

**TO PROTECT THE DEFENSELESS: THE
NEED FOR CHILD-SPECIFIC
SUBSTANTIVE STANDARDS FOR
UNACCOMPANIED MINOR ASYLUM-
SEEKERS**

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I. INTRODUCTION

Today, approximately half of the world's refugees are children, totaling twenty million world-wide.¹ Tragically, these children often receive no protection against the raging vices of war, civil conflict, and human rights abuses.² Moreover, while they may flee their home countries for the same reasons as adult asylum-seekers—to escape armed conflict, persecution, and poverty—they also flee from child-specific human rights

1. WENDY YOUNG, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES 3, at http://www.womenscommission.org/pdf/ins_child.pdf (Dec. 1998).

2. *Id.* at 3–4.

violations, family abuse, and neglect.³ Some of the child-specific human rights abuses are completely unrelated to armed conflict or civil unrest⁴ as countless children fall prey to child trafficking, bonded labor, child prostitution, and child pornography.⁵ Others experience the trauma of certain cultural practices such as female genital mutilation, forced child marriage, and religious sexual servitude.⁶ Finally, they may be denied the most basic rights of family, home, or education.⁷

Although many children eventually seek refuge in Western Europe or the United States,⁸ immigration authorities may deny their asylum claims as unfounded.⁹ In order to qualify as a refugee, one must have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.¹⁰ Unfortunately, many of the reasons why children flee from their home countries do not qualify them for refugee status.¹¹ Although children are generally eligible for asylum on the same terms as adults, they are often viewed as “appendages of their families.”¹² If they are deemed refugees, it is by virtue of the asylum granted to the

3. Kate Halvorsen, *Separated Children Seeking Asylum: The Most Vulnerable of All*, 12 FORCED MIGRATION REVIEW 34 (2002), at <http://www.fmreview.org/FMRpdfs/FMR12/fmr12.12.pdf>.

4. YOUNG, *supra* note 1, at 3; see also *Country Reports on Human Rights Practices*, U.S. Dep't State, at http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html (providing numerous Human Rights Reports issued by the U.S. Department of State) (last visited Oct. 11, 2002); One World News Services, *Children's Rights*, at <http://www.oneworld.org/news/world/children.html> (last visited Nov. 11, 2002).

5. YOUNG, *supra* note 1, at 3–4.

6. *Id.* at 4.

7. *Id.*

8. *Id.*; see also Halvorsen, *supra* note 3, at 34.

9. See YOUNG, *supra* note 1, at 4.

10. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, para. A(2), 189 U.N.T.S. 137, 152–54 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention], available at http://www.unhcr.ch/html/menu3/b/o_c_ref.htm.

11. See Halvorsen, *supra* note 3, at 35–36.

12. YOUNG, *supra* note 1, at 5.

adult with whom they are traveling.¹³ Unaccompanied refugee children, however, must provide their own basis for the asylum claim, and unfortunately, the specters of deprivation and abuse they flee do not readily satisfy the current definition of a “refugee.”¹⁴

This comment focuses on the plight of unaccompanied refugee children in the asylum system. It calls for flexible substantive child-specific standards based on the best interests principle, which should be applied to unaccompanied refugee child asylum claims. Part I explains who unaccompanied refugee children are and the forces behind their refugee status. Part II expounds the relevant issues in asylum law. Part III explores special guidelines for determining child asylum claims. Finally, Part IV proposes remedial measures and child-specific substantive changes in the area of unaccompanied children’s asylum issues.

II. UNACCOMPANIED REFUGEE CHILDREN

A. *Definition*

Some of the children¹⁵ seeking refuge in the United States and Western European countries are totally alone, while others may be traveling with relatives or other adults.¹⁶ The children in the latter group may seem accompanied; however, the adults with whom they travel are not necessarily qualified to care for them.¹⁷ Recognizing the need for special treatment of these children, the United Nations High Commissioner for Refugees (UNHCR) defines unaccompanied children as “children under eighteen years of age who have been separated from both

13. *Id.*

14. See 1951 Convention, *supra* note 10, at 152–54, art. 1, para. A(2).

15. A child is defined as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” Convention on the Rights of the Child, Nov. 20, 1989, art.1, 1577 U.N.T.S. 43, 46.

16. Halvorsen, *supra* note 3, at 34.

17. *Id.* at 34–35 (noting that the exact nature of the relationship to the adult should be assessed because child trafficking is a serious problem).

parents and are not being cared for by an adult who, by law or custom, is responsible to do so.”¹⁸ In view of recent experience, however, UNHCR recognizes that even though many children have been separated from their legal or customary caregiver, they may not actually be unaccompanied.¹⁹ Although such children may be traveling or living with an adult, sometimes even an extended family member, they still face many of the same risks encountered by unaccompanied refugee children.²⁰ Thus, the broader term, “separated children,” which refers to “children under eighteen years of age who are separated from both parents or from their previous legal or customary primary caregiver,”²¹ better expresses some of the potential protection needs of these children.²²

U.S. law combines both of the above approaches;²³ although U.S. law uses the term “unaccompanied alien child,” the concepts embodied in it reflect the broader idea of “separated children.”²⁴ Under the U.S. definition, an “unaccompanied alien child” is one who

- (A) has no lawful immigration status in the United States;
- (B) has not attained 18 years of age; and
- (C) with respect to whom —
 - (i) there is no parent or legal guardian in the United States; or
 - (ii) no parent or legal guardian in the United States is

18. UNITED NATIONS HIGH COMM’R FOR REFUGEES, TRENDS IN UNACCOMPANIED AND SEPARATED CHILDREN SEEKING ASYLUM IN EUROPE, 2000, at <http://www.separated-children-europeprogramme.org/Global/Documents/Eng/Statistics/Trends.htm> (Nov. 2001).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 462(g)(2)(A)–(C), 116 Stat. 2135, 2205 (2002) (to be codified in 6 U.S.C.A. § 279).

24. *Id.*

available to provide care and physical custody.²⁵

B. Reasons Why Children Leave Their Countries of Origin

There are numerous reasons why children may feel compelled to leave their home countries.²⁶ The European members of the Save the Children Alliance have recently sponsored a study of 218 cases of unaccompanied children who had traveled to Europe.²⁷ The study results showed that among the reasons why these children left their homes were the following:

violent death of parent(s), sometimes in front of child; detention and torture of child; armed conflicts that target child civilians; genocide; forced recruitment of children into armed forces, some under 10 years of age; trafficking of children for the purposes of prostitution under brutal conditions; persecution of child's ethnic group; denial of education due to the child's ethnic identity; political activities of the child or child's family members resulting in persecution; rape and sexual assault; abuse and/or abandonment by parents; poverty and complete lack of opportunity.²⁸

25. *Id.*

26. UNITED NATIONS HIGH COMM'R FOR REFUGEES, SEPARATED CHILDREN SEEKING ASYLUM IN CANADA 7 (July 2001), available at <http://www.web.net/~ccr/separated.PDF> (adopted from an original report researched and written by Wendy Ayotte).

27. *Id.*

28. *Id.* at 7 (quoting WENDY AYOTTE, SEPARATED CHILDREN COMING TO WESTERN EUROPE: WHY THEY TRAVEL AND HOW THEY ARRIVE 9 (2000)). For example, thirteen-year-old Edwin escaped from life with his cousin who had forced him to beg on the streets and beat him with car tools if he did not return home with enough money; two-year-old Got was sold by his mother to human smugglers and used by them as a decoy; seven-year-old Fega was abandoned in the United States by her mother, an illegal alien who was afraid to claim her. David Oliver Relin, *Who Will Stand Up for Them?*, PARADE MAGAZINE, Aug. 4, 2002, at 4-5.

III. OVERVIEW OF ASYLUM LAW

A. *1951 United Nations Convention Relating to the Status of Refugees and 1967 United Nations Protocol Relating to the Status of Refugees*²⁹

A person's eligibility for asylum turns upon whether the person fits within the conventional definition of a refugee.³⁰ The *1951 Convention*³¹ applies the term "refugee" to any person seeking protection outside the borders of his or her own country owing to "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."³² As a result, under the *1951 Convention*, the international community does not have to accept purely humanitarian refugees who face a generalized danger to their life or liberty because of war or political unrest in their home countries.³³ Likewise, the *1967 Protocol* includes the *1951 Convention's* definition of a "refugee"; however, it does so without the geographic and temporal limitations of the *1951 Convention*.³⁴

29. 1951 Convention, *supra* note 10; *see also* 1967 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

30. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, para. 28 (1979) [hereinafter UNHCR HANDBOOK]; *see also* Kay Hailbronner, *New Techniques for Rendering Asylum Manageable*, in IMMIGRATION CONTROLS: THE SEARCH FOR WORKABLE POLICIES IN GERMANY AND THE UNITED STATES 159, 168 (Kay Hailbronner et al. eds., 1998).

31. This international instrument was a direct response to the need to define the legal status of refugees after World War II. *See* 1951 Convention, *supra* note 10, at 152–54, art. 1, para. A(2). It contained a general definition of who was to be considered a refugee. *Id.* Because the *1951 Convention* signatories wanted to limit their obligations only to refugee situations that were known or that could stem from events that had already occurred, however, that definition referred only to individuals who suffered persecution as a result of events that occurred before January 1, 1951. *Id.*

32. *Id.*

33. Hailbronner, *supra* note 30, at 168.

34. 1967 Protocol, *supra* note 29, art. 1. The 1967 Protocol was a response to the emergence of new refugee crises. It addressed the need to make the provisions of the

B. Application of the 1951 Convention to National Laws

The 1951 Convention has become a major guideline for dealing with refugees. In the European Union, all member states have ratified the Convention and used its definition of “refugee” in their national laws.³⁵ Likewise, the United States has integrated the 1951 Convention’s definition of a “refugee” into its law.³⁶

C. Selected Definitional Requirements

1. Persecution³⁷

Persecution is an unjustified threat of serious harm, including, but not limited to, a threat to life or freedom on account of race, religion, nationality, political opinion, or membership in a particular social group.³⁸ The Board of Immigration Appeals defined “persecution” as a “threat to the

1951 Convention apply to such new refugees. UNHCR HANDBOOK, *supra* note 30, para. 2.

35. Sabine Weidlich, Comment, *First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?*, 14 GEO. IMMIGR. L.J. 643, 646 (2000).

36. 8 U.S.C. § 1101(a)(42)(A) (2000). Thus, the term “refugee” in the U.S. law applies to:

any 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.

Id.

37. The requirement of persecution constitutes a burdensome limitation on the individuals that have not fled the country in which they fear, or could potentially fear, persecution. See Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 101 (1999).

38. UNHCR HANDBOOK, *supra* note 30, para. 51; Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, in 1209 PRACTICING LAW INSTITUTE: CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 215, 217–18 (2000); *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984); *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”³⁹ Persecution can result from both governmental and non-governmental action that the government is either unwilling or unable to control.⁴⁰ Examples of persecution, as applied to adult asylum-seekers, include discrimination, if the government-imposed restrictions are clearly prejudicial; prosecution based on an individual’s race, religion, nationality, social group, or political opinion; restrictive economic measures directed at a specific racial, religious, national, social, or political group; and gender-based persecution, including domestic violence, and rape.⁴¹

2. *Well-founded fear*

To qualify for asylum, the applicant must establish a well-founded fear of persecution.⁴² Both subjective and objective evidence are used in determining whether a well-founded fear of persecution exists, that is, a refugee’s “frame of mind . . . supported by an objective situation.”⁴³ The most convincing evidence is that of past persecution,⁴⁴ although a reasonable risk

39. *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276, 284 (BIA 1985).

40. Helton, *supra* note 38, at 219; *see also* Moore, *supra* note 37, at 102 (proposing that the 1951 Convention does not identify the state as the necessary agent or actor of persecution if the authorities are either unwilling or unable to offer effective protection from non-state agents of persecution); UNHCR HANDBOOK, *supra* note 30, para. 65; *Matter of McMullen*, 17 I. & N. Dec. 542, 545 (BIA 1980).

41. Helton, *supra* note 38, at 219–20; *see also* Jacqueline Bhabha & Wendy A. Young, *Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 762 (1998) (citing UNHCR HANDBOOK, *supra* note 30, para. 54 (“Discrimination”)). In addition, measures that in themselves do not constitute persecution, if taken together, may amount to persecution on “cumulative grounds.” UNHCR HANDBOOK, *supra* note 30, para. 53. *See Stevic*, 467 U.S. 407 at 418 (citing restrictive economic measures) (quoting *Matter of Dunbar*, 14 I. & N. Dec. 310, 320 (BIA 1973)); *see also* *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1175–76 (9th Cir. 2001) (citing domestic violence); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434–35 (9th Cir. 1987) (citing rape); *Matter of R-R*, 20 I. & N. Dec. 547, 551 (BIA 1992) (citing disproportionate prosecution).

42. 8 U.S.C § 1101(a)(42)(A); 1951 Convention, *supra* note 10, at 152–54, art. 1, para. A(2).

43. *See* UNHCR HANDBOOK, *supra* note 30, para. 38; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987).

44. *See* *Weidlich*, *supra* note 35, at 647; *see also* 8 C.F.R. § 208.13 (2003); *Kotasz v.*

of future or hypothetical future persecution may also amount to a well-founded fear.⁴⁵

3. "On account of"

The U.S. law imposes on prospective asylum applicants an additional requirement not found in the *1951 Convention*.⁴⁶ Namely, applicants must demonstrate that their fear of persecution is "on account of" one of five reasons enumerated in the statute: race, religion, nationality, social group, or political opinion.⁴⁷ The Supreme Court has decided that the phrase "on account of" requires the applicant to show that the persecutors were actually motivated by one of the statutory reasons outlined below.⁴⁸

4. Race

An applicant who claims asylum on the basis of race must demonstrate that the applicant is in fact a member of a persecuted race.⁴⁹ The term "race" applies to "all kinds of ethnic groups that are referred to as 'races' in common usage."⁵⁰ "Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights," and "will frequently amount to persecution."⁵¹ However,

INS, 132 F.3d 39 (9th Cir. 1997), available at 1997 WL 758812, at *1; Matter of B., 21 I. & N. Dec. 66, 69 (BIA 1995).

45. *Cardoza-Fonseca*, 480 U.S. at 440 (citing *Stevic v. INS*, 467 U.S. 407, 424–25 (1984) ("[I]t is enough that persecution is a reasonable possibility."); see also Helton, *supra* note 38, at 222 ("Persecution of an applicant's family, friends or other members of his or her race, religion, nationality, social or political group, may also indicate that 'sooner or later he [or she] also will become a victim of persecution,' and that, as a consequence, the fear of prosecution is well-founded.").

46. 8 U.S.C. § 1101(a)(42); see Helton, *supra* note 38, at 226.

47. 8 U.S.C. § 1101(a)(42).

48. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

49. 8 U.S.C. § 1101(a)(42)(A). See *Demaize-Job v. INS*, 787 F.2d 1332, 1335 (9th Cir. 1986); see also Helton, *supra* note 38, at 223.

50. UNHCR HANDBOOK, *supra* note 30, para. 68; REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 36 (2d ed. 2000).

51. UNHCR HANDBOOK, *supra* note 30, para. 68–69; Germain, *supra* note 50, at

the showing of violence among ethnic groups by itself is not enough to constitute persecution unless the local government tolerates or is unable to prevent the violence.⁵² Likewise, “the mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status.”⁵³

5. Religion

The Universal Declaration of Human Rights proclaims the right to freedom of religion, which includes the freedom to change religion and to manifest it in public and private, teaching, practice, worship, and observance.⁵⁴ Persecution on account of religion may include “prohibition of membership in a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.”⁵⁵ Personal animosity or an isolated incident of religious persecution is not sufficient for a successful asylum claim on the basis of religion,⁵⁶ nor is mere membership in a particular religious community.⁵⁷

6. Nationality

An alien may also petition for asylum on the basis of nationality.⁵⁸ Nationality refers to citizenship, as well as membership in a distinct ethnic or linguistic group, and may often overlap with the term “race.”⁵⁹ Persecution on account of

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52. Helton, *supra* note 38, at 223; *see also* Matter of R, 20 I. & N. Dec. 621, 626–27 (BIA 1992).

53. UNHCR HANDBOOK, *supra* note 30, para. 70.

54. *Id.* para. 71.

55. Germain, *supra* note 50, at 36 (citing UNHCR HANDBOOK, *supra* note 30, para.72).

56. Helton, *supra* note 38, at 223–24 (citing *Gumbol v. INS*, 815 F.2d 406, 412 (6th Cir. 1987)).

57. Germain, *supra* note 50, at 36 (citing *Ahmad v. INS*, 163 F.3d 457, 463 (7th Cir. 1999) (rejecting applicant’s claim of per se persecution of Ahmadis in Pakistan)).

58. 8 U.S.C. § 1101(a)(42)(A).

59. UNHCR HANDBOOK, *supra* note 30, para. 74; Helton, *supra* note 38, at 223.

nationality applies to members of both majority and minority groups and must be inflicted by the government, unless the government is unwilling or unable to control private agents of persecution.⁶⁰

7. *Social Group*

Another basis for asylum claims is social group persecution.⁶¹ The most generally adopted definition of “social group” is “persons of similar background, habits or social status.”⁶² Other interpretations of “social group” include “a group of persons who share some immutable characteristic that an alien is powerless to change or is so fundamental to an alien’s identity that he or she should not be required to change the trait.”⁶³ The concept of “social group” may also encompass those who affiliate voluntarily and share such core common characteristics as interests, lifestyles, cultures, or political leanings.⁶⁴ Again, the applicant must show that the claimed persecution is “on account of” the group’s identifying characteristics; the existence of shared characteristics, however, will not necessarily suffice to qualify persons distinguished by it as members of a particular social group.⁶⁵

“Conflicts due to the presence of two or more ethnic or linguistic groups within the same country have resulted in persecution of groups such as ethnic Albanians in Yugoslavia, Kurds in Iraq, indigenous populations in Central America, and ethnic groups in the former Soviet Union.” Germain, *supra* note 50, at 38.

60. UNHCR HANDBOOK, *supra* note 30, paras. 65, 74, 76.

61. 8 U.S.C. § 1101(a)(42)(A).

62. UNHCR HANDBOOK, *supra* note 30, para. 77.

63. Helton, *supra* note 38, at 225 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (interpreting the phrase “persecution on account of membership in a particular social group” and enumerating some of the characteristics that can be shared by a social group: sex, color, kinship, or a shared past experience), *overruled in part on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), *vacated in part on other grounds* by *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997)).

64. Helton, *supra* note 38, at 225 (citing *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (stating, “[o]f central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group”).

65. *In re R-A-*, 22 I. & N. Dec. 906, 906–907 (BIA 2001) (Attorney General order),

8. *Political Opinion*

Finally, an alien's express or imputed political opinion may be the basis of his or her persecution and asylum claim. "Generally, a political opinion is a viewpoint held by an individual that the persecutor seeks to overcome."⁶⁶ Under UNHCR guidelines, political opinions are "opinions not tolerated by the authorities, which are critical of their policies or methods."⁶⁷ The particular viewpoint need not have been expressed or manifested by the individual's actions if the persecutors attribute it to the applicant.⁶⁸ Thus, the individual may have a well-founded fear of persecution if he or she has expressed the viewpoint, is likely to express it in the future, or the persecutor imputes it to him or her.⁶⁹

available at 2001 WL 1744475. The Department of Homeland Security moved the Attorney General to remand the case to Board of Immigration Appeals (BIA) with instructions to summarily grant asylum. *Id.* Attorney General Janet Reno remanded the case to the BIA for reconsideration following final publication of proposed rules addressing principles to be used in adjudication of gender-related persecution claims. *Id.*; see Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76592-95 (Dec. 7, 2000) (to be codified at 8 C.F.R. 208). The Department of Homeland Security (DHS) has recently adopted the position that "married women in Guatemala who are unable to leave the relationship is an acceptable social group." *In re* Alvarado-Pena, Position on Respondent's Eligibility of Relief, File No.: A-73-753-922 (Dep't of Homeland Sec. 2004). "The applicant must also show that the claimed persecution is 'on account of the group's identifying characteristics.'" Germain, *supra* note 50, at 39 (citing Matter of Sanchez and Escobar, 19 I. & N. Dec. at 285-86, *aff'd*, Sanchez-Trujillo, 801 F.2d at 1571). See *infra* note 213 for examples of social groups found by the courts in the past. The Attorney General certified the case to himself, and subsequently denied the respondent's counsel's request to allow further briefing on the case. Letter from John Ashcroft, Attorney General, to Karen Musalo, Resident Scholar, Center for Gender and Refugee Studies, University of California Hastings College of Law (Sept. 5, 2003).

66. Helton, *supra* note 38, at 225 (citing Matter of Acosta, 19 I. & N. Dec. at 234 (defining persecution on the basis of political opinion)).

67. UNHCR HANDBOOK, *supra* note 30 para. 80.

68. *Id.*

69. Helton, *supra* note 38, at 225-26 (citing *Aguilera-Cota v. INS*, 914 F.2d 1375, 1379-80 (9th Cir. 1990)).

IV. CHILD-SPECIFIC APPROACH TO ASYLUM

A. *The Convention on the Rights of the Child*⁷⁰1. *International Rights of the Child*

“Humankind owes the child ‘the best it has to give.’”⁷¹ Because children are the building blocks for a solid human rights culture, guaranteed human rights for today’s children are an investment in the future.⁷² Children often suffer the same human rights abuses as adults, however, they necessarily depend on the world of adults to protect them.⁷³ Thus, the most vulnerable and disadvantaged children within a country’s borders, unaccompanied minors seeking asylum, should see their rights realized and protected by government.⁷⁴

“Any framework for the adjudication of child asylum claims must consider the provisions of international human rights instruments.”⁷⁵ These instruments, as well as the obligations owed by host states toward individuals seeking asylum within their borders, are important in considering the states’ obligations toward their citizens.⁷⁶ Therefore, the provisions of the *Convention on the Rights of the Child (CRC)* should be of central importance in adjudicating child asylum claims.⁷⁷ “The

70. Convention on the Rights of the Child, *supra*, note 15. Although the United States is one of the two countries that have failed to endorse it, the *Convention on the Rights of the Child* has arguably risen to the status of customary international law and as such is binding on all countries, including the United States. YOUNG, *supra* note 1, at 5.

71. Amnesty Int’l, *Children’s Human Rights: The Future Starts Here*, at http://www.amnestyusa.org/children/future_intro.html (last visited Nov. 22, 2002) (quoting 1959 UN Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., 841st plen. mtg., Supp. No. 16, at 19, U.N. Doc A/4354 (1959)).

72. *Id.*

73. *Id.*

74. See UNICEF, *The Convention on the Rights of the Child*, at <http://www.unicef.org/crc/convention.htm> (last visited Oct. 12, 2002).

75. Bhabha & Young, *supra* note 41, at 760.

76. *Id.*

77. *Id.*

CRC provides a new child-centered perspective on questions of rights and establishes a near-universal set of internationally endorsed and validated standards for children.”⁷⁸

The issue of refugee children and children seeking asylum is specifically addressed in Article 22 of the *CRC*. This provision mandates the signatories of the *CRC* to provide these children with appropriate protection and humanitarian assistance.⁷⁹ Consequently, in cases of unaccompanied minors, they “shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.”⁸⁰

2. *Best Interests of the Child*

Article 3 of the *CRC* states: “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁸¹ As UNHCR correctly concludes, this rule also applies to lawmaking and government administration.⁸² Hence, Article 3 of the *CRC* is not only relevant when determining procedural questions, but also when considering substantive issues pertinent to child asylum claims, such as “defining the behavior that amounts to persecution of a child, the circumstances that give rise to a well-founded fear of persecution in a child, and the threshold that a child must meet to discharge his or her burden of proof.”⁸³ Similarly, determination of child asylum claims by an appropriate body, whether it is action of the court of law or an administrative authority, falls within the scope of Article 3.⁸⁴ Therefore, in

78. *Id.* *The Convention on the Rights of the Child* has influenced the UNHCR guidelines and Canadian guidelines for managing refugee children. *Id.*

79. *Convention on the Rights of the Child, supra* note 15, art. 22(1).

80. *Id.* art. 22(2).

81. *Id.* art. 3(1).

82. UNHCR, *REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE* 21 (1994) [hereinafter *UNHCR GUIDELINES ON PROTECTION AND CARE*].

83. Bhabha & Young, *supra* note 41, at 760.

84. *Id.*

making decisions that will have a long-term effect on the child, adjudicators of asylum claims should give primary considerations to the child-applicant's best interests.⁸⁵

The only significant shortcoming of the best interests principle is its lack of well-defined criteria.⁸⁶ The *CRC* does not list any factors to consider in determining what constitutes a child's best interests, or whether the child-applicant's or the interviewing adult's values should be controlling.⁸⁷ One cannot rule out the possibility that "the value judgments and impressions of those responsible for determining the . . . refugee status . . . of immigrant minors, can potentially interfere with the application of the best interests test," which can become especially problematic in the asylum interview context where an adult interviewer must filter child experiences through the interviewer's own value system.⁸⁸

3. *Opportunity to Express Views*

The *CRC* also aspires to enable children to express their views in matters personally affecting them, such as in the asylum application process.⁸⁹ In accordance with this principle, adjudicators of child asylum claims bear the responsibility for providing the child with appropriate opportunities to freely articulate matters that affect the child.⁹⁰ Flowing from this principle is the obligation to carefully solicit and diligently consider the child's testimony when deciding whether the particular situation has subjected the child to persecution and

85. *Id.*

86. See Lisa Rodriguez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 609 (1998).

87. *Id.*

88. *Id.* at 609–10.

89. Convention on the Rights of the Child, *supra* note 15, art. 12(1). "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." *Id.*

90. Bhabha & Young, *supra* note 41, at 760.

could give rise to a well-founded fear of future persecution.⁹¹

4. *Other Obligations*

Governments who sign the *CRC* accept additional obligations including the duty to: “ensure . . . the survival and development of the child;”⁹² “combat the illicit transfer and non-return of children abroad;”⁹³ “protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse;”⁹⁴ and protect the child from economic exploitation.⁹⁵ In addition, child refugees under the *CRC* should be afforded “protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention.”⁹⁶

B. *Special Guidelines for Determining Child Refugee Status*

1. *United Nations’ Guidelines*

The provisions in the *1951 Convention* and the *1967 Protocol* for determining refugee status are the same for children and adults.⁹⁷ Likewise, U.S. law makes no distinction between asylum claims of children and adults.⁹⁸ Nevertheless, the Office of the High Commissioner for Human Rights, influenced by the *CRC*, recognizes that child asylum claims should be approached in a manner suited to the needs and circumstances of children specifically, rather than in a manner suitable for adults.⁹⁹

91. *Id.*; cf. *Gonzalez v. Reno*, 212 F.3d 1338, 1352 (11th Cir. 2000) (recognizing that the former policy which permits other persons, besides a parent, to speak for the child on immigration matters to some extent may protect the child’s right to apply for asylum despite contrary wishes of parents).

92. *Convention on the Rights of the Child*, *supra* note 15, art. 6(2).

93. *Id.* art. 11(1).

94. *Id.* art. 19(1).

95. *Id.* art. 32(1).

96. *Id.* art. 22(1).

97. UNHCR HANDBOOK, *supra* note 30, para. 213. UNHCR GUIDELINES ON PROTECTION AND CARE, *supra* note 82, at 97.

98. 8 U.S.C. § 1101(a)(42).

99. UNHCR GUIDELINES ON PROTECTION AND CARE, *supra* note 82, at 20–21.

Status determination of unaccompanied children should be guided by several factors. First, the child's degree of mental development and maturity should be considered.¹⁰⁰ Such assessments should be made by child development experts while recognizing that children manifest their fears in different ways than adults.¹⁰¹ Whenever possible, the assessment expert should share the same cultural background and native language with the child.¹⁰²

Second, when an assessment expert determines "that the child is mature enough to have and to express a well-founded fear of persecution, the case may be treated in a manner similar to that of an adult."¹⁰³ If a child does not exhibit a level of maturity necessary to express a well-founded fear in the same way as an adult, a person making the determination of the child's refugee status must examine objective factors such as characteristics of the child's social or ethnic group, political situation in the country of origin, and circumstances of the child's family members.¹⁰⁴

Next, recognizing that children are not legally independent, the *Guidelines on Protection and Care* urge that children be represented by guardians ad litem who are obligated by oath to advocate in the child's best interests.¹⁰⁵ Such legal guardians should be appointed immediately to ensure that the interests of unaccompanied minors seeking asylum are safeguarded.¹⁰⁶

Finally, the child should be given any benefit of the doubt if

100. *Id.* at 100; UNHCR HANDBOOK, *supra* note 30, para. 214.

101. UNHCR GUIDELINES ON PROTECTION AND CARE, *supra* note 82, at 100.

102. *Id.*

103. *Id.*

104. *Id.* at 100-01; UNHCR HANDBOOK, *supra* note 30, para. 217 (stating, "if an unaccompanied minor finds himself in the company of a group of refugees, this may—depending on the circumstances—indicate that the minor is also a refugee").

105. See UNHCR GUIDELINES ON PROTECTION AND CARE, *supra* note 82, at 101; UNHCR HANDBOOK, *supra* note 30, para. 214; *cf.* *Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1174 (S.D. Fla. 2000) (stating, "under applicable law, Elian is too young to make legal decisions for himself, and . . . his father has the legal authority to speak for him in immigration matters").

106. UNHCR GUIDELINES ON PROTECTION AND CARE, *supra* note 82, at 101.

his or her credibility becomes an issue during the interview.¹⁰⁷ The interview for determining child refugee status can be very traumatic for a child who has to relive the events that led to escape; therefore, a trusted adult should be allowed to accompany the child-applicant.¹⁰⁸ The interview should ideally be in the child's native language, but if the interviewer does not share the child's native language, then trained independent interpreters should be present.¹⁰⁹

Also, adjudicators are urged to remember that certain violations of children's human rights under the *CRC* may lead to situations that fall within the scope of the *1951 Convention*.¹¹⁰ Such violations may include recruitment of children into the military, forced labor, trafficking of children for prostitution and sexual exploitation, as well as the practice of female genital mutilation.¹¹¹

Immigration officials should also take into account the circumstances of other family members.¹¹² "If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of their own well-founded fear of persecution, the child him/herself may be presumed to have such a fear."¹¹³ Each child's situation is unique and the best interests of the child can only be preserved by a case-by-case examination of the child's personal, family and cultural background before the child's refugee status is determined.¹¹⁴

107. *Id.* When the child's credibility is at issue, the burden is not on the child to provide proof. *Id.*

108. *Id.* at 102.

109. *Id.*

110. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM, para. 8.7 (Feb. 1997) [hereinafter UNHCR GUIDELINES ON POLICIES AND PROCEDURES].

111. *Id.*; see, e.g., YOUNG, *supra* note 1, at 13 (providing examples of a child soldier from Guatemala and an abused street child from Honduras whose asylum requests were granted).

112. UNHCR GUIDELINES ON POLICIES AND PROCEDURES, *supra* note 110, para. 8.8.

113. *Id.* para. 8.9 (quoting UNHCR HANDBOOK, *supra* note 30, para. 218).

114. *Id.* para. 8.10.

2. *Immigration and Naturalization Service Guidelines*

Due to the unique circumstances and vulnerability of unaccompanied children, the former Immigration and Naturalization Service (INS),¹¹⁵ similar to the U.N., issued special guidelines relating to the asylum claims of this particular class of applicants.¹¹⁶ The guidelines subscribe to the widely recognized principle that any action taken on behalf of refugee children must be guided by “the best interests of the child.”¹¹⁷ The guidelines apply the principle only as a useful measure for determining appropriate interview procedures for child asylum-seekers, but state the best interests principle “does not play a role in determining substantive eligibility under the U.S. refugee definition.”¹¹⁸

The *INS Guidelines* recognize that an unaccompanied minor must often tell his or her story to an asylum officer without the support of familiar adults, even though the child may not fully understand the events that led the child to seek asylum in the United States.¹¹⁹ As a result, the child’s age, maturity, and psychological make-up necessarily affect the story that an asylum officer elicits from the child.¹²⁰ The asylum officer must take these factors into consideration while evaluating the child’s claim and must also consider other objective factors, such as publications, reports, or expert statements about the child’s country of origin, that corroborate the child’s credibility.¹²¹ At all

115. The Homeland Security Act of 2002 was responsible for dismantling the Immigration and Naturalization Service (INS) and assigning its service and enforcement functions to two separate bodies within the Department of Homeland Security. Christopher Nugent and Steven Schulman, *A New Era in the Legal Treatment of Alien Children: The Homeland Security and Child Status Protection Acts*, 80 INTERPRETER RELEASES 233, 234–35 (Feb. 19, 2003).

116. Memorandum from Jeff Weiss, Acting Director, Office of Int’l Affairs, INS, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, *Guidelines for Children’s Asylum Claims* (Dec. 10, 1998) [hereinafter *INS Guidelines*] (on file with author).

117. *Id.*

118. *Id.*

119. *Id.* at 17.

120. *Id.*

121. *Id.*

times, the child bears the burden of proof in establishing his or her asylum claim, which makes this process even more critical for the protection of these children.¹²² The *Handbook on Procedures and Criteria for Determining Refugee Status* requires that a child must prove all components of a claim for refugee status, and for this reason, the evidence presented by the child must be carefully reviewed on a case-by-case basis.¹²³

C. Special Problems with Child Asylum Claims

Both the United Nations' and the former INS's guidelines concerning unaccompanied refugee children indicate that children have special rights that should be preserved.¹²⁴ The obligation to preserve these rights calls for a uniquely tailored approach to child asylum claims.¹²⁵ Nevertheless, in spite of this sensitivity to the claims of refugee children, U.S. and international laws require that child asylum claims conform to the same standards as adult asylum claims.¹²⁶ Notably, the *INS Guidelines* stress that, regardless of how sympathetic the child's claim may appear, asylum may only be granted upon proving all requirements set forth by the law.¹²⁷ However, child-specific situations that cause children to seek refuge outside their home countries often do not fall neatly into the rigid framework of successful asylum claims.¹²⁸ Additionally, children may fail to

122. INS Guidelines, *supra* note 116, at 22; *see also* Cruz-Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (stating, "we find no error in applying this standard of proof for a juvenile"). On the contrary, the *INS Guidelines* urge that when there is hesitation about the child's credibility, the child should be given the benefit of the doubt. INS Guidelines, *supra* note 116, at 26.

123. INS Guidelines, *supra* note 116, at 18.

124. *See id.* at 24–29.

125. *See id.* at 18.

126. *See id.* at 17 (stating that, in order to be granted asylum in the United States, the child must meet the requirements of Section 101(a)(42)(A) of the Immigration and Nationality Act); UNHCR GUIDELINES ON PROTECTION AND CARE, *supra* note 82, at 17 (noting that the same definition of refugee applies to all individuals regardless of their age).

127. INS Guidelines, *supra* note 116, at 18.

128. Michael Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 162 (1990).

articulate acceptable reasons for fleeing their native countries, or to show a well-founded fear of persecution on one of the five specified grounds.¹²⁹

1. *Articulating Acceptable Asylum Grounds*

Most children's refugee experiences do not readily translate themselves into the rigid asylum claim framework.¹³⁰ A child asylum applicant may be less willing or able than an adult to talk about the experiences that caused the child to leave the country of origin, because doing so would result in reliving the trauma of the past events.¹³¹ Rather than specifically describe their persecution in the native country, children often provide generalized responses, such as they fled because of persecution or war.¹³² Without further probing, these statements alone will not suffice for a successful asylum claim.¹³³ A child's age and level of development, as well as limited knowledge of conditions of the native country or the legal significance of such conditions, further endanger a child refugee's asylum claim.¹³⁴ In addition, some violations of child-specific human rights, and the manner in which these violations occur, are different from those that occur with regard to adults.¹³⁵

2. *Proving Past Persecution*

Not only do child asylum claims fail because of the children's inability to articulate the harm they suffered in the country they fled; a significant weakness in a child's asylum claim stems from the relative concept of persecution.¹³⁶ Harm-engendering situations that amount to persecution when applied to children

129. *Id.*

130. *Id.*

131. INS Guidelines, *supra* note 116, at 5.

132. Olivas, *supra* note 128, at 162.

133. *Id.*

134. See UNHCR GUIDELINES ON POLICIES AND PROCEDURES, *supra* note 110, para. 8.6.

135. See *id.* para. 8.7.

136. Bhabha & Young, *supra* note 41, at 762.

often do not have the same effect on adults.¹³⁷ When directed at adults, such actions may only amount to harassment or interference, but when directed at children, they constitute significant harm amounting to persecution.¹³⁸

Children's heightened sensitivity is one reason for this disparity. Children are more likely to be significantly traumatized by hostile situations because of their age, lack of maturity, and vulnerability.¹³⁹ Children, more so than adults, have a tendency to believe improbable threats or to be terrified by unfamiliar circumstances.¹⁴⁰ Children also experience "serious harm" amounting to persecution when they observe infliction of harm, such as "death, torture, rape, domestic abuse, detention, disappearance, forcible conscription, relocation, . . . 'ethnic cleansing'[,]. . . physical searches, questioning, handcuffing, or rough handling of parents" or close relatives.¹⁴¹

Another reason why children experience persecution to a greater extent than adults is the child's heightened dependence and specific needs for assistance and protection.¹⁴² For an adult, separation from one's parents clearly does not constitute persecution, whereas forced separation from parents or close relatives may be persecution for a child.¹⁴³ This includes children whose parents or caregivers either abandoned or abused them.¹⁴⁴ Other violations that may rise to the level of persecution include denial of social or economic rights, such as the right to

137. *Id.*

138. *Id.* Even though the harm a child fears or has suffered may be relatively less than that of an adult, it may still qualify as persecution. INS Guidelines, *supra* note 116, at 19.

139. *See* *Civil v. INS*, 140 F.3d 52, 62 (1st Cir. 1998) (dissenting opinion) (reasoning that the fear experienced by a teenager had a "far greater and more long-lasting impact on someone of her age than it would have had on a full-grown adult.").

140. Bhabha & Young, *supra* note 41, at 762.

141. *Id.* at 762–63.

142. *Id.* at 763.

143. *Id.*; *see also* *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring) (suggesting that a young child's experience of losing her parents and brother amounts to persecution).

144. Bhabha & Young, *supra* note 41, at 763.

education, health care, food, or shelter.¹⁴⁵

U.S. law further requires the asylee to have suffered persecution by governmental or non-governmental action that the government is either unwilling or unable to control.¹⁴⁶ This requirement presents difficulties in adjudication of child asylum claims, because they do not always fall prey to governmental or institutional persecution.¹⁴⁷ On the contrary, it may be the home that is the locus of the child's persecution.¹⁴⁸ Absent government involvement in persecution, however, a child bears the burden of proving that the government was or should have been aware of the persecution, yet did not interfere on behalf of the asylum applicant.¹⁴⁹ In order to prove lack of state protection, the child applicant must show that he or she in fact sought such protection and was denied.¹⁵⁰ This requirement overlooks the child's probable inability to identify the persecution or even petition the proper authorities to alleviate the persecution.¹⁵¹ Even if the child's parents could represent him or her, they may often fail to seek protection for the child "because of a lack of competence, confidence or interest."¹⁵² Moreover, parents or adult caregivers may be implicated in or acquiescent to the persecution.¹⁵³ In such a situation, they would undoubtedly be unwilling to intervene on the child's behalf.¹⁵⁴ Consequently,

145. *Id.*

146. *See* UNHCR HANDBOOK, *supra* note 30, para. 34; 8 U.S.C. § 1101(a)(42) (2000).

147. Bhabha & Young, *supra* note 41, at 763.

148. *Id.*

149. *Id.*

150. *Id.* An exception exists for when seeking government protection would be futile given the circumstances or the government's record of engaging in child-related misconduct. *Id.*

151. *Id.* at 764.

152. *Id.*

153. *Id.* Parents directly or indirectly participate in the abuse when they sell their children, force them into marriage or hazardous work, or subject them to abuse or female genital mutilation. Parental acquiescence to abuse may include conscription into government or guerilla armies, as well as physical or sexual abuse by the parent's partner. *Id.*

154. *See id.*

child asylum applicants attempting to escape from situations in which their parents are unable or unwilling to protect them by seeking governmental aid are effectively excluded from applying for asylum.¹⁵⁵ Because they have no other spokesperson to mediate on their behalf, child asylum applicants are unable to prove that the government was in fact unable or unwilling to protect them.¹⁵⁶

Incidental to the problem of seeking governmental protection is the possibility of internal relocation in the country of origin rather than seeking asylum abroad.¹⁵⁷ “When a non-state actor is involved . . . [a] determination that a government is unable or unwilling to protect a child should include an assessment of whether or not the lack of protection is limited to a specific geographic area or extends nationwide.”¹⁵⁸ The application of this requirement to children ignores the fact that while a child may have momentarily escaped persecution in one part of his or her country, it may not have been reasonable or even feasible for the child to relocate alone.¹⁵⁹

Therefore, immigration authorities, which apply adult standards to child asylum claims, may fail to recognize children’s special rights and circumstances warranting their recognition as asylees.

3. *Proving Well-founded Fear of Persecution*

Proving a well-founded fear of persecution may also present some evidentiary difficulties for an unaccompanied child-applicant.¹⁶⁰ A well-founded fear of persecution is a combination

155. *See id.* But see INS Guidelines, *supra* note 116, at 26 (stating, “[t]he fact that a child did not specifically seek protection does not necessarily undermine his or her case, but instead the adjudicator must explore what, if any, means the child had of seeking protection”).

156. Bhabha & Young, *supra* note 41, at 763–64.

157. INS Guidelines, *supra* note 116, at 26.

158. *Id.*; see, e.g., Matter of A-E-M-, 21 I. & N. Dec. 1157, 1160 (BIA 1998) (noting that no evidence was provided as to whether the applicants feared persecution throughout the country).

159. INS Guidelines, *supra* note 116, at 26.

160. Bhabha & Young, *supra* note 41, at 766. In the case of minors accompanied by

of both a subjective fear of the persecution and objective factors that make the fear reasonable.¹⁶¹ The balance between the subjective fear and the objective circumstances may be more difficult to assess in the case of child applicants.¹⁶²

The law presumes that a child is developmentally unable to experience a fear of persecution unless a child demonstrates a level of maturity rendering the child capable of perceiving and experiencing such fear.¹⁶³ The *Handbook on Procedures and Criteria for Determining Refugee Status* assumes that, in the absence of contrary indicators, adolescents over the age sixteen may be regarded as sufficiently mature to have a well-founded fear of persecution, whereas “[m]inors under sixteen years of age . . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult.”¹⁶⁴

In addition to difficulties arising out of the child’s level of maturity, unaccompanied minors face the challenge of having to prove a well-founded fear from the perspective of a reasonable person in the same circumstances as the applicant.¹⁶⁵ As adult officials decide asylum claims of children, they encounter situations that would not cause a “reasonable” adult to have a

their parents or family members on whom a child is dependent, the minor’s asylum claim is decided on the principle of family unity. UNHCR HANDBOOK, *supra* note 30, para. 213.

161. *Cardoza-Fonseca v. I.N.S.* 480 U.S. 421, 440 (1987) (citing *Matter of Acosta*, 19 I. & N. Dec. at 224, *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), *vacated in part on other grounds by Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997)). This is the precedential decision on the issue. *See id.* Among the objective factors are the “circumstances of the parents and other family members, including their situation in the child’s country of origin.” INS Guidelines, *supra* note 116, at 20; *see also Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (finding evidence of mistreatment of one’s family probative of a threat to the applicant). *But see Matter of A-E-M*, 21 I. & N. Dec. at 1160 (concluding that the reasonableness of fear of persecution is reduced when the family remains safely in the home for a long time after the applicant’s departure).

162. INS Guidelines, *supra* note 116, at 20.

163. *See* UNHCR HANDBOOK, *supra* note 30, para. 214 (noting the need for evaluation of the child by experts conversant with child mentality).

164. *See id.* para. 215.

165. *Matter of Mogharrabi*, 19 I. & N. Dec. at 448; *Bhabha & Young*, *supra* note 41, at 767.

well-founded fear of persecution.¹⁶⁶ It is the child's heightened sensitivity and dependence that allow dramatic and frightening events to have a far greater impact on the child than they would have on an adult.¹⁶⁷

4. *Proving Persecution on Account of Political Opinion*

As with articulating a fear of persecution, the child's age and maturity affects his or her ability to prove persecution resulting from a political viewpoint held by the child.¹⁶⁸ The *INS Guidelines* justly observe that it may be particularly more difficult for younger children to establish such claims successfully.¹⁶⁹ In some cases adjudicators have found no persecution on account of political opinion merely by concluding that the persecutors could not have regarded the child capable of forming a political opinion.¹⁷⁰ Such a finding ignores the capacity of very young teenagers to hold political opinions, especially when family members have been involved in political or activist movements.¹⁷¹ Moreover, regardless of the actual political opinions held, the child may be persecuted because of an opinion the persecutor imputes to the child.¹⁷² The circumstances in which such situations may arise include inhabitants of

166. Bhabha & Young, *supra* note 41, at 767.

167. *Id.* “[A] child sold into slavery by her parents may reasonably fear that she would be sold again if returned, whereas an adult victim of trafficking or smuggling if returned may be able to use his or her greater independence to establish a different life.” *Id.*

168. *INS Guidelines*, *supra* note 116, at 22.

169. *Id.*; *cf.* *Cruz-Diaz v. INS*, 86 F.3d 330, 332 (4th Cir. 1996) (stating, “[t]he guerrillas’ conscription of Cruz-Diaz as a child, his fleeing from the guerillas, and his hiding from both the guerrillas and the army and fleeing for fear of retribution from both does not establish a political opinion on his part”). But the *INS Guidelines* note that “[b]ecause the level of children’s political activity varies widely among countries, . . . Asylum Officers should not assume that age alone prevents a child from holding political opinions for which he or she may be persecuted.” *INS Guidelines*, *supra* note 116, at 22.

170. Bhabha & Young, *supra* note 41, at 765; *see* *Civil v. INS*, 140 F.3d 52, 55 (1st Cir. 1998) (noting the immigration judge’s conclusion that “it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children”).

171. Bhabha & Young, *supra* note 41, at 765.

172. *Id.*

particular villages or members of a given family, tribe, or religion.¹⁷³ In such cases, it is the adjudicator's responsibility to examine the child's family history as well as the child's understanding of the family's activities in order to determine whether these activities could have given rise to the child's persecution based upon imputed political opinion.¹⁷⁴

5. *Proving Persecution on Account of Membership in a Particular Social Group*

The most frequent social group pertinent to child asylum claims is membership in the child's own family.¹⁷⁵ This bears special significance for accompanied children whose claims are derived from those of adults accompanying them as well as for unaccompanied children who claim persecution or fear thereof based upon membership in their family.¹⁷⁶ Similarly, a child may claim persecution on account of membership in a particular social group in cases where the child's parents, relatives, or fellow villagers have been killed, tortured, or imprisoned.¹⁷⁷

Possession of a broadly-based characteristic, such as youth,

173. *Id.*

174. INS Guidelines, *supra* note 116, at 22.

175. Bhabha & Young, *supra* note 41, at 765; *see also* Thomas v. Ashcroft, 359 F.3d 1169 (9th Cir. 2004) (finding extended family constituted social group for purposes of the asylum claim in this case); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (stating, "a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people"); Aguirre-Cervantes v. INS, 242 F.3d 1169, 1174-75 (9th Cir. 2001) (accepting that the applicant for asylum was "persecut[ed] on account of her membership in a family, in which her father is a perpetrator of domestic violence."), *vacated per stipulation* 273 F.3d 1220 (9th Cir. 2001); Campos-Guardado v. I.N.S., 809 F.2d 285 (5th Cir. 1987). *But see* Estrada-Posadas v. INS, 924 F.2d 916, 919 (9th Cir. 1991) (holding that the concept of persecution on account of membership in a particular social group does not extend to the persecution of a family).

176. Bhabha & Young, *supra* note 41, at 765. "Thus, the child or other relative of a political opponent of a regime may be eligible for asylum simply on the basis of that family group membership, since he or she is vulnerable to imprisonment, violence or other persecutory behavior irrespective of his or her own views or behavior." *Id.*

177. *Id.* at 766. Bhabha & Young suggest that in such cases the social group could be defined as consisting of "children who have been traumatized by witnessing the persecution of their parent." *Id.*

is usually insufficient for a classification in a social group.¹⁷⁸ This is because the term “particular social group” does not “encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance.”¹⁷⁹

One commentator points out, however, that group membership of a child asylum applicant could be defined by child-specific persecution.¹⁸⁰ Examples of such groups could be children directly abused by their government through conscription as child soldiers or treated as “non-persons” before the law as a result of being born a “second child” in violation of a government’s one-child policy.¹⁸¹ Another possible child-specific social group category could involve situations in which “the government acquiesces in cultural or social practices for which there is no persecutory intent but which nevertheless are capable of rising to the level of persecution, such as child marriage, sati, [female genital mutilation], and involuntary child abandonment.”¹⁸² Finally, the third proposed broad social group would embrace instances where “the government has failed to adequately and appropriately protect children whose adult caregivers are primarily responsible for the persecutory treatment, such as in cases of incest, child abuse, child sale, bonded child labor, child abandonment, or child trafficking or smuggling for prostitution or forced labor.”¹⁸³

178. *See* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

179. Sanchez-Trujillo, 801 F.2d at 1576; Matter of Sanchez and Escobar, 19 I. & N. Dec. 276, 285–86 (rejecting as overly broad a social group consisting of young Salvadoran men, ages eighteen to thirty, who were urban, working class males of military age).

180. Bhabha & Young, *supra* note 41, at 766.

181. *Id.* (citing Cheung v. Canada, [1993] 2 F.C. 314, in which the court granted asylum to a Chinese woman and her younger daughter, the latter’s social group being that of second children born in contravention of China’s one-child policy, who would not receive food subsidies, would receive a low-grade education, and might not be allowed to register for school).

182. *Id.*

183. *Id.* (citations omitted).

V. RELIEF

A. Congressional Mandate

In the United States, the Constitution endows Congress with the plenary power to regulate immigration policy and rates.¹⁸⁴ Accordingly, the U.S. federal court system is generally deferential to Congress¹⁸⁵ and those departments and agencies within the executive branch entrusted with reviewing immigration law matters, partly because Congress appointed the former INS, now incorporated into DHS, as the agency responsible for implementing immigration law public policy.¹⁸⁶ The Supreme Court has also consistently avoided involvement in immigration law matters adhering to the separation of powers doctrine,¹⁸⁷ or political question doctrine.¹⁸⁸

Therefore, the U.S. Congress is the appropriate forum for consideration of any substantive changes in determining unaccompanied minors' asylum claims.¹⁸⁹ It is not only the body constitutionally charged with regulating immigration matters, but also the one that, through the legislative process, considers

184. See U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power "[t]o establish an uniform Rule of Naturalization").

185. See *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) (stating that decisions in immigration matters "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.")).

186. Kristine K. Nogosek, Comment, *It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees*, 24 *HAMLIN L. REV.* 1, 7 (2000) (citing *INS v. Miranda*, 459 U.S. 14, 19 (1982)).

187. *Id.* (citing *Gonahasa v. INS*, 181 F.3d 538, 541 (4th Cir. 1999)). "The judicial deference given to Congress and INS decisions is frequently referred to as the Immigration Law Plenary Power Doctrine." *Id.*

188. See *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Mathews v. Diaz*, 426 U.S. at 81) (stating that alien regulation is "committed to the political branches of the Federal Government"); see also *Fiallo v. Bell*, 430 U.S. at 796 (quoting *Mathews v. Diaz*, 426 U.S. at 81–82) (stating "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.")).

189. Nogosek, *supra* note 186, at 22.

arguments on all sides of the issue.¹⁹⁰ Both “Congress and the public [would] have the opportunity to consider the psychological and physical trauma unaccompanied minors experience in their home countries” if Congress were the forum for effecting changes in United States’ asylum law.¹⁹¹ “Congress [would also] have the opportunity to consider the protection children are granted by other areas of law and determine if alien children will receive similar protection in America’s asylum law.”¹⁹² Bringing the issue of substantive asylum claims of unaccompanied minors before Congress would provide the perfect opportunity to “fully develop the depth of the issue in the context of international and domestic expectations on the treatment of children who have been traumatized through no fault of their own.”¹⁹³ Congress could then consider whether amending the Immigration and Nationality Act¹⁹⁴ “would further the humanitarian policy reasons underpinning grant of asylum.”¹⁹⁵

B. Congressional and Agency Policy Changes

Both Congress and the former INS have demonstrated, through their policy decisions, the willingness and need for adjustment of the current approach to immigrant children. First, the former INS introduced the *INS Guidelines*, which constituted a policy response to the international changes in the procedures employed in dealing with unaccompanied children

190. *Id.* at 21–22.

191. *Id.* at 22.

192. *Id.* In other areas of U.S. jurisprudence, children are held to different standards than adults. *See Id.* at 14–17. In contract law, for example, the infancy doctrine and the lack of capacity doctrine make contracts entered into by minors voidable. *Id.* at 14. Likewise, under the tender years doctrine of tort law, children under a certain age are considered to lack capacity to incur responsibility for their tortious conduct, and the standard of care employed for children differs from that expected of adults. *Id.* at 15–17.

193. Nogosek, *supra* note 186, at 22.

194. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2000).

195. Nogosek, *supra* note 186, at 22.

seeking asylum.¹⁹⁶

Second, unaccompanied children may overcome the filing restrictions that require all applicants to submit their applications within one year of entering the United States.¹⁹⁷ The child applicant may show “extraordinary circumstances,” thus exempting this requirement, by demonstrating that the child applicant was an unaccompanied minor during his or her first year in the United States.¹⁹⁸

The federal regulations make yet another exception for unaccompanied minors. Namely, they provide unaccompanied minors an exemption from “expedited removal,” whereby an asylum-seeker can be immediately returned to his or her homeland before the asylee even enters the United States.¹⁹⁹ Under expedited removal, immigration inspectors may remove individuals at their port of entry without the possibility of further hearing or review.²⁰⁰ In the case of unaccompanied minors, however, “the INS instructed its field officers to place most unaccompanied minors in regular removal proceedings rather than expedited removal.”²⁰¹ Immigration inspection officers are advised to only depart from this recommendation “if the minor commits an aggravated felony in the presence of the INS officer, has been convicted or adjudicated delinquent of an aggravated felony either within or outside the United States, or has previously been ordered removed from the United States.”²⁰²

Another protective mechanism built into the asylum system prevents an immigration judge from accepting admission of removability from an individual under eighteen years of age who

196. See UNHCR GUIDELINES ON POLICIES AND PROCEDURES, *supra* note 110; see also YOUNG, *supra* note 1, at 5–6, 8 (describing Canadian and British models of dealing with unaccompanied refugee children).

197. 8 C.F.R. § 208.4(a)(5)(ii) (1999).

198. *Id.*

199. YOUNG, *supra* note 1, at 7 (citing Memorandum from the INS Office of Programs, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997)).

200. 8 U.S.C. § 1225(b)(1)(A) (2000).

201. YOUNG, *supra* note 1, at 7.

202. *Id.* (citing Memorandum from the INS Office of Programs, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997)).

is not accompanied by a legal representative, near relative, legal guardian, or friend.²⁰³ An immigration judge must exercise “particular care” in determining a minor’s removability and must take into account the minor’s age and status as an unaccompanied minor.²⁰⁴ If a child is under fourteen years of age, the government must personally serve the Notice to Appear on the person with whom the minor resides, and should attempt to also personally serve the near relative, guardian or friend.²⁰⁵

In addition, recent Homeland Security legislation transferred the responsibility for the care and placement of unaccompanied children to the Office of Refugee Resettlement (ORR). ORR is charged with ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child, making and implementing placement determinations, implementing policies with respect to children’s care, encouraging the use of the refugee foster care system whenever possible, conducting inspections of facilities and other entities in which unaccompanied children reside, and compiling and updating lists of qualified professionals who provide guardian and attorney representation services for unaccompanied children.²⁰⁶

The aforementioned developments are indicative of a trend toward recognizing children’s rights and tailoring public policy and law to children’s best interests.

C. *Judicial Intervention*

The courts could become an alternative forum for effecting changes in asylum law as applied to unaccompanied minors.²⁰⁷ The obvious advantage of this approach is that courts “would

203. 8 C.F.R. § 240.10(c) (1999).

204. Matter of Amaya-Castro, 21 I. & N. Dec. 583, 587 (BIA 1996).

205. 8 C.F.R. § 103.5a(c)(2)(ii) (1999).

206. Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202–03 (2002).

207. Nogosek, *supra* note 186, at 21. Immigration courts, which are part of the Executive Office for Immigration Review, Department of Justice, have jurisdiction over asylum applications that have been placed in removal proceedings. 8 C.F.R. § 208.2 (2003).

align the legal standards in asylum law with the legal standards in other areas of law.”²⁰⁸ Such an approach would be beneficial to child asylum claims, because U.S. law often employs different legal standards to children and adults, effectively protecting children from consequences that usually befall similarly situated adults.²⁰⁹

The courts, by thorough examination of each individual claim, has the possibility to expand the interpretation of asylum eligibility.²¹⁰ It can do so by making decisions appropriately reflecting conditions or upheavals in various parts of the world that contribute to the influx of asylum claimants into the United States.²¹¹ Bearing in mind the best interests principle, the judiciary should review children’s claims with special attention to child-specific human rights abuses and the three broad child-specific social group categories discussed above.²¹² The judiciary should further be guided by the fact that the *INS Guidelines* recognize the *CRC* as “embodying standards for the rights of all children, including those children who are refugees.”²¹³ The *INS Guidelines* indicate that some abuses of children’s rights, such as “bonded labor, rape and sexual assault, prostitution, child

208. *Id.*

209. Nogošek, *supra* note 186, at 21.

210. *See* Germain, *supra* note 50, at 40. For example, in the past, courts recognized the following as valid bases for asylum:

[A] family that plays a prominent role in a minority group that is the object of widespread hostile treatment; parents of Burmese student dissidents; Filipinos of Chinese ancestry; young women who are members of the Tchamba-Kunsuntu tribe who have not been subjected to female genital mutilation and who oppose the practice; members of a Somali clan; homosexuals; women who have been subjected to or face being subjected to the practice of Trokosi, a system of indentured sexual servitude to fetish shrines; young, Westernized, educated, Muslim women who voice their political opinion; persons who are HIV positive; students; members of a royal tribal family; members of a tribe, professionals, business people, and highly educated individuals; former members of the national police; government employees; and union members.

Id. at 40–41 (citations omitted).

211. *Id.*

212. *Supra* Part IV.3.e.

213. YOUNG, *supra* note 1, at 13.

soldier issues, [female genital mutilation], and deprivation of food and medical treatment” may lead to meritorious asylum claims.²¹⁴

VI. CONCLUSION

The concept of asylum is clothed within a broader concept of granting protection to individuals who do not qualify to enter and stay in a country under “regular immigration procedures.”²¹⁵ Hence, the decision to grant asylum to unaccompanied children becomes a decision to protect them from harm and persecution, especially because these children have been separated from adults responsible either for their welfare or for their harm.²¹⁶ The current substantive standards, however, deny many unaccompanied children this protection, because they are unable to meet an adult legal standard employed in determining child asylum claims.²¹⁷ Therefore, Congress, the DHS agencies entrusted with immigration policy, and the judiciary should address this problem by implementing the *CRC*’s principle of the child’s best interests to the legislation, regulation, and adjudication of substantive issues concerning unaccompanied child asylum claims. Without revision of the current standards, the lack of changes in the law will injure an unknown number of unaccompanied children seeking protection in the United States.²¹⁸ These children remain in the precarious legal position of fitting child-size experience of persecution into adult-size standards of refugee status.²¹⁹ Therefore, the issue of unaccompanied child asylum claims must be placed on the national agenda.²²⁰

214. *Id.*

215. Hailbronner, *supra* note 30, at 167.

216. Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 *YALE L. & POL’Y REV.* 137, 169 (1989).

217. *See* Nogosek, *supra* note 186, at 21.

218. *Id.*

219. *Id.*

220. *Id.*

*Danuta Villarreal**

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