



Humanitarian Protection for Children Fleeing Gang-Based Violence in the Americas¹

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Executive Summary

By the end of 2011, the US Customs and Border Protection (CBP) began to see a steady rise in the number of Unaccompanied Alien Children (UAC) from Central America, particularly from the Northern Triangle countries—El Salvador, Honduras and Guatemala—arriving to the US-Mexico border. The number of children entering the United States from these countries more than doubled during fiscal year (FY) 2012 and continued to grow through FY 2014. In FY 2013, CBP apprehended over 35,000 children. That number almost doubled to 66,127 in FY 2014, with Central American children outnumbering their Mexican counterparts for the first time. Research has identified high levels of violence perpetrated by gangs and drug cartels in the Northern Triangle countries and Mexico as a primary reason for this surge. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) passed with bi-partisan support in 2008, children from Central America cannot be immediately deported and must be given a court hearing.

In contrast, unless there are indicia of trafficking, Mexican children are returned immediately to their country. Advocates have expressed concern that expedited removal of Mexican children places children with valid humanitarian claims at risk of being returned to harm, including forcible recruitment into drug cartels and trafficking rings. After the spike in arrivals in FY 2014, several members of Congress called for a change in the TVPRA, urging that Central American children be treated like Mexican children and undergo expedited procedures for their removal. Many of their constituents supported such measures. The Obama administration requested additional funds to strengthen border security, speed up deportation procedures and implement

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measures to address the humanitarian crisis in Central America. Groups and individuals across the country came together to provide shelter, medical and psychological care and legal representation to many of these children. Despite these efforts, much needs to be done to ensure that their rights are protected.

This paper provides an overview of the violence perpetrated by gangs and other criminal organizations which compels many children to flee their communities. It describes the US government's obligations to protect UAC upon arrival, and good practices of other governments relating to the protection of child migrants and refugees. It also discusses Special Immigrant Juvenile Status, gang-related asylum case law, and the difficulty of prevailing in asylum claims based on persecution by gangs. It concludes with recommendations to the administration and policymakers to ensure compliance with US obligations under national and international laws.

Introduction: Flight from Northern Triangle Countries and Mexico

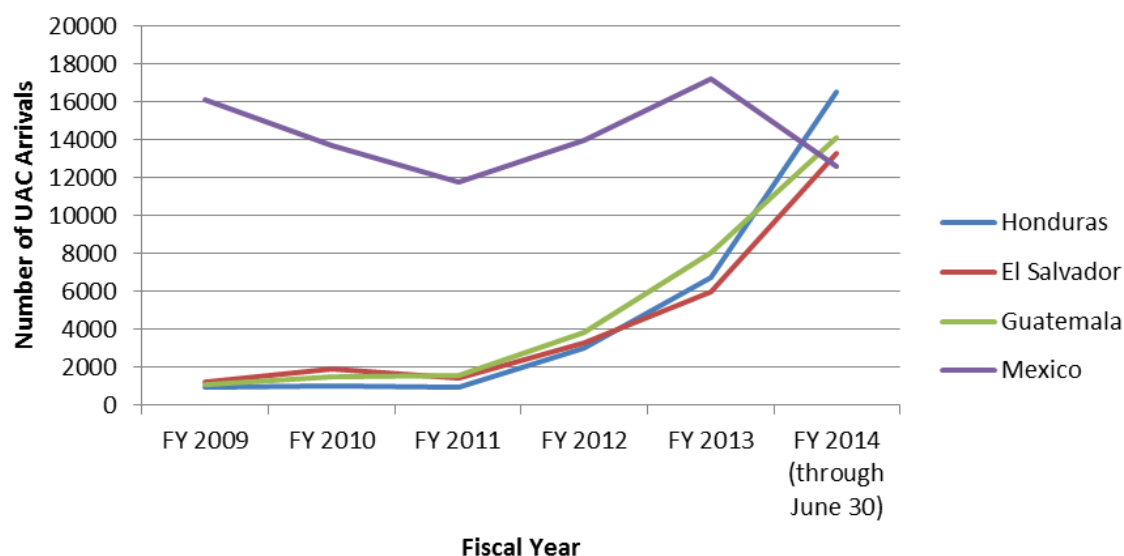
At the end of 2011, the United States started to experience a dramatic increase in arrivals of Unaccompanied Alien Children (UAC)² from Central America, particularly from the countries of El Salvador, Honduras, and Guatemala (CBP 2014). The number of UAC entering the US from these countries more than doubled in fiscal year (FY) 2012 and continued through FY 2014 (ibid.).³ The Department of Health and Human Services Office of Refugee Resettlement (HHS-ORR), which provides for the care and custody of UAC, had a record number of 10,005 children in its care by April 2012 (Jones and Podkul 2012). In FY 2013, the US Customs and Border Patrol (CBP) apprehended over 35,000 unaccompanied children. That number almost doubled to 66,127 in FY 2014, with Central American children outnumbering Mexican children for the first time (CBP 2014).

Various studies, including those commissioned by the United Nations High Commissioner for Refugees (UNHCR), the Women's Refugee Commission, and the American Immigration Council, have attempted to understand the underlying reasons for the dramatic rise in UAC arrivals to the United States⁴ (Jones and Podkul 2012; UNHCR 2014a; Kennedy 2014). Interviews with children have identified high levels of violence perpetrated by gangs and drug cartels as a primary push factor (Jones and Podkul 2012; Kennedy 2014). Other

2 An "unaccompanied alien child" is any child who (1) does not have legal status in the United States; (2) is under 18 years old; and (3) has no parent or guardian in the United States who can care for him or her. 6 U.S.C. § 279(g)(2).

3 During the first quarter of FY 2015, 10,100 children were apprehended at the southwest border, a 39 percent decrease compared to the same period in FY 2014. However, analysts suggest that the numbers will likely accelerate unless measures to address the root causes of flight are implemented. See Meyer et al. 2015.

4 The United States may not always be the default option. Children often try first to relocate within their country, and, if they have family in a nearby country, they are likely to seek protection in a country other than the United States (Kennedy 2014, 4). In fact, UNHCR reported a 432 percent increase in asylum applications from the neighboring countries of Belize, Costa Rica, Nicaragua, Panama and Mexico by individuals from El Salvador, Honduras and Guatemala (UNHCR 2014).

Figure 1. UAC Arrivals by Country of Origin

reasons for their flight include extreme poverty, domestic violence, family reunification, rumors of immigration benefits,⁵ and lack of adequate employment and educational opportunities. A 2014 study conducted by Fulbright Fellow Elizabeth Kennedy in El Salvador found that 90 percent of 322 minors interviewed had family in the United States, but only 35 percent provided family reunification as a reason for attempting to reach the United States (Kennedy 2014, 3). Most of the children interviewed cited fear of crime and violence as the reason for seeking to reunify with family in the United States.

A study by the US Conference of Catholic Bishops found that over 50 percent of children from Honduras, Guatemala, and El Salvador reported that violent crime in their country of origin had influenced their decision to leave home (USCCB 2012, 7-8). About 50 percent of Honduran refugees had witnessed gun or gang-related violence, including the murder of family or friends (*ibid.*, 8-9). Rising levels of gang membership also support the claim that widespread violence and gang activity are an underlying cause of UAC migration to the United States (Seelke 2014). Additionally, children who reach their teenage years start receiving threats and pressure to join gangs, prompting them to undertake a perilous journey at a young age with the hope of attaining long-term security.

This article examines why unaccompanied children have arrived in record numbers to the United States in recent years. It provides an overview of the violence that children face in El Salvador, Guatemala, Honduras and Mexico perpetrated by gangs and other criminal organizations. The article discusses the US government's legal obligations towards children arriving at its borders and describes good practices of other governments relating to the protection of child migrants and refugees. It describes possible forms of relief from

⁵ Some commentators contend that immigration policies such as Deferred Action for Childhood Arrivals (DACA) and rumors spread by smugglers have encouraged the influx. However, recent entrants are not eligible for DACA and the study conducted by Kennedy found that the majority of Salvadoran children interviewed had never heard rumors to the contrary.

deportation with a focus on asylum and Special Immigrant Juvenile Status (SIJS). The article concludes with recommendations for the administration and policymakers to ensure that the rights of these children are protected.

Background: Children and Gangs

Gang Culture in the United States

Much of the violence in Central America and flight of Central Americans north is the consequence of long-term social inequality and poverty throughout the region. Violence in the region grew and spread in large part due to US support of wars against popular movements seeking social change in Northern Triangle countries in the 1970s and 1980s. The violence and displacement over the past decades are the legacy of these wars with consequences not only in Central America but in the United States as well.⁶

The origin of gangs in the United States can be traced as far back as the 1780s. Gangs emerged with particular force when waves of Irish, Italian, Slavic and other immigrants came to the country in the nineteenth century (Thale and Falkenburger 2006; Howell and Moore 2010). Gangs in Central American immigrant communities began to develop in Los Angeles by the 1980s, the Mara Salvatrucha (MS-13) and the 18th Street Gang being the most prominent (Thale and Falkenburger 2006, 2-4; Howell and Moore 2010, 9-12, 14; Seelke 2014). Gangs tend to “originate in communities characterized by poverty, racism, disenfranchisement, deprivation, and low levels of social control” and exposure to violent conflict increases the risk of affiliation (Johnson 2006).

US politicians mistakenly believed that deportation of gang members would remedy the gang problem in the United States. This led, in part, to congressional approval of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which significantly expanded the range of criminal activities and convictions for which immigrants could be deported (Thale and Falkenburger 2006, 4; Seelke 2014, 2-3). Persons with certain criminal convictions became subject to deportation regardless of their length of time in the United States, family and community ties, or status as lawful permanent residents (LPRs) (Johnson 2006). Deportations of thousands of Central Americans occurred at the same time as Guatemala and El Salvador were ending long-term civil wars and Honduras was recovering from low-intensity conflict that left more than ten thousand persons disappeared.

The United States has targeted gang members through programs such as Operation Return to Sender implemented in 2006, and the ongoing Operation Community Shield, launched in 2005 (Thale and Falkenburger 2006, 4; Seelke 2014, 15). Unfortunately, the involuntary return of gang members to countries of origin has resulted in strengthening the transnational link between the Central American and US gangs, without curtailing the level of gang violence in Central America or in the United States (Thale and Falkenburger 2006, 4).⁷

⁶ For in-depth analysis of the history of inequality, poverty and violence in Central America and the role of US foreign policy in the region, see *Understanding Central America: Global Forces, Rebellion and Change* by John A. Booth, Christine J. Wade and Thomas W. Walker (Westview Press 6th ed., 2014).

⁷ See also Seelke 2014 stating that policymakers in Central America have expressed concerns regarding the

Migration flows have reinforced this link and have contributed to the spread of US gang culture throughout Central America (Arana 2005; Thale and Falkenburger 2006, 4; Howell and Moore 2010, 15; Johnson 2014).

In response, Central American governments have adopted highly repressive policing strategies, often referred to as *mano dura* (iron fist), in order to curtail gang violence and to assert control over the increasing rise in gang membership. *Mano dura* laws and policies have made youth gang membership unlawful and apply more “relaxed evidentiary standards” in legal proceedings against them, resulting in massive detention of gang members and harsh prison sentences (Thale and Falkenburger 2006, 3, 5). Gangs now control many of the prisons in El Salvador, Guatemala, and Honduras, operating their criminal activities from within prison walls. Rather than reducing gang activity, these short-term repressive policies have stimulated gangs to go underground, become more organized, commit more violent crimes, become involved in new types of criminal conduct, and lower their public profile (ibid., 4-5, 11, 20).⁸ In addition, gangs are often blamed for crimes actually committed by other parties, and a large number of young men are being arrested merely for having a tattoo or wearing baggy pants (ibid., 3, 5; Seelke 2014, 4).

Violence in Honduras

During the last six years, transnational criminal groups, especially Mexican drug cartels, have increased their presence in Honduras. The 2009 coup that removed President Manuel Zelaya from power exacerbated the instability in the country. Shortly after the coup, Colombian drug traffickers changed their routes and made Honduras the primary point for cocaine transfer to the Mexican cartels (Noriega and Lanza 2013). Local gangs such as the 18th Street gang and the Chirizos have grown in great part due to the presence of the Colombian and Mexican cartels (Gurney 2014). The Honduran police force is one of the most corrupt in the Americas. The government often uses the military to enforce the law and the judicial system is weak (InSight Crime 2014). Gang violence, propelled by drug trafficking and weak law enforcement, has made Honduras one of the most violent countries in the region (*The Economist* 2013).

As of 2012, the most recent year for which global statistics are available, Honduras had the highest homicide rate in the world at 90.4 deaths per 100,000 people (UNDOC 2013). Total homicides increased from a total of 2,417 in 2005 to a peak of 7,172 homicides in 2012, before declining slightly to 6,757 in 2013 (Observatorio de la Violencia 2006; 2013; 2014). The most recent reports released by the Honduran government on December 31, 2014, report that the homicide rate has decreased to 66 per 100,000 inhabitants from a rate of 79 per 100,000 in 2013 (Gagne 2014; *La Prensa* 2015). San Pedro Sula and Distrito Central (an area comprising the capital, Tegucigalpa), had the first and fourth highest homicide

adverse effects of US deportation policies on the region’s gang and security problems and indicating that US law enforcement has compiled evidence that certain imprisoned MS-13 leaders had requisitioned retaliatory killings of people in the Washington, DC metro area and were attempting to unify Salvadoran gang cells with their US counterparts.

⁸ For example, Thale and Falkenburger report that gang members now refuse to get tattoos or wear clothing that would identify them as gang members, making them less visible for law enforcement identification. Seelke observes that *mano dura* techniques proved counter-productive, and falsely-imprisoned youth who were not gang members often became so in prison.

rates in the world outside a war zone, at 169.30 per 100,000 and 101.99 per 100,000, respectively (CCSPJP 2013).

Children and teens have been the primary targets of the “significant increase in both inter-gang and generalized violence” (Jones and Podkul 2012, 9). According to the Washington Office on Latin America, “Honduran boys and men ages 15 to 30 have a one in 300 chance of being murdered” (Jesuits and WOLA 2014). Since 2005, the murder rates for women and girls have increased by 346 percent, while murder rates for men and boys increased by 292 percent (ibid.; Observatorio de la Violencia 2006; 2013; 2014). In the first five months of 2014, over 454 young people under 24 years of age were murdered, with 102 murders occurring in May alone. Of these recent homicides, 64 percent of victims were 18 to 23 years old, while 36 percent were under 17 years old (*La Nación* 2014).

While the statistics do not indicate which proportion of these deaths resulted from gang violence, UNHCR found that about 34 percent of Honduran children were fleeing to escape violence perpetrated by gangs or other criminal groups (UNHCR 2014a). Selvin, a 23-year old Honduran, fled Honduras when he was 16 years old and now lives in Worcester, Massachusetts. He described his experience with gangs as follows: “[t]hose guys, they make you to do things that you don’t want to do. You’re trying to be someone in life, but you can’t, unless you join them selling drugs, killing people. And you didn’t want to do that. You want to be a better person” (Malone and Gaynor 2012).

Police and members of the public in Honduras also engage in violence against poor adolescents, and young men in particular (US Department of State 2014c). Young people who do not belong to a gang and who have not been violently targeted by gangs may fall victim to police and civilian violence, particularly if they are “supposed habitual criminals [or] suspected gang members” and sometimes for no apparent reason at all (ibid.).

Violence in El Salvador

El Salvador’s homicide rate declined from 66 per 100,000 in 2011 to 41.2 per 100,000 in 2012 as the result of a truce between its two biggest gangs, the 18th Street gang and MS-13. However, it still has the fourth highest homicide rate in the world (Jones and Podkul 2012, 10; UNDOC 2013, 122-33). While the homicide rate dropped in 2012, the rate of extortion remained the same, or increased in some areas (Villiers Negroponte 2013). As the truce began to break down, homicides increased by nearly 70 percent in the first half of 2014 (Mejia Giraldo 2014; *El Espectador* 2014). The National Police report a total of 3,912 homicides in 2014—an average of thirteen murders a day—representing a 35 percent increase from the prior year (El Salvador.com 2015).

The 2013 US Department of State Human Rights Report for El Salvador notes that prisoners—including gang members—conduct criminal activities from prison, sometimes with the assistance of prison guards, raising serious concerns about the government’s ability to control the violence, which disproportionately targets children, young adults and single women (US Department of State 2014a).

According to the Women’s Refugee Commission, children are mostly targeted by gang members at their schools, leading to one of the lowest school attendance rates in Latin

America (Jones and Podkul 2012, 10). Women and girls are particular targets of violence, and 580 out of 4,000 murders committed in 2010 were classified as femicides, or gender-based murders (ibid., 11).

UNHCR noted with concern that 72 percent of Salvadoran children interviewed had traveled to the United States after experiencing severe harm, and 66 percent left specifically to avoid violence by gang or criminal groups or because of police incapacity in the face of such threats (UNHCR 2014, 31). Kennedy found that 59 percent of Salvadoran boys and 61 percent of Salvadoran girls identified crime, gang threats, or violence as a reason for migrating (Kennedy 2014, 1). Gang members threatened and beat Mario, age 17, for instance, when he rebuffed their attempts to recruit him and he reported the threats to the police. When the police failed to respond, he fled to the United States with copies of the complaints he filed with the police. Many of his friends had been murdered or disappeared for refusing to join a gang (Malone and Gaynor 2012).

Children frequently recounted witnessing murders, extortion, and threats to family members. UNHCR reported that while boys most often feared gang recruitment and retaliation, girls feared sexual violence. Maritza, age 15, left El Salvador after her uncle told her that a gang member was planning to hurt her. She stated, “in El Salvador they take young girls, rape them and throw them in plastic bags.” After hearing of the threat, Maritza’s family decided that it was safer to send her to the United States to reunite with her mother than for her to remain at home (UNHCR 2014a, 34).

According to Kennedy, children who do not have a gang presence in their neighborhoods “frequently indicated that they expect one to arrive soon,” viewing it as inevitable (Kennedy 2014). Children are targeted by gangs and police alike and have few opportunities. Carlos, a young Salvadoran, described the challenges he faced as a young man in El Salvador. He stated, “[i]n El Salvador, there is wrong—it’s being young. You’re stalked by gangs, the authorities beat and follow kids because they don’t trust them; they think they are gang members. There are no jobs for young people because employers don’t trust the kids either . . . It is better to be old” (Jones and Podkul 2012).

Violence in Guatemala

Almost twenty years after the end of Guatemala’s bloody civil war, the country continues to suffer from pervasive violence committed by gang members and supported by state corruption. Guatemala joins El Salvador and Honduras as a country with one of the highest murder rates in the world. Guatemala’s 2012 homicide rate topped out at 39.9 per 100,000 people, the fifth highest rate in the world (Jones and Podkul 2012; *The Economist* 2013). Guatemala also has one of the highest rates of femicide in the world, along with Honduras and El Salvador (Musalo and Bookey 2013), and anecdotes of gang-perpetrated rapes and femicides abound (see, e.g., UNHCR 2014a; Jones and Podkul 2012; Musalo and Bookey 2013). Although homicide rates have declined in 2014, UNICEF has named Guatemala as the second most dangerous country in the world for children from zero to 19 years of age; El Salvador placed first (UNICEF 2014; Examiner.com 2014).

The MS-13 and 18th Street gang are Guatemala’s most prominent street gangs. Although

they mainly focus on extortion, they are also involved in other major crimes, including kidnapping and bank robberies. While estimates vary widely, the United Nations Office on Drugs and Crime calculated that there were 22,000 members of the MS-13 and 18th Street gangs in Guatemala in September 2012 (UNDOC 2012). Although both gangs are transnational in nature, they are not as centralized and organized as the Zetas (Daughterty 2015), a violent transnational criminal organization from Mexico.

The Zetas have established operations in Guatemala for their drug trafficking, money laundering, and contraband networks. Their presence dates back to 2008 when they first stored narcotics and arms in the northern region of the country. The Zetas' control over local police and the military is growing and they launder their proceeds through private businesses and public contracts. The Zetas bribe local police and their supervisors, members of the judiciary, and prosecutors, to provide information and protection for the maintenance and growth of their operations. They also recruit former military personnel—especially those from the Special Forces known as the Kaibiles—to provide security (InSight Crime 2011; Sacks 2013). The Zetas have been responsible for some of the most horrific violence in Guatemala, including the 2011 massacre of 28 farmhands of Los Cocos farm in northern Guatemala (InSight Crime 2011).

Children from the urban areas of Guatemala are amongst the most vulnerable to the long-lasting problems of food insecurity, targeting and recruitment by gang members, and the rise in the use of force and violence on the part of state militarized security forces (Jones and Podkul 2012, 11). The United Nations has criticized Guatemala for the militarization of its police force, raising concerns of greater violations of human rights in the country (Gagne 2015). Only 20 percent of Guatemalan children interviewed by UNHCR reported fleeing violence in society, including gang violence. However, many stated that they were fleeing domestic abuse, extreme poverty, and state-sponsored violations, which make children more vulnerable to gang recruitment (UNHCR 2014a, 34; US Department of State 2014b, 19).

Canilo, a young Guatemalan who fled to the United States because of gang violence, reported that gang members came to the store where he worked and robbed him. He stated, “[t]hey took me out of the store, and they took the money and they beat me up . . . they were following me everywhere” (Malone and Gaynor 2012).

Violence in Mexico

There are several major drug cartels operating in Mexico, including the Zetas, the Sinaloa Cartel and the Knights Templar, all of them involved in drug trafficking, human smuggling, extortion, and human trafficking. Armed civilian vigilante groups have formed in a number of areas across the country to defend their communities against cartels (*The Telegraph* 2014).

The war against the cartels launched in 2006 by Mexican President Felipe Calderón has resulted in significant violations of human rights (HRW 2014b). It is estimated that more than 120,000 Mexicans died and 27,000 disappeared between 2007 and 2012 (Molloy 2013). Torture is widely practiced by security forces to obtain information and forced

confessions. The criminal justice system rarely provides justice to the victims of violent crimes and human rights violations (HRW 2014b).

Criminal groups in Mexico often engage children in smuggling activities precisely because US authorities deport them back to Mexico with little delay (UNHCR 2014a, 38). Their age, poverty, and exposure to violence from criminal groups and cartels make children vulnerable to trafficking and exploitation (ibid., 38, 39). Criminal organizations force children to engage in “unlawful and dangerous activities,” including smuggling, which facilitates the flight of families and children from Northern Triangle countries who cross the US-Mexico border to escape gang violence in their home countries (ibid.).

The Zetas also regularly kidnap migrants from Northern Triangle countries in Mexico and demand ransom from their family members in the United States. Franklin, for instance, was 16 years old when he fled Honduras and was kidnapped by Los Zetas in Mexico. He noted, “[t]he Zetas are dangerous. They want money, and they want to know if you have family in the US who can pay.” After five days in captivity, Franklin was able to escape and eventually reached the United States (Malone and Gaynor 2012).

US Legal Obligations to Children Fleeing Violence in Their Home Countries

As the number of unaccompanied minors has steadily risen over the years, the US government has developed a structure to address the needs of children seeking protection. In 2002, Congress passed the Homeland Security Act of 2002. The Act eliminated the Immigration and Naturalization Service (INS), created the Department of Homeland Security (DHS) and transferred all of its immigration benefit and enforcement functions to DHS’s Immigration and Customs Enforcement (ICE), CBP, and US Citizenship and Immigration Services (USCIS) (Byrne and Miller 2012, 6).⁹ The Act also transferred responsibility for the care and custody of UAC to HHS-ORR.¹⁰ US law defines UAC as persons under age 18 who lack lawful immigration status in the United States and have no parent or legal guardian who is willing or able to provide them with care and physical custody.¹¹

TVPRA Screening

The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 (TVPRA) governs the treatment of UAC arriving in the United States.¹² The TVPRA instituted screening procedures for UAC that provide different treatment for UAC

9 Homeland Security Act (HSA) of 2002, Pub. L. No. 107-296, § 471(a), 116 Stat. 2135, 2205 (2002).

10 HSA of 2002, § 462(a), 116 Stat. at 2202.

11 6 USC § 279(g)(2) (2012). Typically, this means that “if a parent or legal guardian is not present to provide care (or cannot be present within a short period of time) that child is technically considered unaccompanied and processed accordingly” (quoted in Zamora 2014). Thus, a child may have relatives in the United States, but if they live on the opposite coast and do not have the money to travel, the child will likely be classified a UAC (see ibid.).

12 William Wilberforce, Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §235, 122 Stat. 5044, 5074-82 (2008) (codified as amended at 8 USC § 1232).

from contiguous countries (i.e., Mexico and Canada) than for UAC from other points of origin (Seghetti, Siskin and Wasem 2014).¹³ While federal immigration law mandates that unaccompanied children from non-contiguous countries be admitted and placed into the custody of HHS, similarly-situated children from Mexico do not have the same rights and can be deported within 24 hours of their arrival if they do not have a valid humanitarian protection claim.

CBP must screen all incoming UAC (or suspected UAC) within 48 hours to determine whether they are UAC from a contiguous country and, if so, whether they have been victims of trafficking or persecution (Seghetti, Siskin and Wasem 2014, 3-5).¹⁴ Those UAC from contiguous countries who fear persecution or may have been victims of trafficking must be transferred immediately to HHS-ORR. UAC from contiguous countries who are not found to have a credible fear of persecution or to have been trafficked may be allowed to withdraw their application for admission to the United States and voluntarily return to their country rather than be placed in removal proceedings (*ibid.*).¹⁵ The number of Mexican children who enter HHS-ORR custody is small (Graham 2014).

Reports have shown that most Mexican children do not receive adequate screening at the border. UNHCR found that despite the US government's legal burden to establish that each Mexican UAC does not have an international protection need during the TVPRA screening, CBP's operational practices reinforce a presumption of an absence of a protection need. During field missions to the border, UNHCR personnel observed a bias by CBP officers which desensitized them to the needs of Mexican children (UNHCR 2014b).

ICE must transfer all UAC arriving from *non*-contiguous countries such as El Salvador, Guatemala, and Honduras to HHS-ORR custody within 72 hours; these children are typically subject to removal proceedings and may begin an application for asylum or other immigration relief in the course of those proceedings (Seghetti, Siskin and Wasem 2014, 3-4, 8).¹⁶

Prior to the TVPRA, there were many obstacles for UAC who hoped to obtain legal immigration status in the United States, whether through Special Immigrant Juvenile Status (SIJS),¹⁷ political asylum, or other means (USCCB 2012). SIJS applicants often aged out of eligibility because USCIS had no mandatory processing deadline, and some would-be applicants could not even apply because DHS refused to provide its consent, which was a pre-requisite. Furthermore, successful applicants did not have access to the specialized, federally-funded foster care programs that now exist (*ibid.*). Likewise, underage asylum applicants did not benefit from a tolling of the one-year bar, and they were required to pursue their cases before a federal immigration court instead of through USCIS (*ibid.*).

Enactment of the TVPRA eliminated many of these barriers (USCCB 2012, 3-5, 8).

13 8 USC § 1232 (2012).

14 8 USC § 1232(a)(2).

15 8 USC § 1232(a)(2) (2012).

16 8 USC § 1232(a)(4), (b)(3) (2012).

17 For those UAC who do not qualify for asylum, SIJS may be the only immigration relief available. SIJS allows children who come to the United States—legally or not—to adjust to permanent resident status if they have been abused, abandoned, or neglected by at least one parent. SIJS may be available to children who are unmarried, under 21, and physically present in the United States at the time of filing (USCIS 2014a).

Additionally, it provided that SIJS applicants only had to prove that reunification with one parent—rather than both—was not possible due to abuse, neglect, or abandonment, and that return to their home country was not in their best interest (*ibid.*, 8).¹⁸ Unfortunately, because of their limited access to this form of protection, Mexican minors who are apprehended at the border are unable to apply for SIJS.

It is important to note that until the recent influx of unaccompanied children at the border, the TVPRA had a history of bipartisan support dating back to 2000, when Congress originally passed the law. The TVPRA was reauthorized in December 2008 by Congress and signed into law by President Bush.

Shortly after the surge in arrivals of families and unaccompanied children at the border in 2014, President Obama requested \$ 3.7 billion in emergency supplemental funding to respond to their needs.¹⁹ In response to the president's request, several members of Congress introduced legislation seeking to amend the TVPRA in order to be able to apply the same standards to Central American children that apply to Mexican children. These bills included provisions to expedite screening and removal of all unaccompanied children arriving at the border and to detain children until proceedings were finalized (Zamora 2014).

With the exception of advocacy groups, few in the public or private sectors have suggested that Mexican children should be provided the same procedural protections at the border as their Central American counterparts. This is particularly troubling given the length and breadth of violence suffered by children in Mexico, including gang and cartel violence, violations committed by the military and police, domestic abuse and human trafficking.

Apprehension and Detention of Unaccompanied Minors

Typically, UAC enter the immigration system through apprehension and detention at a port of entry by ICE, CBP or the US Coast Guard. Less commonly, they may be apprehended internally by local, state, or federal authorities (Byrne and Miller 2012, 9-10). In the latter scenario, UAC who have entered the juvenile or criminal system can be transferred to DHS detention facilities (*ibid.*, 10). After DHS takes UAC into its custody, they are then transferred to a temporary detention facility. This temporary detention facility is where preliminary DHS processing occurs, in which an initial determination of UAC status is conducted (*ibid.*).

If the child is an *accompanied* minor from a contiguous country (Mexico or Canada), he or she will be removed with his or her parent or guardian unless it is suspected that he or she may be a victim of trafficking or fears persecution. If the child is an accompanied minor from a non-contiguous country, he or she will be placed in family detention facilities, from which DHS will initiate removal proceedings. If older than 18 years of age, he or she will be placed in DHS custody, from which point removal proceedings will be initiated.

¹⁸ 8 USC § 1232(d) (2012).

¹⁹ White House Fact Sheet: Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border (July 8, 2014), available at: <https://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu>.

Different detention procedures apply for *unaccompanied* children. If the child is unaccompanied, under 18 years of age, and Mexican or Canadian, a voluntary return process will be initiated by DHS unless the child fears persecution or may be the victim of trafficking.²⁰ If the child is from a non-contiguous country, DHS will initiate removal proceedings and transfer the child to the custody of HHS-ORR's Division of Unaccompanied Children's Services (DUCS).

ORR provides care for children in its custody through a network of private and nonprofit entities and governmental juvenile agencies (Byrne and Miller 2012, 14). Services such as education, health care, recreational activities, vocational training, mental health services, case management, and, if possible, efforts to reunite the child with family, must be provided (ibid.; Women's Refugee Commission 2009, 5).

ORR initially places children according to the information provided by ICE regarding age, gender, country of origin, date and location of apprehension, and medical and psychological condition. Children are placed in shelter care, staff-secure care, secure care, and transitional (short-term) foster care, based on their special needs, criminal record and age (Women's Refugee Commission 2009). According to a Vera Institute of Justice report, 80 percent of children are transferred to shelter care, four percent to secure care, another four percent to staff-secure care, and the rest to short-term care (ibid., 15).

Typically, when children are transferred to HHS-ORR-affiliated long-term foster care programs, they undergo a second screening process to determine their eligibility for any form of immigration relief, including SIJS, asylum, T non-immigrant visa (T visa), and U non-immigrant visa (U visa) (USCCB 2012, 3-5). However, a study conducted by the US Conference of Catholic Bishops Migration and Refugee Services (USCCB/MRS) revealed that very few UAC who applied for asylum were granted asylum, and none of the UAC in USCCB/MRS custody had successfully applied for a U or T visa (ibid., 12). Children had much higher success rates with SIJS applications (ibid.).

Protection of Minors: A Global Perspective

Convention on the Rights of the Child: Providing Emergency and Humanitarian Aid to Children

As of August 1, 2014, 194 states are parties to the Convention on the Rights of the Child.²¹ Although the United States signed the Convention, it has not ratified it. The United States and Somalia remain the only two signatories who have not ratified this treaty.²² While the Convention is not binding in the United States, many of its provisions have been

20 See Byrne and Miller 2012 diagramming pathways through the immigration system for an arriving alien child.

21 *Databases: Convention on the Rights of the Child*, UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en#17 [hereinafter *Databases*]; *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf> [hereinafter *Convention*].

22 *Id.*

incorporated into US law.²³

The Convention defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”²⁴ The Convention requires that states parties take appropriate measures to ensure that child refugees and children seeking refugee status receive protection and assistance from the state.²⁵ Furthermore, the Convention lays out a number of rights related to the treatment of unaccompanied minors and victims of violence, including:

- States parties are obliged to protect children from trafficking, drugs, and exploitation, whether economic, sexual, or otherwise.²⁶
- States parties must undertake appropriate measures to help child victims heal physically and psychologically from any abuse, exploitation, or violence they have suffered.²⁷
- Children have a right to health care and an adequate standard of living.²⁸
- States must provide care and custody when a child’s parents or guardians are unable or unavailable to do so.²⁹

Best Interests of the Child Standard and US Practices

These obligations conform to one of the Convention’s foundational concepts: that states parties must act in the best interests of the child.³⁰ The “best interests of the child” standard has deep roots in US domestic and international law (Carr 2009).³¹ In instances of abuse and neglect, child custody battles, and other lawsuits involving children, courts seek to determine the child’s best interests when crafting an appropriate legal solution (ibid., 125-26).

In immigration law, however, the “best interests of the child” standard rarely applies. Prior to 2008, a federal court settlement, known as the Flores Settlement Agreement, served as the guideline for treatment of UAC and included no requirement relating to the “best interests of the child” (Hill 2010, 91-97). The United States added “best interests of the child” language to the TVPRA in 2008, requiring UAC in HHS-ORR custody to “be promptly placed in the least restrictive setting that is in the best interest of the child” (Hill 2010).³² However, this standard does not necessarily apply in determining a legal remedy for the

23 *Databases.*

24 Convention art. 1.

25 *Id.* art. 22.

26 *Id.* art. 32–36.

27 *Id.* art. 38.

28 *Id.* art. 24, 27.

29 *Id.* art. 20.

30 *Id.* art 3.

31 The UN Committee on the Rights of the Child asserts that the standard must be read in light of the Convention’s goals and other protections and should not be taken out of context to justify corporal punishment or more extreme practices detrimental to a child’s life and human dignity. Rep. of the Comm. on the Rights of the Child, at 42 ¶ 61, 65th Sess., UN Doc. A/67/41 (2012), available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=dtYoAzPhJ4NMy4Lu1TOebFNrDp8XISC5b81sCc2pljDCS0TyCmeD87%2f%2bN SaPcKfgyIT8SJXek9PC0bOS6OpnrW7Yz3UVb6SWt9LEe31wrZE%3d>.

32 See also 8 USC §1232(c)(2)(A).

child, who may be treated exactly like an adult under US immigration law.³³ Furthermore, US immigration law too often discards this standard for the sake of expediency or other priorities (Carr 2009, 126; Cavendish and Cortazar 2011, 46-47). After recent allegations that CBP officers have mistreated UAC while in custody, CBP has initiated an internal investigation, but stories of substandard UAC and family detention conditions abound (Preston 2014; Hennessy-Fiske and Carcamo 2014).

Despite progress in the development of US legal standards governing the treatment of UAC, Human Rights Watch has criticized sub-par screening processes:

Under current US policy, unaccompanied migrant children who may be refugees must undergo initial asylum screenings and some trafficking screenings by armed and uniformed CBP officers. By contrast, international standards say it is in unaccompanied children's best interests to be assessed in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques. (HRW 2014a)

Unaccompanied children are generally held in shelters or temporary holding facilities by the US government upon apprehension. While these facilities are distinct from adult detention centers, they are secure. The practice of housing children in detention-like conditions is extremely detrimental to their well-being given their vulnerability (Corlett et al. 2012; Farmer 2013; Plumer 2013). To worsen matters, the United States does not guarantee the right to free legal representation for unaccompanied children, despite international community recommendations that children should be provided counsel especially in court proceedings (Jones and Podkul 2012, 26). The United States recognizes the importance of legal counsel for children in other contexts—its own child welfare system provides representation for minors in the court system as a safeguard of a child's interests in the outcome of his or her case (ibid.).

Other Country Practices Relating to Migrant and Refugee Children

While no one state implements all of the Convention's articles perfectly, a number have developed practices worth adopting, some of which are detailed below.

Sweden

In 2009, Sweden was among the states parties that had strictly complied with the Convention's recommendations and had implemented new legislation and public laws to enhance and protect the rights of children. For example, 2006 legislation divested the Swedish Migration Board of the care and responsibility of UAC and transferred that responsibility to municipalities, who have more experience in the care and integration of children into their communities.³⁴ Sweden also enacted anti-discrimination legislation,

³³ See, e.g., 8 USC § 1158 (establishing requirements for asylum, which apply equally to children and adults).

³⁴ Concluding Observations of the Committee on the Rights of the Child: Sweden, at 2, 51st Session., UN Doc. CRC/C/SWE/CO/4 (2009), on file with the authors [hereinafter Concluding Observations: Sweden].

which entered into force on January 1, 2009. The legislation included age as a protected ground and also prohibited discrimination throughout the education system. Furthermore, it established the Office of the Equality Ombudsman which is responsible for implementing the law.³⁵

On a related note, the Swedish Migration Board is very careful in its age assessment procedures for incoming UAC. Children are interviewed by an official who makes an initial determination of age based on a range of factors, not just physical appearance. In cases where the immigrant's age is uncertain, officials may pursue additional investigation or request x-rays to help determine his or her age (Corlett et al. 2012, 65). In case of continuing doubts, the case will be resolved in favor of the immigrant (ibid.).

Even after the enactment of the Anti-Discrimination Act in Sweden, the Committee on the Rights of the Child, the treaty body which monitors the implementation of the Convention, was concerned that such laws would not eliminate discrimination in practice and criticized “*de facto* discrimination against and xenophobia and racist attitudes towards children of ethnic minorities, refugee and asylum-seeking children, and children in migrant families.”³⁶ The Committee commended legislation passed in 2008 that provides asylum seekers and former asylum seekers a right to health care and medical services similar to that of children with legal residency status.³⁷ However, the Committee expressed concern that undocumented children had access only to urgent medical care. It also noted that large numbers of unaccompanied asylum-seeking children disappear from reception centers, even after the responsibility for their housing and custody has been transferred to municipalities. It also criticized the absence of legislation to appoint a temporary legal guardian within 24 hours of a UAC's arrival.³⁸

Belgium

Belgium has also implemented a number of praiseworthy laws and programs for the humane treatment of arriving UAC.³⁹ The International Detention Coalition has highlighted Belgium's guardianship procedures and housing and detention policies as worthy of imitation (Corlett et al. 2012, 66, 75, 85).

Immigration authorities in Belgium have no connection to Guardianship Services, the entity that appoints guardians for arriving children. Ultimately, the guardian ensures the child's overall mental and physical wellbeing. This involves finding housing and a lawyer for the child and helping him or her to navigate the country's legal system. It also requires developing a relationship of trust as the guardian proceeds to resolve problems and find a long-term solution for the child (ibid., 66).

35 *Id.*

36 *Id.*

37 *Id.* at 14.

38 *Id.*

39 Concluding Observations of the Comm. on the Rights of the Child: Belgium, 54th Sess., U.N. Doc. CRC/C/BEL/3-4 (2010), available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsK8r1vpHio%2fg7Mp83cTcS1c05QT5mnR5thnCrmZ3uitpq9%2fANfxMfS0dGWqJIH76%2bJZ%2f9Ef3M18BxdhvcysWt%2fR46vm6bL6qs8qRTOHy7vbg> [hereinafter Concluding Observations: Belgium].

Belgium offers a variety of housing options for arriving minors, including collective housing facilities, individual housing, and autonomous living with guidance from guardians (72). Belgium also avoids detaining children and families that are required to return to their country of origin, instead lodging them in “return houses,” where they generally have access to education and appropriate medical care (85).

Potential Legal Protections for Minors in the United States

While there exist a number of legal protection options for minors in the United States, including T and U visas, for victims of trafficking and other crimes, DACA, and relief under the Violence Against Women Act, this section will focus only on asylum and SIJS.⁴⁰

I. Asylum

A. Eligibility Criteria

US law establishes baseline requirements for asylum in 8 USC § 1158. To qualify, a person must meet the definition of a refugee as defined in the statute, must satisfy procedural filing requirements and must not be statutorily barred from asylum.⁴¹ The Immigration and Nationality Act defines “refugee” as “any person who is outside any country of such person’s nationality...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...”⁴² US law requires that the protected ground (e.g., political opinion, social group) be “at least one central reason” for the persecution.⁴³

Most gang-based asylum claims rely on the particular social group or political opinion categories, although cases have succeeded on religious grounds as well, where applicable.⁴⁴ Since the issuance of the Supreme Court’s decision in *INS v. Elias-Zacarias*,⁴⁵ courts have also put particular emphasis on the “nexus” language in the definition of refugee, which requires persecution “on account of” one of the enumerated protected categories.⁴⁶ In other

40 For information on T and U visas, visit the website of ASISTA, a nongovernmental organization dedicated to the protection of immigrant survivors of domestic violence and sexual assault at: http://www.asistahelp.org/en/about_asista/.

41 INA § 208; 8 USC § 1158.

42 INA §§ 101(a)(42)(A), 208; 8 USC §§ 1101(a)(42)(A), 1158. See also, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST. 6223, T.I.A.S. 6577 (establishing the international bases for refugee status, which correspond to the US definition in 8 USC § 1101(a)(42)(A)).

43 INA § 208(b)(1)(B)(i); 8 USC § 1158(b)(1)(B)(i).

44 See, e.g., *Matter of __*, (Newark, N.J., May 13, 2008), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (Case ES.017) (granting asylum based on 16-year-old girl’s evangelical Christian views); *Matter of __*, (Arlington, Va., March 20, 2008), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (Case H.019) (granting asylum after determining that his Pentecostal Christian religion was one central reason for the young man’s persecution).

45 502 US 478, 483 (1992) (holding that neutrality is not a political opinion).

46 INA § 208(b)(1)(B)(i); 8 USC § 1158(b)(1)(B)(i).

words, there must be some objective indication that the claimant was persecuted *because of* his or her political opinion, social group, or other category, and not merely because he or she refused to fight with guerillas or join a gang, for example.⁴⁷

This poses a challenge in asylum cases, where refusal to join a gang does not, on its own, constitute expression of a political or religious opinion or membership in a particular social group.⁴⁸ In fact, “[a]djudicators [of gang-based asylum claims] have been quick to conclude that gangs are motivated by the desire to increase their ranks, wealth, or power” rather than by the victim’s political opinion, religion, or social group membership.⁴⁹ This has been particularly problematic in political opinion and religious persecution cases, since persecutors rarely share with their victims the precise reasons for their beating, kidnapping, or torturing (Frydman and Desai 2012, 15).⁵⁰ Social group cases often fail in the first instance on social visibility and particularity grounds, as discussed below (ibid.).

B. Gang-Related Asylum Case Law

1. Particular Social Group

Courts have uniformly adopted the Board of Immigration Appeals’ (BIA) formulation of particular social group in *Matter of Acosta* as one whose members “share a common, immutable characteristic...that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”⁵¹ *Matter of Acosta* goes on to specify that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience...”⁵²

However, subsequent decisions have altered the *Acosta* formula, creating challenges for gang-based asylum seekers. In 2008, the BIA decided *Matter of S-E-G-*,⁵³ which officially designated “social visibility” and “particularity” requirements for social group membership. Its companion case, *Matter of E-A-G-*,⁵⁴ rejected the claimants’ two proposed social groups for failure to meet these new requirements: (1) “young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons” and (2) “family members of such Salvadoran youth.”⁵⁵ *Matter of E-A-G-* refused social group status to “persons resistant to gang membership” for lack of social visibility⁵⁶ and rejected the proposed group of “young persons who are perceived to be affiliated with gangs” because association with criminal entities—and thus the mistaken perception that one is involved with such entities—cannot underpin an asylum claim.⁵⁷

47 *INS v. Elias-Zacarias*, 502 U.S. at 483.

48 See, e.g., *INS v. Elias-Zacarias*, 502 U.S. at 483; *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008).

49 *Id.*

50 *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000).

51 *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

52 *Id.*

53 24 I&N Dec. 579 (BIA 2008).

54 24 I&N Dec. 591 (BIA 2008).

55 *Matter of S-E-G-*, 24 I&N Dec. 579, 588 (BIA 2008).

56 *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008).

57 *Id.* at 595–96 (BIA 2008).

The circuit courts have largely adopted the BIA's "social visibility" and "particularity" requirements from *Matter of S-E-G-* and *Matter of E-A-G-*, and generally show no sign of changing course in the near future. However, the Third and Seventh Circuits have refused to defer to these BIA requirements, and the Ninth Circuit seems on course to join them (Frydman and Desai 2012, 3-6).⁵⁸ Perhaps because of this circuit split, the BIA decided two new cases in 2014 which explicitly attempted to clarify—not overrule—the "social visibility" requirement, which the BIA renamed "social distinction."⁵⁹ In doing so, it emphasized that "social visibility" had never meant literal ocular visibility.⁶⁰ *Matter of W-G-R-* then stated that "[t]o have the 'social distinction' necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."⁶¹ *Matter of M-E-V-G-* further clarified that the persecutor's actions or perceptions, though relevant, are not determinative; rather, courts must look to *society's* perception or recognition when determining the validity of a given social group.⁶² The potential repercussions of these decisions are not yet known since the circuit courts have not yet had the occasion to address this new precedent.

While gang-based social group claims are often difficult to prove at the BIA and circuit court level, successful claims before immigration judges indicate an openness on their part to consider them. For example, in one case, the immigration judge determined that the claimants were members of a social group defined by membership in their family and the fact that they were identical twin girls.⁶³ Despite the fact that the girls had never been physically harmed by gang members, the judge found that they had suffered past persecution based on the alleged aggressiveness of certain gang members and the fact that the girls had changed schools and essentially secluded themselves at home, taking taxis between home and school to avoid recruitment, rape, or other misfortune.⁶⁴ The judge found past persecution but also made sure to analyze well-founded fear of future persecution in case the government appealed the decision.⁶⁵

Generally, social group cases fall into one of a few categories, some of which have proven more successful than others. Ultimately, the only category of social group claim that almost invariably fails is the claim predicated exclusively on resistance to gang recruitment or

58 See also *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083, 1087-91 (9th Cir. 2013) (holding that "witnesses who testify against gang members" may constitute a particular social group and casting doubt on the BIA's "social visibility" requirement); *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 606-07 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

59 *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014).

60 *Matter of M-E-V-G-*, 26 I&N at 236; *Matter of W-G-R-*, 26 I&N at 216.

61 *Matter of W-G-R-*, 26 I&N at 216-17.

62 *Matter of M-E-V-G-*, 26 I&N at 242-43 (responding to the Ninth Circuit's decision in *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1089 (9th Cir. 2013)).

63 *Matter of M-*, at 28 (Jan. 14, 2009), available at: http://www.uscritefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/Matter_of_M%20_IJ_Decision.pdf.

64 *Id.* at 32.

65 *Id.* at 35-40.

refusal to join a gang.⁶⁶ Courts at all levels have consistently denied these claims, although if they succeed, it tends to be at the immigration judge level.⁶⁷ On the other end of the spectrum, claims of persecution based on membership in a particular family are among the most successful. Courts at all levels recognize the family as sufficiently visible and particular,⁶⁸ so the major challenge with these groups is proving nexus (Frydman and Desai 2012, 12-14). Claims by *former* gang members also tend to succeed, although *current* gang members—active or not—will be denied asylum.⁶⁹ Prosecutorial witnesses and police informants have met with less success due to the BIA's decision in *In re C-A*,⁷⁰ which denied relief to “former noncriminal government informants working against the Cali drug cartel.” However, many circuits have since recognized that police informants constitute a particular social group (ibid., 11-12).⁷¹ Relief will therefore largely depend on the federal judicial circuit in which the individual resides (ibid.). Gender-based claims can be successful as well, particularly at the immigration judge level. However, many of the gender social group claims are rejected as overly general, amorphous, unparticular, or insufficiently visible in society.⁷² For example, a particular social group of women between certain ages

66 See, e.g., *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). But see *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011) (refusing *Chevron* deference to the social visibility and particularity requirements and remanding to the BIA); see also, Frydman and Desai 2012.

67 See, e.g., *Matter of ___*, (Arlington, Va., Aug. 4, 2009), available at: http://www.uscristrefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/Matter_of_IJ_Decision.pdf; Transcript of Immigration Proceedings, *Matter of ___*, (Harlingen, Tex., Dec. 11, 2002), available at: http://www.uscristrefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/ES_007.pdf.

68 See, e.g., *Aquino Cordova v. Holder*, No. 13-1597, 2014 WL 3537873, (4th Cir. July 18, 2014); *Martinez-Seren v. Holder*, 394 F. App'x 404 (9th Cir. 2012); *Matter of C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006) (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”); *Matter of S-*, (Baltimore, Md., June 11, 2009), available at: http://www.uscristrefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/Matter_of_S_IJ%20Decision.pdf.

69 See, e.g., *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (recognizing former gang membership as a valid social group but denying relief on other grounds); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (denying relief for current gang members); *Matter of Edwin Jovani Enamorado*, (Harlington, Tex., Nov. 22, 1999), available at: http://www.uscristrefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/H_008.pdf. But, see *Matter of W-G-R-*, 26 I&N Dec. 208, 221, 224 (BIA 2014) (denying claim for lack of particularity and nexus).

70 *In re C-A-*, 23 I. & N. Dec. 951, 957, 961 (BIA 2006).

71 See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Garcia v. Att'y Gen.*, 665 F.3d 496 (3rd Cir. 2011), as amended (Jan. 13, 2012).

72 See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010) (noting that the BIA has never “specifically addressed in a precedential decision whether gender by itself could form the basis of a particular social group”); *In re Sandra*, (Baltimore, Md., Nov. 8, 2006) available at: http://www.uscristrefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/G_008.pdf. But, see *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1225 (10th Cir. 2011) (affirming the BIA's refusal to grant asylum, even though the woman had been the victim of gang rape for her refusal to join a gang); *Caal-Tiul v. Holder*, 582

without more characteristics may be taken as too broad and considered a mere demographic division. Such a group possesses a multiplicity of other characteristics, including lifestyles, diverse cultural backgrounds and religious affiliations. In order to bolster such claims, evidence of other characteristics in addition to gender should be submitted to “...narrow the diverse and disconnected group.”⁷³

2. Political Opinion

As with social group claims, refusal to join a gang for allegedly political reasons does not typically qualify a person for asylum. Courts almost uniformly deny such cases on two grounds: (1) lack of political opinion or imputed political opinion and (2) lack of nexus (Frydman and Desai 2012, 16-18).⁷⁴ In fact, since *Matter of S-E-G-* and *Matter of E-A-G-*, which addressed political opinion claims as well, no published cases have found that refusal to join a gang substantiates a political opinion asylum claim.⁷⁵ In those two cases, the BIA found no indication that the gangs’ persecution resulted from respondents’ political or imputed political opinion, stating that it was equally possible that the gangs merely wanted to increase their ranks.⁷⁶ Even in seemingly worthy cases, like *Rivera Barrientos v. Holder*,⁷⁷ the courts have dismissed indications that political opinion caused persecution, concluding instead that recruitment concerns were the gangs’ primary motivation.⁷⁸

Rivera Barrientos had responded to MS-13 recruitment attempts saying, “[n]o, I don’t want to have anything to do with gangs. I do not believe in what you do,” to which they responded “[i]f you don’t want to join with us, if you don’t participate with us, if you are against us, your family will pay.”⁷⁹ Later, MS-13 members gang-raped her, but the circuit court still determined that this could have occurred just as much for recruitment purposes as for her political opinion.⁸⁰ Under the Immigration and Nationality Act, an applicant for asylum must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the claimed persecution.⁸¹ Concerns have been raised that courts are misinterpreting the “one central purpose” language in the statute to mean “*the* central purpose” when analyzing nexus in political opinion cases and, thereby, impermissibly limiting other potential purposes (Frydman and Desai 2012, 17). Courts seem to approve such claims only when the applicant was already a member of a group that the persecutors viewed to be a political opponent.⁸² Political opinion cases based on extortion or on a person’s decision to become a police

F.3d 92 (1st Cir. 2009) (rejecting asylum based on membership in the social group of “indigenous women”).

73 *Perdomo v. Holder*; 611 F.3d 662, 668 (9th Cir. 2010).

74 See, e.g., *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008).

75 *Mendez-Barrera v. Holder*, 602 F.3d at 16–18.

76 *Matter of E-A-G-*, 24 I&N Dec. 591, 596–97 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579, 588–90 (BIA 2008).

77 658 F.3d 1222 (10th Cir. 2011).

78 *Id.* at 1225, 1228.

79 *Rivera-Barrientos v. Holder*; 666 F.3d 641, 643 (10th Cir. 2012).

80 658 F.3d at 1228.

81 INA § 208(b)(1)(B)(i) (2012); 8 USC § 1158(b)(1)(B)(i) (2012).

82 *Escobar v. Holder*; 657 F.3d 537 (7th Cir. 2011) (member of Columbia’s Liberal Party); *Martinez-Buendia v. Holder*, 616 F.3d 711, 717 (7th Cir., 2010) (member of Colombian Health Brigades).

informant also tend to fail due to lack of nexus because courts attribute greed and a desire for retribution as the primary motivators for gang persecution in such cases (*ibid.*, 18-19).

Cases at the immigration judge level seem to meet with more success. For example, applicants have received asylum for imputed political opinion based on family members' politics⁸³ and for repeated refusal to join a gang.⁸⁴ In other cases, belief in the rule of law and opposition to "crime and the criminal lifestyle" constituted a political opinion.⁸⁵

3. Religion

Claims based on religious persecution can be successful, particularly at the immigration judge level. When they fail, it is often for lack of nexus.⁸⁶ In fact, circuit courts that have adjudicated gang-based religious persecution cases have not yet approved a case, each finding lack of a sufficient nexus.⁸⁷ However, these cases either lacked evidence that gang members knew of and cared about the claimants' religious views, or they involved a mixed-motive, and the courts found personal and financial reasons to be the initial and central cause of the persecution.⁸⁸ Thus, there is no reason to believe that these claims will continue to fail in the circuit courts if the nexus between religious views and persecution can be established. In cases in which gang members *knew* of the claimant's religious opinions before approaching them, the claim would be better-situated than those which the circuit courts have addressed thus far.⁸⁹

II. Special Immigrant Juvenile Status (SIJS)

For those UAC who do not qualify for asylum, SIJS may be the only immigration relief available. SIJS allows children who come to the United States—legally or not—to adjust

83 *Matter of* __, (Boston, Mass., Nov. 26, 2007), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (Case ES. 015, at 10).

84 Transcript of Immigration Proceedings, *Matter of* __, (Harlingen, Tex., Dec. 11, 2002), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (ES.007, at 12); *Matter of* __, (Los Angeles, Cal., May 1, 2002), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (H.006, at 13-15) (imputing to respondent a pro-government view based on his repeated refusals to join the gang).

85 *Matter of* __, (San Antonio, Tex., September 9, 2004), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html>, (H.002, at 13-14); *Matter of* __, (El Paso, Tex., Dec. 19, 1997), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (G.003, at 10-13).

86 See, e.g., *Matter of* __, (Newark, N.J., May 13, 2008), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (Case ES.017) (granting asylum based on 16-year-old girl's evangelical Christian views); *Matter of* __, (Arlington, Va., March 20, 2008), available at: <http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html> (Case H.019) (granting asylum after determining that his Pentecostal Christian religion was one central reason for the young man's persecution); see also Frydman and Desai 2012, 21 and n.291-93 (citing successful IJ cases based on religious persecution).

87 See, e.g., *Bueso-Avila v. Holder*, 663 F.3d 934 (7th Cir. 2012); *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010); *Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir. 2009).

88 *Bueso-Avila*, 663 F.3d at 938; *Mendez-Barrera*, 602 F.3d at 27; *Quinteros-Mendoza*, 556 F.3d at 164.

89 *Bueso-Avila*, 663 F.3d at 938; *Mendez-Barrera*, 602 F.3d at 27.

to LPR status if they have been abused, abandoned, or neglected by at least one parent.⁹⁰ SIJS may be available to children who are unmarried, under 21, and physically present in the United States at the time of filing (USCIS 2014).

To qualify, a US state juvenile court must designate the UAC a dependent on the court and declare that the UAC cannot reunite with one or both parents due to abuse, abandonment, neglect, or similar reasons (USCIS 2011). Furthermore, the juvenile court must determine that “it is not in the best interests of the child to be returned to his or her country of citizenship” (ibid.). After the juvenile court makes this factual finding, USCIS can adjudicate the immigration application and grant SIJS (ibid.).

Although a grant of LPR status to an unaccompanied child is certainly a positive outcome, it does not come without a price. The law prevents a child from petitioning for a parent or a sibling based on his or her LPR status. In addition, the family court process can place a child in the uncomfortable and difficult position of alleging neglect against his or her parents who have made the difficult decision of sending their child north on a dangerous journey. Parents must decide between the dangers at home versus the journey north with the hopeful goal of protection for their child in the United States, and children typically find no fault in their parent’s decision.

The number of applications for SIJS has steadily risen over the last years from 1,645 in 2010 to 3,993 in 2013 (USCIS 2013). These numbers are low in comparison to the potentially thousands of eligible children who enter the United States on a yearly basis. Lack of counsel and the bifurcated nature of SIJS proceedings, which involve family courts and USCIS pose a real challenge in identifying and obtaining SIJS for many children.

Conclusion

There are a number of ways in which the US government, nongovernmental organizations (NGOs), and individuals can work together improve protection of unaccompanied children fleeing their countries. Local and state bar associations across the United States are working with immigration and family lawyers within their ranks to create *pro bono* programs to identify and provide representation to children. Immigration courts are working closely with NGO advocates and private attorneys to create Friend of the Court programs, encouraged by the Executive Office for Immigration Review (EOIR), to better adjudicate children’s cases.⁹¹

Several medical-legal-social partnerships have been created in cities, including New York, Philadelphia, San Francisco, Los Angeles and in the Rio Grande Valley. A large number of children are fleeing their countries of origin because of violence and trauma. While the most pressing needs may be medical attention and legal representation for children shortly after their arrival, psycho-social support is vital in the long-term for them and for their caregivers.

90 INA § 245(h) (2012); 8 USC § 1255(h) (2012); INA § 101(a)(27)(J). ; 8 USC § 1101(a)(27)(J) (2012).

91 EOIR Memorandum, Office of the Chief Immigration Judge, *Friend of the Court Guidance*, 10 September 2014, available at: <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACFriendCtOct2014.authcheckdam.pdf>.

In order to comply with national and international obligations, the Obama administration and policymakers should focus on the following:

- **Additional personnel to adjudicate claims:** The number of immigration judges and USCIS Asylum Officers is insufficient to adequately and fairly process the claims for protection filed by children. As a result, backlogs have increased in the adjudication of cases in both the courts and before the USCIS Asylum Office. There are over 430,000 cases pending on the dockets of 260 immigration judges sitting in 58 immigration courts across the country. Cases remain pending on some court dockets for up to 800 days.⁹² The number of applications for asylum filed in immigration court and with USCIS in 2014 rose to 121,200 claims—44 percent more than the number filed the previous year (UNHCR 2014c, 3).⁹³ As a result of the overload of cases, applicants who file with the USCIS Asylum Office can expect long delays as they wait to be interviewed, in some cases from one to two years (Carlson 2015). Resources should be provided to train and hire new immigration judges and asylum officers immediately in order to assure that due process rights of both the children and those affected by the backlogs are protected. Long delays adversely affect the asylum process. Witnesses may no longer be available. Memories fade. Torture victims suffer greatly when they are unable to present their claims in a timely fashion. They are left in a state of limbo, which can and often does cause psychological harm.
- **Incorporating “best interests of the child” standard into all decision-making, not just custody decisions.** The bipartisan immigration reform bill passed by the Senate in 2013, S. 744, would require CBP to give “due consideration” to the best interests of the child, “family unity” and “humanitarian concerns” in repatriation decisions. Amendment 1340 to that bill, which was unfortunately not included in the Senate vote, would have made the best interests standard the “primary consideration” in all federal decisions involving unaccompanied children. Congress should pass S.744 and include the amendment.
- **CBP screening:** Organizations and individuals have raised concerns regarding the Border Patrol’s ability to fairly screen children from non-contiguous countries for trafficking and persecution and to prevent the return of children to persecutors or abusers. Measures must be taken to improve the screening process. Men and women in uniform with weapons should not question children. CBP screeners should, at minimum, be paired with child welfare experts or NGO personnel, as proposed in S. 744. Alternatively, CBP screeners should be replaced with USCIS asylum officers.
- **Due process protections:** Organizations and individuals have advocated for a system which provides greater procedural protections, resources, and time to protect families and children under the law without unduly delaying the adjudication process. These measures can and should include access to court-appointed counsel and legal orientation programs. US immigration law has been

92 TRAC Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts, available at: http://trac.syr.edu/phptools/immigration/court_backlog/.

93 For more on the USCIS asylum backlog, see Matza 2015.

likened in complexity to US tax law. Thus, the need for adequate and free counsel along with understandable information on the legal process is vital to protect children fleeing the violence in their countries.

Efforts to address the problems arising as a result of the violence in the Northern Triangle countries and Mexico should not be limited to the United States. Mexico, Guatemala, El Salvador, Honduras and the United States must share responsibility for addressing the push and pull factors of refugee flows northward. A human rights-based approach must form the basis for collaboration and should prioritize the following:⁹⁴

- **Promote sustainable economic development:** Development should focus on job creation, training and education to provide opportunities for young people in sending countries.
- **Sponsor violence prevention programs:** Funding should be funneled to credible and successful violence prevention programs in communities, to reintegration efforts for young people seeking to leave behind the influence of gangs, and for the protection of children who have suffered or are at risk of violence. Organizations in the United States such as Homeboy Industries in Los Angeles, internationally recognized as one of the most successful gang intervention and reentry programs of its kind, can provide a model for the creation of similar programs in the Northern Triangle countries.⁹⁵
- **Strengthen civilian institutions:** In order to effectively confront and resolve problems of organized crime, gangs and insecurity, the Northern Triangle countries, Mexico, and the United States should work together to create and support professional and accountable police forces and an unbiased and effective criminal justice system. Civilian institutions, not the military, should be responsible for criminal investigations, prosecutions and sentencing. The United States is urged to share its resources and experiences in strengthening institutions to effectively enforce laws against organized crime within its borders.
- **Combat corruption and increase accountability:** Strong programs must be established to increase transparency and accountability to address deep corruption which prevents access by individuals to services, weakens state bodies, and poisons democracy.

The United States is urged to support governments and agencies whose leaders demonstrate a serious commitment to strengthening civilian-led enforcement, sound prosecutions, and the rule of law. Sending countries must encourage and create conditions necessary for the effective participation of civil society in this process; otherwise, it will fail.

94 The Washington Office of Latin America published these suggestions after a meeting of Vice-President Joseph Biden, the presidents of El Salvador, Guatemala and Honduras and Inter-American Development Bank President Luis Alberto Moreno on November 14, 2014, during which they discussed a joint plan to respond to the underlying conditions driving migration from Central America. More information is available at: <http://www.wola.org/sites/default/files/SIF-CAmericaAd-ENG-WEB-FNL-1118.pdf>.

95 For more information on Homeboy Industries, visit its website at <http://www.homeboyindustries.org/why-we-do-it/>.

Although unexpected numbers of migrants and refugees—especially vulnerable families and children—certainly pose challenges for the US government, measures consistent with US legal and moral obligations must be taken to protect those seeking refuge and safety in our nation. We should heed Pope Francis’ call that “these children be welcomed and protected” as he stated during his 2014 Colloquium on Migration in Mexico (Blumberg 2014). To do otherwise runs contrary to our identity as a nation.

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