asylum in the United States.<sup>45</sup> Female asylum seekers also fear domestic abuse and generalized violence, which authorities in their home countries tend to ignore.<sup>46</sup> Although the United States Government has acknowledged the graveness of the situation in many parts of Mexico and Central America,<sup>47</sup> CBP keeps turning back children from Mexico without proper screening for credible fear of being sent home. Meanwhile, the

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<sup>39</sup> As a result of drug-related crime and widespread impunity, Honduras became the world's murder capital in 2013, with a murder rate among young adult men of over 300 for 100,000 people. HUMAN RIGHTS WATCH, *supra* note 34, at 12.

<sup>40</sup> Sonia Nazario, Opinion, *The Children of the Drug Wars*, N.Y. TIMES, Jul. 11, 2014, <http://www.nytimes.com/2014/07/13/opinion/sunday/a-refugee-crisis-not-an-immigration-crisis.html>; HUMAN RIGHTS WATCH, *supra* note 34, at 12.

<sup>41</sup> Nazario, *supra* note 40, at 2.

<sup>42</sup> CAMPOS & FRIEDLAND, *supra* note 33, at 1.

<sup>43</sup> *Id.*; Nazario, *supra* note 40, at 1. A case in point is Carlos Gutierrez, who came to public's attention in 2013 as the "legless cyclist," making an 800-mile bike trip through Texas on prosthetic legs in protest of U.S. asylum policies. A Mexican gang cut off Mr. Gutierrez's legs for refusing to pay extortion fees from his business. His case had been on hold as "a low priority," and is currently administratively closed. But most similar claims from Mexicans are rejected because the victims do not fit the traditional interpretation of a member of "a particular social group" for the purposes of receiving asylum. Juan Carlos Llorca, *Legless Cyclist Rides for Asylum Seekers*, ASSOCIATED PRESS (Nov. 9, 2013, 8:47 PM EST), <http://bigstory.ap.org/article/legless-cyclist-rides-asylum-seekers>; see discussion *infra* Part III and Part IV.

<sup>44</sup> See CAMPOS & FRIEDLAND, *supra* note 33, at 9.

<sup>45</sup> UNHCR REG'L OFFICE FOR THE U.S. AND THE CARIBBEAN, *supra* note 22, at 27.

<sup>46</sup> UN Special Rapporteur on violence against women found during her 2014 trip to Honduras that "violent deaths among women [in the country] had increased by 263 percent between 2005 and 2013 and that reports indicated a 95 percent rate of impunity for femicide and sexual violence crimes." HUMAN RIGHTS WATCH, *supra* note 34, at 13.

<sup>47</sup> See Dara Lind, *Thousands of Children Are Fleeing Central America to Texas—Alone*, VOX (Jun. 4, 2014), <http://www.vox.com/2014/6/4/5773268/children-migration-central-america-texas-unaccompanied-alien-children-border-crisis> (mentioning the Obama administration's plan to offer financial assistance to Central American governments so that these governments would be able to "provide more safety and stability" to their citizens).

U.S. Board of Immigration Appeals (“BIA”) and federal courts remain reluctant to view gang violence related to the recruitment of new members or to sexual exploitation as grounds for asylum.<sup>48</sup>

### III. LEGAL BACKGROUND

#### A. *Treatment of UAC in U.S. Custody*

The main government agencies responsible for unaccompanied child migrants in the United States are the Department of Homeland Security (“DHS”), CBP, Immigration and Customs Enforcement (“ICE”), Department of Health and Human Services (“HHS”), Office of Refugee Resettlement (“ORR”), U.S. Citizenship and Immigration Services (“USCIS”), and Department of Justice’s (“DOJ”) Executive Office for Immigration Review (“EOIR”).<sup>49</sup> The DHS is the umbrella agency for CBP, ICE, and USCIS.<sup>50</sup>

Most UAC present themselves at a U.S. port of entry or come into contact with CBP along the Mexican border.<sup>51</sup> After CBP apprehends them, the children face a somewhat different procedure depending on whether they are from a “contiguous country”<sup>52</sup> or a “third country”—one that does not share a border with the United States.<sup>53</sup> Pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), DHS must screen all children from contiguous countries for assertions of credible fear of persecution and trafficking, and ask about their willingness to return to their country of origin.<sup>54</sup> The screening and voluntary return of contiguous-country UAC to their home countries takes place within forty-eight hours of their initial contact with CBP.<sup>55</sup> CBP then hands a Notice to Appear form to those children who do

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<sup>48</sup> See discussion, *infra* Part IV.

<sup>49</sup> LISA SEGNETTI, CONG. RESEARCH SERV., IN10107, UNACCOMPANIED ALIEN CHILDREN: A PROCESSING FLOW CHART (July 16, 2014), <http://fas.org/sgp/crs/homsec/IN10107.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> SEGNETTI ET AL., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, *supra* note 13, at 1.

<sup>52</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(a)(2) (2013). The term “contiguous countries” means those countries that share a border with the United States, i.e., Mexico and Canada. “Children from contiguous countries” refers to minors who are either citizens or permanent residents of either Canada or Mexico. Although the Act applies to both Mexican and Canadian UAC, in practice, it affects predominantly children from Mexico, as they are significantly more likely to be fleeing across the U.S. border to escape difficult or dangerous living conditions. CAVENDISH & CORTAZAR, *supra* note 5, at 68 n.49.

<sup>53</sup> SEGNETTI, UNACCOMPANIED ALIEN CHILDREN: A PROCESSING FLOW CHART, *supra* note 49.

<sup>54</sup> 8 U.S.C. § 1232(a)(2) (2013); SEGNETTI, UNACCOMPANIED ALIEN CHILDREN: A PROCESSING FLOW CHART, *supra* note 49.

<sup>55</sup> SEGNETTI, UNACCOMPANIED ALIEN CHILDREN: A PROCESSING FLOW CHART, *supra* note 49.



not agree to return, and places them in official removal proceedings.<sup>56</sup>

ICE next picks up UAC from contiguous countries who refuse to voluntarily return and transports them to ORR right away; the transfer of non-contiguous or third-country children to ORR must occur within seventy-two hours.<sup>57</sup> ORR then takes custody of the children and has the task of placing them, in order of preference, with parents, other relatives, a sponsor, at a shelter, or in a foster home.<sup>58</sup> If the children have asylum claims, USCIS adjudicates them; if the claims are unsuccessful, EOIR conducts removal hearings.<sup>59</sup> Lastly, ICE is responsible for returning the children who are ordered removed to their home countries.<sup>60</sup>

## B. CBP Screenings

### *United States Law*

Although TVPRA significantly improved the protections available to migrant children from contiguous countries, in practice its promise to these children has failed to materialize.<sup>61</sup> Prior to TVPRA's passage, CBP simply turned back all UAC from Mexico at the border.<sup>62</sup> In contrast, under TVPRA, DHS must screen all children from contiguous countries for signs that they are victims or potential victims of trafficking.<sup>63</sup> If there is any reasonable suspicion that a child is or could become a trafficking victim, or that the child has a well-founded fear of persecution, CBP cannot automatically repatriate the child.<sup>64</sup> Instead, it must place the minor in ORR's care, after which the child must receive the same treatment as the UAC from non-contiguous countries.<sup>65</sup> TVPRA created a three-part test to decide whether the immediate repatriation of a child from a contiguous country is permissible.<sup>66</sup> The officer conducting the initial screening must determine:

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> The preferred order for custody is laid out in the *Flores Agreement*. See also SEGGETTI ET AL., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, *supra* note 13, at 8; SEGGETTI, UNACCOMPANIED ALIEN CHILDREN: A PROCESSING FLOW CHART, *supra* note 49.

<sup>59</sup> SEGGETTI, UNACCOMPANIED ALIEN CHILDREN: A PROCESSING FLOW CHART, *supra* note 49.

<sup>60</sup> *Id.*

<sup>61</sup> Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252-53 (2010).

<sup>62</sup> CAVENDISH & CORTAZAR, *supra* note 5, at 31.

<sup>63</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(a)(2) (2013).

<sup>64</sup> See *id.*

<sup>65</sup> 8 U.S.C. § 1232(b).

<sup>66</sup> 8 U.S.C. § 1232(a)(2)(A).

whether the UAC has *not* “been a victim of a severe form of trafficking, and there is no credible evidence” he or she will be in danger “of being trafficked” after returning to Mexico;

whether the UAC is *not* afraid to go back to Mexico because of a “credible fear of persecution”; and

whether he or she can decide independently “to withdraw [his or her] application for admission” to the U.S.<sup>67</sup>

Only if a UAC answers all three questions in the affirmative does the interviewing officer have the authority to send the child back without referring the child to ORR first.<sup>68</sup> This test is so strict that, if applied correctly, few Mexican UAC would undergo immediate repatriation.<sup>69</sup>

When Congress passed the TVPRA, it assigned the responsibility for screening children from contiguous countries to DHS.<sup>70</sup> Unfortunately, it provided no further clarification on how to delegate this responsibility.<sup>71</sup> Rather than passing the task on to USCIS, DHS handed it to CBP<sup>72</sup>—a militarized agency whose Mission Statement announces, “We are the guardians of our Nation’s borders. . . . We protect the American public against terrorists and the instruments of terror.”<sup>73</sup>

A recent report by Appleseed, a network of non-profit public interest organizations,<sup>74</sup> estimates that CBP repatriates nearly all of the Mexican UAC it detains, in spite of TVPRA’s screening provisions.<sup>75</sup> A lack of transparency about whom CBP apprehends, what happens during the apprehensions and initial screenings, and how CBP processes UAC from contiguous countries allows for

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<sup>67</sup> 8 U.S.C. § 1232(a)(2) (emphasis added); CAVENDISH & CORTAZAR, *supra* note 5, at 23.

<sup>68</sup> 8 U.S.C. § 1232(a)(2)(B).

<sup>69</sup> It is of course possible that, upon learning that the asylum procedure may take months, during which time they might be placed in detention, some children would choose to return to Mexico. Given how expensive and harrowing the journey to the U.S. tends to be, however, it seems unlikely that almost every child from Mexico would voluntarily decide to return home if the child were fully informed of the available options. *See* CAVENDISH & CORTAZAR, *supra* note 5, at 17.

<sup>70</sup> *Id.* at 32.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*; CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/about> (last visited Apr. 3, 2015).

<sup>74</sup> APPLESEED, <http://appleseednetwork.org> (last visited Apr. 3, 2015).

<sup>75</sup> CAVENDISH & CORTAZAR, *supra* note 5, at 16–17. The authors point out the worrying lack of official record keeping of CBP’s apprehensions of Mexican UACs, as well as of the outcomes of these apprehensions. *Id.* at 9. The conclusion that CBP repatriates nearly all Mexican UAC is an extrapolation from the annual data available about UAC of all nationalities and from the yearly numbers of repatriated UAC that Mexico has reported. *Id.* at 16–17.

TVPRA's provisions to be ignored and makes it difficult for DHS to supervise the process.<sup>76</sup> Most importantly, child advocates point out that CBP is especially ill-positioned to conduct the initial screenings that TVPRA requires.<sup>77</sup> As CBP's Mission Statement illustrates, its agents' job is to patrol the border and enforce the law, not to act as child advocates.<sup>78</sup> CBP also lacks training in child-sensitive interviewing techniques, trauma recognition, and the protection of children.<sup>79</sup>

Minors crossing the border spend days or weeks trying to avoid CBP; when CBP picks them up, most of these children do not want to discuss deep personal traumas with the agents.<sup>80</sup> Further, CBP agents often fail to ask the children any screening questions or to clearly explain what their rights are.<sup>81</sup> Appleseed's report found that, out of twenty-three interviewed Mexican minors whom CBP had either repatriated or detained,<sup>82</sup> three-quarters did not understand their rights after the interview with CBP.<sup>83</sup> Agents routinely threatened children with indefinite detention if they refused to return to Mexico, told them they must return to Mexico, or said there was no relief available to them because they were Mexican.<sup>84</sup> These practices directly contradict both TVPRA's language and the policy behind it, which is in turn based on the international best interest of the child principle.

### *International Law*

The governing tool of international human rights law for the protection of children is the Convention on the Rights of the Child ("CRC").<sup>85</sup> Since its entry into force in 1990, every country except the United States has ratified it.<sup>86</sup> Because of its near-universal acceptance, the Convention's core principle of the best interest of the child has become a binding norm on all countries.<sup>87</sup> Further, the United States' status as a signatory requires it to observe the Convention's objectives and purposes.<sup>88</sup>

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<sup>76</sup> See *id.* at 9.

<sup>77</sup> *Id.* at 31–32.

<sup>78</sup> *Id.* at 32.

<sup>79</sup> *Id.* at 32.

<sup>80</sup> *Id.* at 33, 35.

<sup>81</sup> *Id.* at 40.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 40.

<sup>84</sup> *Id.* at 40.

<sup>85</sup> G.A. Res. 44/25, annex, Convention on the Rights of the Child, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, 1577 U.N.T.S. 3 (Nov. 20, 1989) (entered into force Sept. 2, 1990), <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

<sup>86</sup> *Id.*

<sup>87</sup> See WENDY ZELDIN, CHILDREN'S RIGHTS: INTERNATIONAL LAWS, ¶ 5 (July 2, 2015), <http://www.loc.gov/law/help/child-rights/international-law.php>.

<sup>88</sup> Emily A. Benfer, *In the Best Interests of the Child?: An International Human Rights*

In its Preamble, the Convention references the Charter of the United Nations, which captures the essence of the international community's commitment to protecting the inherent rights of every human being.<sup>89</sup> It highlights the special place that children occupy in the area of human rights protection, and the States' duty to extend special care to them.<sup>90</sup> Part I sets out the basic rights of all children.<sup>91</sup> Article 2 stresses the principle of non-discrimination, and obligates the States to respect the rights of all children equally, regardless of their parents' "race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."<sup>92</sup> Article 3 contains the best interest of the child principle, and states that the principle "shall be a *primary* consideration" "[i]n all actions concerning children," including the actions of courts, administrative agencies, and the legislature.<sup>93</sup>

The Convention further requires states to recognize each child's "inherent right to life," and to ensure every child's survival and proper development "to the maximum extent possible."<sup>94</sup> It holds states responsible for implementing the rights of the child both under the states' domestic laws and according to states' international obligations.<sup>95</sup> Article 20 states that a child outside his or her family circle "is entitled to special protection and assistance provided by the state."<sup>96</sup>

Article 9 prohibits the separation of a child and the child's parents against the parents' will, unless the authorities officially determine that the separation is needed to ensure the best interest of the child.<sup>97</sup> Except when it is not in the child's best interest, each state must respect a separated child's right to direct regular contact with his or her parents,<sup>98</sup> even when the child lives in a different country than the parents.<sup>99</sup> Article 34 urges states to take action, both separately and together, to protect children from sexual exploitation, while Article 35 requires states to fight child trafficking.<sup>100</sup>

Article 22 speaks specifically to the rights of child refugees, both those who seek recognition of their refugee status and those who have already received

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*Analysis of the Treatment of Unaccompanied Minors in Australia and the United States*, 14 IND. INT'L & COMP. L. REV. 729, 733 (2004).

<sup>89</sup> Convention on the Rights of the Child, *supra* note 85, at 1.

<sup>90</sup> *Id.*

<sup>91</sup> Article 1 defines a "child" as a person under eighteen years of age. Convention on the Rights of the Child, *supra* note 85, at 2.

<sup>92</sup> *Id.* (emphasis added).

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> *Id.* at 2–3, art. 6.

<sup>95</sup> *Id.* at 3, art. 7.

<sup>96</sup> *Id.* at 5–6.

<sup>97</sup> *Id.* at 3, art. 9.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 3, art. 10.

<sup>100</sup> *Id.* at 10.

such recognition.<sup>101</sup> It holds states responsible for guaranteeing the Covenant rights to all refugee and asylum-seeking children, in addition to any rights flowing from other treaties, such as the 1951 Refugee Convention and 1967 Protocol.<sup>102</sup> It calls for international cooperation in ensuring assistance to refugee children and their reunification with family.<sup>103</sup>

### C. *Substantive Asylum Determinations*

#### *United States Asylum and International Refugee Law: Definitions of "Refugee" and "Asylee"*

The U.S. grounds for asylum mirror the grounds for refugee determination established by the two universal documents currently defining the status of refugees—the United Nations' 1951 Convention Relating to the Status of Refugees<sup>104</sup> (the "Convention") and the 1967 Protocol Relating to the Status of Refugees (the "Protocol").<sup>105</sup> The Convention defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>106</sup>

The Protocol dropped the temporal limitation of the Convention definition, revising the meaning of "refugee" to be "any person within the definition of Article 1 of the Convention" as if the words "As a result of events occurring before 1 January 1951 and" and the words "as a result of such events," in Article 1 A (2) were omitted.<sup>107</sup> While the United States is not a party to the Convention, it has ratified the Protocol and thus de facto accepted the Convention's definition of a refugee.<sup>108</sup> The United States further solidified its commitment to international refugee law through its enactment of the Refugee Act of 1980, whose language effectively copies the Protocol's refugee definition and

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<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), <http://www.unhcr.org/3b66c2aa10.html>.

<sup>105</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967), <http://www.unhcr.org/3b66c2aa10.html>.

<sup>106</sup> Convention Relating to the Status of Refugees, *supra* note 104, at 14.

<sup>107</sup> Protocol Relating to the Status of Refugees, *supra* note 105, at 46.

<sup>108</sup> *Id.*

also applies it to asylees in the United States.<sup>109</sup> The Refugee Act of 1980 has, in turn, been incorporated into the Immigration and Nationality Act (“INA”), Section 101(a)(42)(A) of which provides the current grounds for refugee status and asylum. It defines a refugee or asylee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to 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 . . . .<sup>110</sup>

*Membership in a Particular Social Group in U.S. Asylum Law*

1. “Persecution” or a Well-Founded Fear

An applicant for asylum in the United States has the burden of proof as to the three main elements of the asylee definition: past persecution, or reasonable fear of persecution; “on account of,” or the causal connection between the persecution and one or more Convention grounds; and the applicability of a Convention ground to the applicant’s situation.<sup>111</sup> For the purposes of asylee status determination, the first element—“persecution”—amounts to objectively serious harm.<sup>112</sup> A showing of past persecution is *prima facie* evidence of a “well-founded fear” of being persecuted in the future.<sup>113</sup> If no persecution previously occurred, the asylum seeker has to demonstrate that, based on the totality of past circumstances, it is reasonable for a person in the applicant’s situation to fear future persecution.<sup>114</sup> The past circumstances can include, *inter alia*, threats against the applicant, against the applicant’s family members, or serious harassment of the applicant.<sup>115</sup> “Well-founded fear” thus contains two elements—a strong subjective fear on the applicant’s part and a reasonable, or objectively justifiable, fear of future persecution.<sup>116</sup> The applicant must satisfy both components of the test to be granted asylum, and his or her fear must be credible.<sup>117</sup> Another sub-element of persecution in asylum claims is the applicant’s state’s

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<sup>109</sup> 8 U.S.C. § 1158(b)(1)(A) (2013); *see* Protocol Relating to the Status of Refugees, *supra* note 105, at 46.

<sup>110</sup> 8 U.S.C. § 1101(42)(A) (2013).

<sup>111</sup> *Id.*

<sup>112</sup> *See In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

<sup>113</sup> 8 C.F.R. § 1208.13(b)(1) (2014).

<sup>114</sup> *See id.*

<sup>115</sup> *See, e.g., Zelaya v. Holder*, 668 F.3d 159, 159 (4th Cir. 2012); *In re S-E-G-*, 24 I. & N. Dec. 579, 579 (B.I.A. 2008).

<sup>116</sup> 8 C.F.R. § 1208.13(b)(1) (2014).

<sup>117</sup> 8 C.F.R. § 1208.13(a) (2014).

role in the persecution. In step with UNHCR's approach,<sup>118</sup> U.S. courts have substantially broadened their interpretation of the state's involvement,<sup>119</sup> which currently includes both a state's direct and indirect part in the persecution, through acquiescence, unwillingness, or inability to protect the asylum applicant from persecution by non-state agents.<sup>120</sup> Finally, the applicant must demonstrate that he or she will not be able to avoid persecution by relocating to another part of his or her country.<sup>121</sup>

## 2. "On Account of" or "Nexus"

One of the most problematic provisions of the 1951 Convention is the requirement that the individual refugee show that his or her persecution is *on account of* at least one of the Convention grounds.<sup>122</sup> 'Nexus' is the term of art that describes the reason for the persecution as one or more of the grounds for protection.<sup>123</sup> The Convention's drafters left much of the interpretation of the refugee definition, including the nexus requirement, to individual states.<sup>124</sup> As a result, although the United Nations High Commissioner for Refugees ("UNHCR") has issued interpretational guidelines on the Convention definition,<sup>125</sup> there is no unified, mandatory interpretation of the nexus requirement.<sup>126</sup>

In 2005, Congress passed the REAL ID Act.<sup>127</sup> The Act was in part Con-

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<sup>118</sup> UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/enG/Rev.3 (Dec. 1, 2011), <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>119</sup> See *In re S-E-G-*, 24 I. & N. Dec. at 579.

<sup>120</sup> See *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

<sup>121</sup> 8 C.F.R. § 1208.13(b)(1)(i)(B) (2014).

<sup>122</sup> Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unified Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 777 (2002-2003).

<sup>123</sup> *Id.*

<sup>124</sup> See Convention Relating to the Status of Refugees, *supra* note 104; Musalo, *supra* note 122, at 785-86.

<sup>125</sup> UNHCR, 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, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); UNHCR, 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, U.N. Doc. HCR/GIP/02/02 (May 7, 2002); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992).

<sup>126</sup> See Convention Relating to the Status of Refugees, *supra* note 104; Musalo, *supra* note 122, at 779.

<sup>127</sup> REAL ID Act, Pub. L. No. 109-13, § 101(a), 119 Stat. 231, 303 (2005); see DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 1041 (4th ed. 2009).

gress's attempt to clarify the nexus requirement.<sup>128</sup> It modified INA section 208(b)(1)(B)(i) to require a refugee to show that "race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason for*" his or her persecution.<sup>129</sup> Thus, the current U.S. nexus approach is best summarized as: "Persecution = Serious Harm + Failure of State Protection" on account of one or more Convention grounds,<sup>130</sup> where the grounds are the main reason, or among the main reasons, for the persecution.<sup>131</sup> The approach applies to so-called "mixed-motive" cases, where, for the purposes of refugee or asylum status, the Convention-ground motivation "cannot be incidental, tangential, superficial, or subordinate to another reason for [the] harm."<sup>132</sup> The refugee or asylum seeker must prove the centrality of the Convention-ground motivation through direct or circumstantial evidence.<sup>133</sup>

For instance, the Fifth Circuit in *Larios v. Holder*<sup>134</sup> rejected the applicant's asylum claim based on his resistance to gang recruitment because it found lack of nexus. The Court agreed with the immigration judge's reasoning that, "if petitioner were targeted by gangs, the motivation would not be on account of his membership in a particular social group but to increase the gang's numbers."<sup>135</sup> Alternatively, the Court reasoned that the gang might target Larios after the United States deports him based on a belief that, since "he is returning from the United States, he comes from a family with money."<sup>136</sup> This analysis, coupled with the Court's rejection of his claimed social group, caused the failure of Larios' claim.

### 3. "Particular Social Group"—Immutable or Fundamental Characteristic, Particularity, and Social Visibility

The last element an asylum applicant must prove is that one or more Convention grounds are a central reason for his or her persecution.<sup>137</sup> The "membership in a particular social group" category for refugee and asylee determinations has been an unclear and controversial ground, both internationally and within the United States.<sup>138</sup> It is also a ground that UAC frequently invoke in

<sup>128</sup> See WEISSBRODT ET AL. *supra* note 127, at 1041.

<sup>129</sup> 8 U.S.C. § 1158(b)(1)(B)(i) (2013) (emphasis added).

<sup>130</sup> Musalo, *supra* note 122, at 789, 796.

<sup>131</sup> See 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i) (2013).

<sup>132</sup> *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

<sup>133</sup> *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

<sup>134</sup> *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 8 U.S.C. § 1158(b)(1)(B)(i) (2013).

<sup>138</sup> CAPITAL AREA IMMIGRANTS' RIGHTS ("CAIR") COAL., PRACTICE MANUAL FOR PRO BONO ATTORNEYS REPRESENTING UNACCOMPANIED IMMIGRANT CHILDREN 11 (2014), [http://www.caircoalition.org/wp-content/files\\_mf/1391555303CAIRCoalitionPracticeManualfor](http://www.caircoalition.org/wp-content/files_mf/1391555303CAIRCoalitionPracticeManualfor)



their gang-based claims.<sup>139</sup> Since the adoption of the Convention and Protocol's refugee definition into U.S. asylum law, the BIA has issued numerous decisions in which it has struggled to define the boundaries of the term.<sup>140</sup> Because reading the phrase literally might lead one to conclude that it could be applied so broadly<sup>141</sup> as to make the other grounds in the Convention and INA definitions meaningless, the BIA in *In re Acosta*<sup>142</sup> found the *ejusdem generis* canon of statutory interpretation the most suitable for defining "particular social group."<sup>143</sup>

Based on the phrase's grouping with the grounds of "race," "religion," "nationality," and "political opinion," the BIA determined that "membership in a particular social group" required either one or more shared "immutable characteristics," or traits that are "beyond the power of the individual to change or [are] so fundamental to individual identity or conscience that [they] ought not be required to be changed."<sup>144</sup>

In addition to an immutable characteristic, the BIA and federal courts have required social group applicants to show the particularity and social visibility of the group. *In re S—E—G—*,<sup>145</sup> the BIA held that "the essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."<sup>146</sup> One of BIA's most recent pronouncements on social visibility came in *In re M—E—V—G—*.<sup>147</sup> In that case, it re-named the "social visibility" requirement "social distinction" and explained that a particular social group did not have to be visible in an "ocular" way to satisfy the standard, as long as the local society understood it to be a distinct group.<sup>148</sup>

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RepresentingUnaccompaniedImmigrantChildrenJan312014.pdf (stating that "[c]ourts have often struggled" with this category).

<sup>139</sup> *Id.* at 28.

<sup>140</sup> See, e.g., *Zelaya v. Holder*, 668 F.3d 159, 159 (4th Cir. 2012); *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996); *R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999).

<sup>141</sup> *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir.1993). The Third Circuit pointed out that the literal meaning of "a particular social group," if taken to its extreme, could include "virtually any set [of] more than one person." *Id.*

<sup>142</sup> *In re Acosta*, 19 I. & N. Dec. 211, 211 (B.I.A. 1985).

<sup>143</sup> *Id.* at 233.

<sup>144</sup> *Id.*

<sup>145</sup> *In re S-E-G-*, 24 I. & N. Dec. 579, 579 (B.I.A. 2008).

<sup>146</sup> *Id.* at 585.

<sup>147</sup> *In re M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

<sup>148</sup> *Id.* at 234. The BIA acknowledged the interpretational difficulties the "social group" category created, especially because of its vagueness and the failure of the Convention, the Protocol, and the INA to define it. *Id.* at 230. The BIA cited *In re Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A.1985), in which the Board complained about the lacking evidence of legislative intent as to the "social group" definition. *Id.*

In short, to satisfy the “membership in a particular social group” category, an applicant must currently prove that (1) all members of the applicant’s proposed group possess an immutable characteristic, or one that they should not be required to change; (2) the social group is particular, or perceived as a distinct group in the applicant’s society; and (3) the group has “social distinction.”<sup>149</sup> In addition, the BIA in *In re R—A—*<sup>150</sup> held that one could not define a social group simply by the persecution that its alleged members have suffered.<sup>151</sup>

Two recent gang-related cases—*In re S—E—G—* and *Zelaya v. Holder*<sup>152</sup>—illustrate the particularity and social visibility requirements.<sup>153</sup> *In re S—E—G—* involved two teenage boys from El Salvador and one young woman related to them.<sup>154</sup> The boys attempted to flee forced gang recruitment, while the woman tried to avoid rape by the gang.<sup>155</sup> The BIA found their claimed social groups, “Salvadoran youths who have resisted gang recruitment” and “family members of such Salvadoran youths,” insufficient with regard to the element of particularity.<sup>156</sup> The BIA reasoned that the proposed traits were too “amorphous,” as people could have different ideas about the meaning of these terms.<sup>157</sup> The Board also held that the proposed social groups lacked social visibility, because the groups’ characteristics were not “recognizable and discrete” in the teenagers’ society.<sup>158</sup>

Similarly, in *Zelaya v. Holder*,<sup>159</sup> the Fourth Circuit affirmed the decisions of the immigration judge and the BIA denying asylum to the applicant.<sup>160</sup> The court rejected the claimed social group of “young Honduran males who refuse[d] to join MS-13, ha[d] notified the authorities of MS-13’s harassment tactics, and ha[d] an identifiable tormentor within MS-13.”<sup>161</sup> At the time Zelaya sought asylum in the United States, he was sixteen years old.<sup>162</sup> He had left his family behind to escape the gang, which had harassed and threatened him since he was eleven.<sup>163</sup> As a reaction to Zelaya’s refusal to join MS-13, the gang almost shot him on one occasion, and when Zelaya filed a police report of

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<sup>149</sup> See *Acosta*, 19 I. & N. Dec. at 211.

<sup>150</sup> R-A-, 22 I. & N. Dec. 906, 906 (B.I.A. 1999).

<sup>151</sup> *Id.* at 918.

<sup>152</sup> *Zelaya v. Holder*, 668 F.3d 159, 159 (4th Cir. 2012).

<sup>153</sup> *Id.* at 166; *In re S-E-G-*, 24 I. & N. Dec. 579, 580 (B.I.A. 2008).

<sup>154</sup> 24 I. & N. Dec. at 580.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 586.

<sup>158</sup> *Id.*

<sup>159</sup> *Zelaya v. Holder*, 668 F.3d 159, 159 (4th Cir. 2012).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 165. The acronym “MS-13” stands for “Mara Salvatrucha,” a brutal gang that operates widely throughout Central America. *Id.*

<sup>162</sup> *Id.* at 162.

<sup>163</sup> *Id.*

the incident, the officer told him there was nothing the police could do because the gang would come after them, as well.<sup>164</sup> After Zelaya arrived in the United States, he learned that gang members had killed his best friend as a revenge for Zelaya's escape.<sup>165</sup>

Zelaya's counsel presented clear evidence of the boy's reports to the police, and the immigration judge found his testimony credible.<sup>166</sup> Yet, after expressing concern that Zelaya would die upon his return to Honduras, the judge held that he did not qualify for asylum.<sup>167</sup> The main reason for the denial was that Zelaya's proposed social group, defined by youth and opposition to gangs, was "too amorphous," thus lacking an immutable characteristic and particularity.<sup>168</sup> The Fourth Circuit affirmed this holding, claiming that Zelaya's proposed group was "materially indistinguishable" from the social group the BIA rejected in *In re S—E—G—*.<sup>169</sup> The Fourth Circuit specifically stated that it had to uphold the rejection of Zelaya's claim unless the denial of asylum was "manifestly contrary to the law and an abuse of discretion."<sup>170</sup> Because the court could not find a "clear error" with respect to the asylum decision, it affirmed.<sup>171</sup>

#### *Standard of Review on Appeal: U.S. Asylum Claims*

The current U.S. standard of review for asylum appeals makes it extremely difficult to change the precedent on gang-based social group claims, effectively foreclosing the possibility of a more expansive reading of the asylee definition based on international guidance.<sup>172</sup> The following section provides a brief description of the appeals system available to UAC.

U.S. law allows for two types of asylum claims: a defensive and an affirmative.<sup>173</sup> An asylum seeker can bring a defensive claim before an immigration judge after the commencement of removal proceedings against the applicant.<sup>174</sup> The affirmative claim requires that the applicant come forward at a port of entry or within a year of his or her arrival in the United States, while maintaining legal status.<sup>175</sup> The most important difference between the two types is the nature of the applicant's questioning—adversarial for defensive claims, non-

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<sup>164</sup> *Id.* at 163.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 164.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 166.

<sup>169</sup> *Id.* at 167; see *In re S-E-G-*, 24 I. & N. Dec. 579, 586 (B.I.A. 2008).

<sup>170</sup> *Zelaya*, 668 F.3d at 165; 8 U.S.C. § 1252(b)(4)(C) (2013).

<sup>171</sup> *Zelaya*, 668 F.3d at 168.

<sup>172</sup> See § 1252(b)(4)(C).

<sup>173</sup> Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 648 (2007).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

adversarial for affirmative ones.<sup>176</sup> TVPRA enabled unaccompanied and undocumented children to apply affirmatively first, even if they entered without inspection.<sup>177</sup> As a result, every UAC is entitled to an initial non-adversarial hearing with a USCIS asylum officer, even after receiving a Notice to Appear, which marks the beginning of removal proceedings.<sup>178</sup>

If the asylum seeker loses his or her case in immigration court, the applicant can file an appeal with the BIA.<sup>179</sup> A single judge decides the appeal; however, if the case concerns a matter of law of substantial importance, a panel of three judges reviews it.<sup>180</sup> Unless the case involves a constitutional question, the final place for appeal is a federal appeals court.<sup>181</sup>

In a reaction to the September 11 terrorist attacks, Congress passed a number of immigration reforms that have reduced many qualified applicants' chances for asylum.<sup>182</sup> In 2002, then-Attorney General John Ashcroft modified BIA's standard of review for asylum claims to make them more deferential to the factual findings of the immigration courts.<sup>183</sup> Part of the reform shrank the BIA appeals panel from three judges to one, unless the case involved an especially significant legal issue,<sup>184</sup> and authorized BIA judges to issue "affirmances without opinions," in contrast to the pre-2002 requirement to provide full-opinion explanations for their holdings.<sup>185</sup> Lastly, the BIA could no longer conduct de novo review of all asylum cases; rather, it was limited to overriding the immigration courts' decisions only for clear error.<sup>186</sup> Thus, under the current standard, the BIA cannot overrule an immigration court's finding of fact just because the BIA would have given different weight to the facts or made a differing determination.<sup>187</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232(d)(7)(B) (2013).

<sup>178</sup> 8 U.S.C. § 1232(d)(7)(B); LISA SEGNETTI ET AL., CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 10 (2014).

<sup>179</sup> Melloy, *supra* note 173, at 648–49.

<sup>180</sup> *Id.* at 648–49.

<sup>181</sup> *Id.* at 649.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 649–50.

<sup>185</sup> *Id.* at 650.

<sup>186</sup> *Id.*

<sup>187</sup> Melloy, *supra* note 173, at 670.

*Membership in a Particular Social Group in International Refugee Law: UNHCR's Guidance on UAC, Gender-Based, and Gang-Related Asylum Claims*

a. *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*

The CRC is the most authoritative document on the best interest of the child; yet, the principle as it pertains to UAC is best understood in light of the relevant UNHCR Guidelines for the interpretation of a particular social group.<sup>188</sup> UNHCR has issued four sets of guidelines that are relevant to UAC's asylum claims based on social group membership: the *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* ("Children's Guidelines");<sup>189</sup> *Guidelines on International Protection: "Membership of a Particular Social Group"* ("Social Group Guidelines");<sup>190</sup> *Guidelines on International Protection: Gender-Related Persecution* ("Gender Guidelines");<sup>191</sup> and *UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ("Gang Victims' Guidelines").<sup>192</sup>

The Children's Guidelines state the following regarding substantive determinations of asylum and refugee claims:

It should be . . . borne in mind that, under the Convention on the Rights of the Child, children are recognized certain specific human rights, and that the manner in which those rights may be violated as well as the nature of such violations may be different from those that may occur in the case of

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<sup>188</sup> See UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Feb. 1997), <http://www.unhcr.org/3d4f91cf4.html>; UNHCR, *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, U.N. Doc. HCR/GIP/02/02 (May 7, 2002); UNHCR, *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*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (March 31, 2010), <http://www.refworld.org/pdfid/4bb21fa02.pdf>.

<sup>189</sup> The guidelines define an unaccompanied child as below eighteen years of age and "separated from both parents and . . . not being cared for by an adult who by law or custom has responsibility to do so." *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *supra* note 188, at 1.

<sup>190</sup> *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, *supra* note 188.

<sup>191</sup> *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*, *supra* note 188.

<sup>192</sup> *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, *supra* note 188.

adults. Certain policies and practices constituting gross violations of specific rights of the child may, under certain circumstances, lead to situations that fall within the Scope of the refugee Convention. Examples of such policies and practices are the *recruitment of children for regular or irregular armies*, their subjection to forced labour, the trafficking of children for prostitution and sexual exploitation and the practice of female genital mutilation.<sup>193</sup>

This paragraph suggests that the best interest of the child must guide all determinations of children's asylum claims, and that special accommodations to the asylee definition should be considered in the case of child applicants.<sup>194</sup>

b. *Guidelines on International Protection: "Membership of a Particular Social Group"*

Significantly, for children's gang-based asylum claims, the Social Group Guidelines state that even though persecution "cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society."<sup>195</sup> For example, while left-handed individuals do not constitute a particular social group, their persecution by reason of their left-handedness could cause society to see them as members of the social group of left-handed people.<sup>196</sup> The UNHCR also notes that, to establish a particular social group, it is not necessary that all the people in the group suffer persecution.<sup>197</sup> In addition, the UNHCR Social Group Guidelines do not require voluntary association:

[A]n applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be "cohesive." . . . Thus women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.<sup>198</sup>

A similar argument could be made for young boys who are the targets of gang recruitment,<sup>199</sup> or girls whom gangs target with sexual exploitation.<sup>200</sup>

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<sup>193</sup> Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, *supra* note 188, at 13 ¶ 8.7 (emphasis added).

<sup>194</sup> *Id.*

<sup>195</sup> 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, *supra* note 188, at 4.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See id.*

<sup>200</sup> *See id.*

c. *Guidelines on International Protection: "Gender-Related Persecution"*

UNHCR's Gender Guidelines provide additional assistance specifically aimed at analyzing social group claims based on gender.<sup>201</sup> The Guidelines highlight that an interpreter of the Convention definition of "gender-related persecution" should read it with "an awareness of possible gender dimensions in order to determine accurately claims to refugee status."<sup>202</sup> The UNHCR stresses the unfortunate fact that, historically, decision-makers have constructed the refugee definition through a male-centered perspective, thus overlooking the validity of claims by women and LGBT people.<sup>203</sup> However, both international and domestic laws have evolved toward a better understanding and higher receptiveness of gender-based claims.<sup>204</sup> The Guidelines also urge states to recognize women as "a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."<sup>205</sup> Finally, UNHCR criticizes attempts to deny women from certain male-dominated, oppressive cultures the recognition as a particular social group solely based on the size of such a group.<sup>206</sup> The determination of a refugee or asylee status should never hinge on external considerations such as fear of "flood-gates."<sup>207</sup>

The Gender Guidelines emphasize both the Convention-related and humanitarian aspects of gender-based claims.<sup>208</sup> Because they affirm that it is perfectly valid to establish a particular social group on the basis of gender alone (given that the other requirements of the refugee definition are met), the Guidelines are extremely valuable for closing the gap in asylum availability for those victims of domestic and sexual abuse who have attempted, but failed to obtain their country's protection.<sup>209</sup> Like U.S. asylum law, the UNHCR Guidelines allow for a broad definition of "persecution," and do not require that the persecutor be a state's agent.<sup>210</sup>

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<sup>201</sup> UNHCR, *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*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

<sup>202</sup> *Id.* at 2.

<sup>203</sup> *Id.* at 2-3.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 7.

<sup>206</sup> *Id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.* at 2.

<sup>209</sup> *See id.* at 7.

<sup>210</sup> *See In re Kasinga* 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (stating that the practice of female genitalia mutilation can be "the basis for a claim of persecution").

d. *The UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*

UNHCR issued its Gang Victims' Guidelines in 2010 as a reaction to the surge of asylum claims from Central American victims of gang violence.<sup>211</sup> The Guidelines define a gang as a group of two or more people that commit crimes as its main or one of its main objectives.<sup>212</sup> In cases of persecution by non-state agents, both the Gang Victims' and Social Group Guidelines advise that the causal link between the persecution, the state, and one or more of the Convention grounds is satisfied where:

[T]here is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.<sup>213</sup>

The Gang Victims' Guidelines emphasize that the causal link may be established where a gang targets people because of their unique vulnerabilities, such as their youth, homelessness, poverty, or lack of family protection.<sup>214</sup> The victims' age and gender should be weighed as especially important factors in defining a particular social group.<sup>215</sup> The Guidelines highlight the fact that gang recruiters target young persons; therefore, "an age-based identification of a particular social group, combined with social status, could be relevant" for asylum seekers who have resisted gang recruitment.<sup>216</sup> The Guidelines also stress that, to be recognized as a particular social group, the group does not need to experience a higher frequency of persecution than other segments of the surrounding society,<sup>217</sup> and the group's size is irrelevant to refugee or asylee status determinations.<sup>218</sup> Youth is an immutable characteristic,<sup>219</sup> as is a history of resistance to gang recruitment and former association with gangs, as long as the associa-

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<sup>211</sup> UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, at 6 (Mar. 31, 2010), <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.

<sup>212</sup> *Id.* at 1.

<sup>213</sup> *Id.* at 10; U.N. High Commissioner for Refugees, 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, at 6, ¶ 23 (May 7, 2002), <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

<sup>214</sup> Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, *supra* note 211, at 6–7, ¶ 19.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at ¶ 36.

<sup>217</sup> *Id.* at ¶ 35.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at ¶ 36.



tion was involuntary.<sup>220</sup>

As to assessing the possibility of avoiding persecution by relocating within the victim's country, the Guidelines caution against the presumption that avoiding harm in this way is reasonable, especially in the case of children from small Central American countries where gang activity is widespread.<sup>221</sup> Studies show that child asylum seekers have often sought safe havens by internally relocating, but have been repeatedly unsuccessful.<sup>222</sup>

#### IV. DISCUSSION

##### A. *Fear of Cost and Floodgates: Voluntary Returns at the Border*

The goals of gate-keeping and cost-minimizing are most glaring in the convergence of the voluntary return option for children from contiguous countries<sup>223</sup> with DHS's delegation of the responsibility to screen these children for risks of being trafficked to CBP.<sup>224</sup>

Although this decision might make sense in terms of minimizing costs (after all, CBP agents are usually the first U.S. officials that UAC come into contact with), it is not at all conducive to protecting the best interests of the child. The process is ripe with problems caused by a mismatch between CBP's mission and childrens' unique needs.<sup>225</sup> The lack of training in child sensitivity and appropriate screening techniques, insufficient diligence in screening and record keeping, and facilities that are unsuitable for children make it unlikely that a child will feel confident enough to seek asylum and thus refuse to sign the "voluntary" withdrawal of the request for admission.<sup>226</sup> Because the voluntary withdrawal/return option allows U.S. authorities to repatriate a child to Mexico almost immediately,<sup>227</sup> it saves the authorities the significant costs associated with providing review of status claims, as well as long-term housing and care to additional UAC. After the child is released from U.S. custody, he or she often ends up in the hands of the human traffickers who initially smuggled the child across the border, and is then forced to work for the smugglers.<sup>228</sup> Each time CBP catches the child, the process repeats.<sup>229</sup> Thus, in the eyes of the traffickers, the Mexican UAC are excellent subjects for exploitation for as long as they

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<sup>220</sup> *Id.* at ¶ 37.

<sup>221</sup> *Id.* at ¶ 53.

<sup>222</sup> *Id.* at ¶ 54.

<sup>223</sup> See SEGHEITTI ET AL., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, *supra* note 13.

<sup>224</sup> See discussion, *supra* Part III, B.

<sup>225</sup> See discussion, *supra* Part III, B.

<sup>226</sup> See discussion, *supra* Part III, B.

<sup>227</sup> See discussion, *supra* Part III, A.

<sup>228</sup> See SEGHEITTI ET AL., UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, *supra* note 13.

<sup>229</sup> See *id.*

remain under the age of eighteen.<sup>230</sup>

At the same time, the American public's fear of teenage criminals flooding the United States might also come into play, especially since the border is much more accessible to residents of Mexico than Central America. DHS's assignment of child-screening duties to CBP, whose core mission is to prevent the entry of criminals and terrorists into the country,<sup>231</sup> corresponds to BIA's and the courts' generally icy attitude toward gang-related asylum claims.<sup>232</sup>

#### B. *Fear of Floodgates and Criminals: Substantive Determinations of Children's Asylum Claims*

The traditional Convention-based grounds for asylum are problematic in the context of children fleeing the violence in Central America and Mexico.<sup>233</sup> The grounds were aimed primarily at protecting the victims of serious *discrimination* by states rather than at safeguarding people's lives and rights more broadly.<sup>234</sup> While this strategy makes sense when a government has effective control over its subjects, it loses its logic in the context of a failed or nearly failed state under the reign of generalized violence.<sup>235</sup> Yet, the Refugee Convention and Protocol are the only internationally recognized documents governing refugee law,<sup>236</sup> and it took decades for the current member states to ratify them.<sup>237</sup> The UN's attempt to accommodate the realities of modern-day refugees has thus been a push for an ever-expanding interpretation of the Convention definition, in the form of non-binding interpretative guidelines.<sup>238</sup>

Currently, the two most contested elements of gang-based asylum claims in

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<sup>230</sup> See CAVENDISH & CORTAZAR, *supra* note 5.

<sup>231</sup> See discussion *supra*, Part III, B.

<sup>232</sup> See discussion *supra*, Part III, C.

<sup>233</sup> See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 229–30 (1996).

<sup>234</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), available at <http://www.unhcr.org/3b66c2aa10.html>; see Fitzpatrick, *supra* note 233, at 239–40.

<sup>235</sup> See Fitzpatrick, *supra* note 233, at 229.

<sup>236</sup> The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees define a refugee much more broadly than the 1951 Convention. See 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, 8 I.L.M. 1288 (entered into force 20 June 1974), available at <http://www.unhcr.org/45dc1a682.html>; see Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Nov. 22, 1984, available at <http://www.refworld.org/docid/3ae6b36ec.html>. These instruments are solely regional in scope, however. *Id.*

<sup>237</sup> See Fitzpatrick, *supra* note 233, at 229 (pointing out that, in 1993 alone, ten countries joined the Convention and Protocol).

<sup>238</sup> See discussion, *supra* Part III.

U.S. courts are the nexus between the persecution and a Convention ground and the definition of a particular social group.<sup>239</sup> The international principle of the best interest of the child and the UN's Guidelines provide a model for resolving the controversy. Read together, the CRC, Social Group, Women's, Children's, and Gang Victims' Guidelines urge a broad interpretation of the definition of a social group, especially in the case of children. Under the Guidelines, the particular social group can be based on the targeting of women,<sup>240</sup> boys, children (or young people more generally),<sup>241</sup> the homeless, the poor,<sup>242</sup> business owners,<sup>243</sup> or groups whose members belong to several of these categories.<sup>244</sup> The approach implicit in the Guidelines is to examine why the gang targeted a person and then deduce a social group from the reason or reasons for the persecution. For example, if the persecution relates to gang recruitment, one would examine the types of people the gang recruits.<sup>245</sup> If the answer is mostly boys and young men of certain social backgrounds, and if the asylum seeker fits this profile, his membership in this particular social group can form the basis of his asylum claim.<sup>246</sup> The caveat, however, is that the members of the group must either share one or more immutable characteristics, or the group must be recognized as a particular social group in the applicant's society.<sup>247</sup>

In the case of unaccompanied children, this requirement should not be hard to satisfy. Children's testimonies suggest that the gangs' targeting of boys and young men for recruitment is no secret in their home communities.<sup>248</sup> Neither is the sexual persecution of girls and young women by gang members.<sup>249</sup> In both

<sup>239</sup> See discussion, *supra* Part II, C.

<sup>240</sup> UNHCR, 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, at 8, ¶ 30, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), <http://www.refworld.org/docid/3d36f1c64.html>.

<sup>241</sup> UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, at 4, ¶ 11 (Mar. 31, 2010), <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.

<sup>242</sup> *Id.* at 4, ¶¶ 11–12.

<sup>243</sup> *Id.* at 4, ¶ 12.

<sup>244</sup> See *id.* at 4, ¶ 11. The guidelines also list the more widely accepted groups based on sexual orientation and family ties. *Id.*

<sup>245</sup> See *id.*

<sup>246</sup> *Id.*

<sup>247</sup> UNHCR requires the group to either possess a shared "immutable characteristic" or "social visibility." *Id.* at 12, ¶ 34.

<sup>248</sup> UNHCR REG'L OFFICE FOR THE U.S. AND THE CARIBBEAN, CHILDREN ON THE RUN 10 (2014), available at [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf). Kevin, age seventeen, reported, "My grandmother wanted me to leave. She told me: If you don't join, the gang will shoot you. If you do join, the rival gang will shoot you. But if you leave, no one will shoot you." (internal quotations omitted). *Id.*

<sup>249</sup> *Id.* at 9. The Report cites the statement of Maritza, a fifteen-year old Salvadoran girl: I am [in the U.S.] because the gang threatened me. One of the gang members 'liked' me

of these cases, the applicant can meet the social visibility requirement if he or she can show that the targeting of male youths for gang recruitment or young females for sexual exploitation is common knowledge in the applicant's society. The applicants can further strengthen their asylum claims by showing that their relatives have advised them to escape persecution by fleeing to the United States.<sup>250</sup> Further, as the Gang Victims' Guidelines have recognized, youth, poverty, and past resistance to gang recruitment can all constitute immutable characteristics.<sup>251</sup> Unfortunately, when it comes to gang-related claims, U.S. courts do not agree.<sup>252</sup>

Although the courts have tended to focus their analysis on particularity and social visibility rather than the immutable characteristics of social groups defined by their opposition to gangs, in *In re S—E—G—*, the court held that the applicant's group's defining characteristic of "youth" was not immutable.<sup>253</sup> This argument does not make logical sense in the context of persecution, since it takes years for an individual to outgrow his youth, and in that time, the individual's persecutors could kill him. Thus, refusing to see youth as an immutable characteristic in asylum cases undermines the humanitarian purpose of the Refugee Convention, which is what the Social Group Guidelines warn against.<sup>254</sup> Most importantly, it runs directly contrary to the best interest of the child principle as applied to UAC by the Children's Guidelines.<sup>255</sup>

With regard to the particularity requirement, U.S. appellate courts have defined the particularity requirement not by what it is, but rather by what it is

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. . . [He] was going to do me harm. In Salvador they take young girls, rape them and throw them in plastic bags. My uncle told me it wasn't safe for me to stay there.

<sup>250</sup> See *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010). In *Larios*, the court held that the applicant's proposed social group of "young Guatemalan men" who opposed gang recruitment did not meet the "social visibility" test, because the applicant had "failed to provide even a scintilla of evidence" that his proposed group was generally recognized in Guatemalan society as a particular group. *Id.* Showing that the general society does indeed perceive young men and women as endangered by gangs in a particular way, whether because of recruitment or sexual exploitation, could help establish the social visibility of the claimed group. See *id.*

<sup>251</sup> Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, *supra* note 241, at 12–13, ¶¶ 36–37.

<sup>252</sup> See discussion, *supra* Part III, C.

<sup>253</sup> *In re S-E-G-*, 24 I. & N. Dec. 579, 583 (B.I.A. 2008).

<sup>254</sup> See UNHCR, 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, at 2, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) ("While the ground [of a particular social group] needs delimiting—that is, it cannot be interpreted as to render the other four Convention grounds superfluous—a proper interpretation must be consistent with the object and purpose of the Convention.").

<sup>255</sup> See UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, at 12, ¶ 8.6 (Feb. 1997), <http://www.unhcr.org/3d4f91cf4.html>.

not.<sup>256</sup> The decisions in *Larios* and *Zelaya* imply that for a social group to be recognized as being “particular,” it must not be “amorphous.”<sup>257</sup> The term’s characterization by exclusion reveals its vagueness and arbitrariness, and suggests that the main motivation behind the courts’ particularity requirement might be guarding the “floodgates” from asylum seekers. Yet, the Social Group Guidelines state in no uncertain terms that “[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists . . . .”<sup>258</sup> In addition, the Social Group Guidelines’ explicit statement that members’ social “cohesiveness” is not a prerequisite for the recognition of their particular social group suggests that a group’s “amorphousness” should not be a disqualifying factor, either.<sup>259</sup>

C. *Border Screenings and Substantive Asylum Determinations in Light of the Best Interest of the Child*

The best interest of the child principle is hardly straightforward. The CRC acknowledges and incorporates competing considerations that often shape what is best for the child.<sup>260</sup> In addition, the Convention cautiously reflects the sometimes-conflicting goals of both the child and the state when it requires that the child’s best interest be *a* primary, and not *the* primary, consideration in all decisions involving the child.<sup>261</sup>

As it pertains to UAC, the most glaring tension in the CRC is between the interests of family reunification and of the child’s well-being.<sup>262</sup> Yet, once again, careful reading reveals the CRC’s resolution of this conflict in favor of the child’s safety. This conclusion flows from Article 6’s emphasis on the child’s “inherent right to life” and its requirement that States ensure the child’s survival “to the maximum extent possible.”<sup>263</sup> Moreover, the CRC qualifies family reunification both in terms of the parents’ will to be with the child and the child’s best interest.<sup>264</sup>

<sup>256</sup> See *Zelaya v. Holder*, 668 F.3d 159, 167 (4th Cir. 2012); *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010).

<sup>257</sup> *Zelaya*, 668 F.3d at 166.

<sup>258</sup> 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, *supra* note 254, at 5, ¶ 18.

<sup>259</sup> *Id.* at 4, ¶ 15.

<sup>260</sup> See G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, Convention on the Rights of the Child, (1989), entered into force Sept. 2, 1990.

<sup>261</sup> *Id.* at 2.

<sup>262</sup> *Id.* at 2, arts. 6, 9.

<sup>263</sup> *Id.* at 2–3, art. 6.

<sup>264</sup> *Id.* at 3, art. 9. Article 9 reads: “States Parties shall ensure that a child shall not be separated from his or her parents *against their will*, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such *separation is necessary for the best interests of the child*.” (Emphasis added).

According to the Children's Guidelines, states must not deny unaccompanied children entry to their territories.<sup>265</sup> In addition to mandating that the best interest of the child be "*the basic guiding principle*"<sup>266</sup> when dealing with unaccompanied child migrants (in contrast with the more cautious CRC requirement<sup>267</sup>), the Guidelines emphasize the child's reunion with family as a main priority. The Guidelines specifically state, "it is essential that unaccompanied children are assisted in locating and communication with their family members. . . . All attempts should be made to reunite the child with his/her family . . . when the best interests of the child would be met by such a reunion."<sup>268</sup>

These instructions imply that, if a UAC has a healthy relationship with his or her family and receives asylum, the state that granted the asylum should arrange for the child's immediate family members to join the child in the asylum-granting country. Coupled with the Guidelines' recommendation that states give a liberal reading to the refugee definition in deciding children's claims, it is easy to see why the U.S. would be reluctant to follow UNHCR's guidance as to the child's best interest.

The U.S. law makes no accommodations for the family reunification of UAC to whom the U.S. has granted asylum.<sup>269</sup> Yet, one of the major advantages of asylum over other forms of legal protection available to UAC is that once the UAC who were initially granted asylum become U.S. citizens and reach twenty-one years of age, they can apply for legal permanent residence for their parents.<sup>270</sup> An asylum recipient can adjust his or her status to legal permanent residence one year after receiving asylum, and can apply for U.S. citizenship within four years of the date asylum is granted.<sup>271</sup> Given that most UAC are teenagers at the time they seek asylum, they might be able to petition for their parents within a few years. Although this process is lengthy and would hardly open the "floodgates" to U.S. immigration, one consideration in refusing to expand the interpretation of the refugee definition for minors might be to discourage families from sending their children illegally to the United States, with the hope of eventually joining them legally. Yet, instead of pushing the BIA and courts toward denying children asylum for seemingly arbitrary reasons, the U.S. Government might address this concern better through cooperating with sending<sup>272</sup> countries to develop a campaign to educate the public about the serious dangers of the journey north, which could discourage those without a well-

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<sup>265</sup> UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, at 1 (Feb. 1997), <http://www.unhcr.org/3d4f91cf4.html>.

<sup>266</sup> *Id.* (emphasis added).

<sup>267</sup> Convention on the Rights of the Child, *supra* note 260, at 2.

<sup>268</sup> Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, *supra* note 265, at 15, art. 10.5.

<sup>269</sup> 8 U.S.C. § 1151(b) (2013).

<sup>270</sup> *Id.*

<sup>271</sup> 8 C.F.R. § 1209.2 (2014).

<sup>272</sup> A "sending" country is a source of a significant number of migrants. *See* International

founded fear of persecution from attempting the trip. Aiding governments in developing employment and enrichment programs for their youth could be an even more effective strategy to reduce violence and stem the flow of asylum claims. For those children with legitimate claims for U.S. protection, the prospect of eventually reuniting with their parents in the United States goes a long way toward protecting their best interests. This can be done even without having to change family-based immigration law.

Tension between the Government's and a child's interests does not need to result in sacrificing children's safety or discouraging children from seeking asylum in the U.S. To win asylum, a child must still demonstrate a credible, well-founded fear of being persecuted in the child's home country.<sup>273</sup> Once the child meets this standard (as in all of the cases discussed above),<sup>274</sup> there is no valid reason not to expand the refugee definition's interpretation in the manner that the UNHCR Guidelines suggest. Of course, the legislature and judiciary may instead weigh other considerations more heavily than ensuring children's safety, such as national security and guarding the floodgates of immigration. While it is admittedly difficult to imagine satisfying the best interest of the child standard in terms of both granting asylum and ensuring family reunification, simply granting additional children asylum under a more expansive reading of the refugee definition would be a compromise that matches the humanitarian concern at the heart of the CRC and the Children's Guidelines—ensuring children's survival and freedom from persecution.

The best interest of the child principle makes no appearance in any of the UAC asylum cases discussed above.<sup>275</sup> In fact, the EOIR Guidelines explicitly forbid immigration judges from using the principle in their substantive determinations of children's asylum claims.<sup>276</sup> While it is certainly necessary to ensure

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Organization for Migration, *Key Migration Terms*, 2015, para. 17, <https://www.iom.int/key-migration-terms>.

<sup>273</sup> 8 U.S.C. § 1101(a)(42)(A) (2013).

<sup>274</sup> See discussion *supra*, Part II, C.

<sup>275</sup> *Zelaya v. Holder*, 668 F.3d 159, 159 (4th Cir. 2012); *In re S-E-G-*, 24 I. & N. Dec. 579, 579 (B.I.A. 2008); *Larios v. Holder*, 608 F.3d 105, 105 (1st Cir. 2010). See also *Orellana-Monson v. Holder*, 685 F.3d 511, 511 (5th Cir. 2012). In *Orellana-Monson*, a case involving the gang-opposition based claims of two brothers ages eight and eleven, the UNHCR filed an *amicus curiae* brief on the children's behalf, which failed to sway the court's *per curiam* decision. See UNHCR, *UNHCR Intervention Before the United States Court of Appeals for the Fifth Circuit in the Case of Orellana-Monson and Another v. Holder, Attorney General* (May 7, 2009), No. 08-60394, available at <http://www.refworld.org/docid/4b2a002b2.html>.

<sup>276</sup> Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges, Court Admins., Judicial Law Clerks, & Immigration Court Staff, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children 4 (May 22, 2007), available at <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> ("The concept of 'best interest of the

a child-friendly environment in detention and during court hearings,<sup>277</sup> in light of the brutalities that so many UAC face, this form-over-substance approach looks like a very insufficient gesture.

## V. CONCLUSION

The current U.S. system for dealing with the surge in unaccompanied and undocumented children coming from Mexico and Central America is a test of the American public's political will to put the children's best interests first. Unfortunately, the substantial barriers to asylum that Congress and the courts have erected for these children suggest that other, more selfish considerations have taken precedent over the children's well-being. While TVPRA was a huge step forward in protecting children from exploitation by traffickers, the fact that DOS delegated the responsibility for the initial screening of child migrants to CBP<sup>278</sup> indicates that the protective provisions were never taken seriously. The main judicial barrier to recognizing more of the gang-related asylum claims is the current precedent set by the U.S. courts of appeal. Unfortunately, the new rules for appellate review make it extremely difficult to change the precedent, as an appellate court can overturn a lower court's decision only on the basis of a "clear error." An appellate court will hardly find a clear error in the lower court's decision that follows the appeals court's own precedent. Yet, when it comes to identifying the best interest of the child in life-or-death situations, international law provides unambiguous guidance for children's asylum claims.

The Guidelines that UNHCR issued endorse an expansive reading of the 1951 Convention's refugee definition, particularly regarding asylum claims based on gang-related persecution. Yet, U.S. courts have willfully disregarded the guidance of international human rights law in the service of fear-mongering political rhetoric that equates the surge in asylum claims with "invasion" and paints teenagers running from death threats as criminals. Fundamentally, CBP's screenings and courts' interpretation of a "particular social group" come down to two choices: endorsing the Government's "anti-illegals" agenda, or saving children's lives.

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child' does not negate the statute or the regulatory delegation of the Attorney General's authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge's discretion in taking steps to ensure that a 'child appropriate' hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.").

<sup>277</sup> BETSY CAVENDISH & MARU CORTAZAR, *APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS* 28 (2011), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

<sup>278</sup> *Id.* at 2.



