

# Children ON THE RUN



UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO  
AND THE **NEED FOR INTERNATIONAL PROTECTION**

A Study Conducted by the United Nations High Commissioner for Refugees  
Regional Office for the United States and the Caribbean  
Washington, D.C.



**UNHCR**  
The UN  
Refugee Agency

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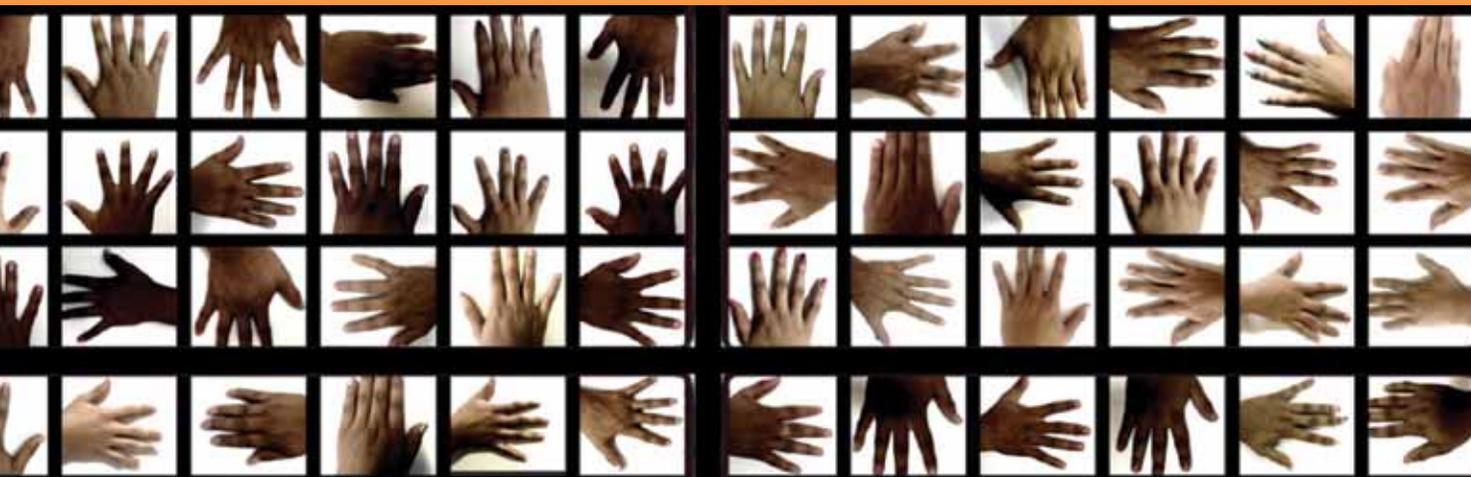
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## UNHCR and Unaccompanied and Separated Children

The United Nations High Commissioner for Refugees (UNHCR) is the sole international, intergovernmental United Nations organization entrusted by the UN General Assembly with responsibility for providing international protection to refugees and others of concern and, together with Governments, for seeking permanent solutions to their problems.<sup>1</sup> UNHCR would not be able to carry out its essential duties without the support, cooperation and participation of States around the globe.

UNHCR provides international protection and direct assistance to refugees throughout the world in some 125 countries. UNHCR has over 60 years of experience supervising the international treaty-based system of refugee protection and has twice received the Nobel Peace Prize for its work on behalf of refugees. UNHCR works closely with Governments and others to best ensure the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* are honored and that national and regional migration policies are sensitive to the potential protection needs of all individuals. Central to international refugee protection – and UNHCR’s mandate – are to provide refugees the protection of asylum, to ensure their human rights are respected and to safeguard the fundamental principle of *non-refoulement*: the prohibition against returning any refugee to a place where she or he would face danger.<sup>2</sup>

The protection of children is a core priority of UNHCR at the global, regional and national levels.<sup>3</sup> UNHCR has long recognized both the right of children to seek asylum in their own right and their inherent vulnerability – especially those children who are unaccompanied by or have been separated from their families<sup>4</sup> – as well as the fact that there are certain child-specific forms of persecution that may give

rise to a claim for refugee protection. Of foremost concern to UNHCR is that all unaccompanied and separated children be consistently and appropriately screened for protection and, once identified, have full access to seek and receive international protection that takes into account their age and experiences in a child-sensitive manner.<sup>5</sup> A fundamental goal is to ensure that all “girls and boys are safeguarded from all forms of violence, abuse, neglect and exploitation.”<sup>6</sup> All actions taken concerning refugee children should be guided by the principle that “the human rights of the child, in particular his or her best interests, are to be given primary consideration.”<sup>7</sup>

Central to providing unaccompanied and separated children appropriate identification, screening and protection is the recognition that “States are primarily responsible for the protection of all children and should promote the establishment and implementation of child protection systems, in accordance with their international obligations, ensuring access to all children under their jurisdiction.”<sup>8</sup> In addition, the *Convention on the Rights of the Child*, the fundamental international framework for the rights and protection of children, gives particular attention to the special protection needs of children deprived of their family environment and of children who are refugees or are seeking asylum, and it states that all the provisions of the *Convention* apply without discrimination to all children under the jurisdiction of a State.<sup>9</sup>

Many unaccompanied and separated children, including those interviewed for this study, arrive in the context of “mixed migration” movements, which include both individuals in need of international protection and migrants without international protection needs. In view of this, the *Refugee Protection and Mixed Migration 10-Point Plan of Action*, “a tool developed by UNHCR to assist Governments and other stakeholders to incorporate refugee protection considerations into migration policies,” is relevant to consider.<sup>10</sup> The *10-Point Plan* recognizes that the number of refugees and asylum-seekers is a relatively small portion of the global movement of people and that such movement often involves human smugglers and traffickers, and it stresses that “steps must be taken to establish entry systems that are able to identify new arrivals with international protection needs and which provide appropriate and differentiated solutions for them.”<sup>11</sup> Significantly, the *10-Point Plan* contains an entire section on “child protection systems,” one on identifying women and girls at risk, and another on protecting victims of trafficking.<sup>12</sup>

In accordance with these priorities, the UNHCR Regional Office for the United States and the Caribbean in Washington, D.C. (UNHCR Washington), has likewise identified the vulnerability of children as a primary concern and has devoted many resources to investigating protection issues relating to children arriving to and within the United States.<sup>13</sup> For example, in 2012, with the full cooperation and support of the U.S. Government, UNHCR Washington began monitoring the protection screening of unaccompanied and separated children from Mexico at the southern U.S. border.<sup>14</sup> This report is a key component of UNHCR’s work with and on behalf of unaccompanied and separated children in the region.



## EXECUTIVE SUMMARY

Since 2009, UNHCR has registered an increased number of asylum-seekers – both children and adults – from El Salvador, Honduras and Guatemala lodging claims in the Americas region.<sup>15</sup> The United States recorded the largest number of new asylum applications out of all countries of asylum, having receiving 85% of the total of new applications brought by individuals from these three countries in 2012. The number of requests for asylum has likewise increased in countries *other than the U.S.* Combined, Mexico, Panama, Nicaragua, Costa Rica and Belize documented a 432% increase in the number of asylum applications lodged by individuals from El Salvador, Honduras and Guatemala. In the United States, the number of adults claiming fear of return to their countries of origin to government officials upon arriving at a port of entry or apprehension at the southern border increased sharply from 5,369 in fiscal year (FY) 2009 to 36,174 in FY 2013.<sup>16</sup> Individuals from El Salvador, Honduras, Guatemala and Mexico account for 70% of this increase.

Beginning in October 2011, the U.S. Government recorded a dramatic rise – commonly referred to in the United States as “the surge” – in the number of unaccompanied and separated children arriving to the United States from these same three countries – El Salvador, Guatemala and Honduras. The total number of apprehensions of unaccompanied and separated children from these countries by U.S. Customs and Border Protection (CBP) jumped from 4,059 in FY 2011 to 10,443 in FY 2012 and then more than doubled again, to 21,537, in FY 2013. At the same time, a tremendous number of children from Mexico have been arriving to the U.S. over a longer period of time, and although the gap is narrowing as of



FY 2013, the number of children from Mexico has far outpaced the number of children from any one of the three Central American countries. For example, in FY 2011, the number of Mexican children apprehended was 13,000, rising to 15,709 in FY 2012 and reaching 18,754 in FY 2013. Unlike the unaccompanied and separated children arriving to the U.S. from other countries, including El Salvador, Guatemala and Honduras, most of these children were promptly returned to Mexico after no more than a day or two in the custody of the U.S. authorities, making it even more difficult to obtain a full picture of who these children were and why they were coming to the U.S.

With a grant from the John D. and Catherine T. MacArthur Foundation, UNHCR Washington undertook an extensive study to examine the reasons why children are displaced from the four countries. While recognizing a significant contextual difference between the situation in Mexico and in the Northern Triangle of Central America, the common denominator is that all four countries are producing high numbers of unaccompanied and separated children seeking protection at the southern border of the United States. UNHCR's research was to ascertain the connection between the children's stated reasons, the findings of recent studies on the increasing violence and insecurity in the region, and international protection needs.<sup>17</sup> UNHCR Washington conducted individual interviews with 404 unaccompanied or separated children – approximately 100 from each country – who arrived to the U.S. during or after October 2011 and, in the context of the current regional and national environments and the tremendous number of displaced children arriving to the U.S. from these four countries, analyzed the children's responses in order to answer two questions:

**Why are these children leaving their countries of origin?  
Are any of these children in need of international protection?**

UNHCR found that the large majority of children interviewed from all four of these countries provided information that clearly indicates they may well be in need of international protection.<sup>18</sup> The responses of these children were complex and multifaceted and in many cases included both protection-related and non-protection-related concerns. Significantly, protection-related reasons were very prominent, and this report focuses on those reasons.<sup>19</sup> Our data reveals that no less than 58% of the 404 children interviewed were forcibly displaced because they suffered or faced harms that indicated a potential or actual need for international protection. The study was specifically designed to be representative and statistically significant for drawing conclusions and inferences, and as such, this finding that 58% of the children raised potential international protection means that in general, 58% of all the unaccompanied and separated children in the same age range, from these four countries, arriving in the U.S. would likewise raise potential international protection needs.<sup>20</sup> Other findings of the study would also be reflected in the same population at large, such as, for example, the percentage of children with family members in the United States.<sup>21</sup> The central conclusion of this study is that given the high rate of children who expressed actual or potential needs for protection, all unaccompanied and separated children from these four countries must be screened for international protection needs.

Two overarching patterns of harm related to potential international protection needs emerged: violence by organized armed criminal actors and violence in the home. Forty-eight percent of the displaced children interviewed for this study shared experiences of how they had been personally affected by the augmented violence in the region by organized armed criminal actors, including drug cartels and gangs or by State actors. Twenty-two percent of the children confided that they had survived abuse and violence in their homes by their caretakers. A third category of harm giving rise to potential international protection needs arose only among

## CHARACTERISTICS OF THE CHILDREN INTERVIEWED

- Country of origin and number of children:
 

	Boys	Girls
El Salvador (104):	69	37
Guatemala (100):	79	21
Honduras (98):	69	29
Mexico (102):	98	4
<b>Total (404):</b>	<b>313</b>	<b>91</b>
- Between Ages 12-17
- Entered the U.S. during or after October 2011
- Held at some point in U.S. federal custody
- Gender distribution mirroring that represented in ORR custody by nationality
- Those in U.S. Government shelters present for more than five days in order to acclimate
- Randomly selected within these parameters and voluntarily participated

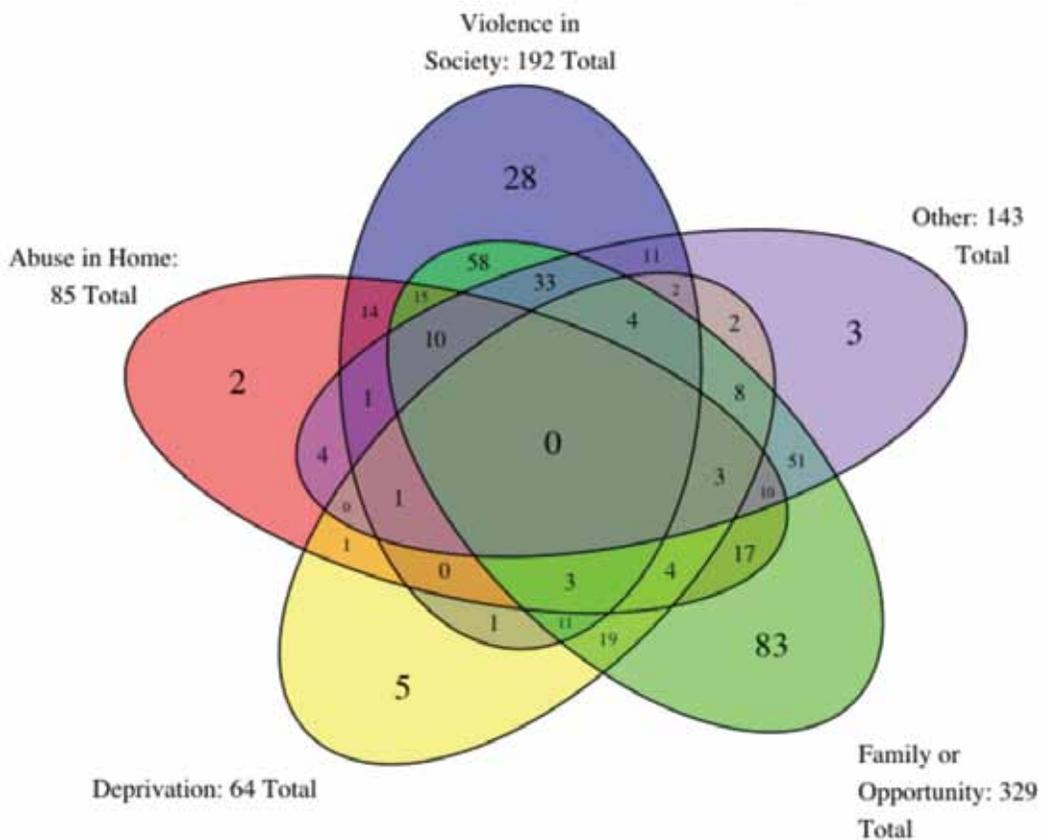
## CHILDREN FROM EACH COUNTRY WITH POTENTIAL INTERNATIONAL PROTECTION NEEDS

El Salvador:	72%
Guatemala:	38%
Honduras:	57%
Mexico:	64%
<b>Total:</b>	<b>58%</b>

the children from Mexico: recruitment into and exploitation by the criminal industry of human smuggling – that is, facilitating others in crossing into the United States unlawfully. Thirty-nine percent of the children from Mexico fell into this category.<sup>22</sup> Eleven percent of the children reported having suffered or being in fear of both violence in society and abuse in the home.

UNHCR found that these types of serious harm raised by the children are clear indicators of the need to conduct a full review of international protection needs consistent with the obligations to ensure that unaccompanied and separated children are not returned to situations of harm or danger.

## Children’s Reasons for Leaving Home



## The Meaning of International Protection

Because the potential need for international protection of so many of these children is a core finding of this study, “international protection” is defined here to ensure that its meaning is clearly understood. It is the responsibility of States to protect their citizens. When Governments are unwilling or unable to protect their citizens, individuals may suffer such serious violations of their rights that they are forced to leave their homes and often even their families to seek safety in another country. Since, by definition, the Governments of their home countries no longer protect the basic rights of these individuals, the international community must step in to ensure that those basic rights, as articulated in numerous international and regional instruments, are respected. The principal means for providing international protection to individuals unable to receive protection in their countries of origin is the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*. To receive protection under these instruments, an individual must satisfy the definition of “refugee,” and there must not be any reason, as articulated in the *1951 Convention*, to exclude an individual from such protection. Once an individual is found to be a refugee, protection under the *1951 Convention* and *1967 Protocol* must be granted. The foremost protection is the guarantee against return to danger or *non-refoulement* – the cornerstone

of international refugee protection – and the ability to remain lawfully in the country of asylum. Other fundamental human rights as articulated in these and other international and regional instruments, among them the rights to livelihood, education and exercise of religious beliefs, must also be respected.

There may be individuals who are found not to meet the refugee definition contained in the *1951 Convention* or *1967 Protocol* but are nevertheless in need of international protection due to their lack of safety or security and their inability to receive State protection in their countries of origin. Some of these individuals may fall within the broader refugee definitions contained in the *Organization of African Unity Convention* or the *Cartagena Declaration*. Others may not meet one of these broader refugee definitions or may be in a location where neither of these broader definitions applies. In general, these are persons fleeing armed conflict, serious internal disorder, massive human rights violations, generalized violence or other forms of serious harm with no link to a refugee protection ground as contained in the international refugee definition. Such individuals should be given access to a process to review their eligibility for a formal, legal – complementary or subsidiary – status, with defined rights and obligations, for the period of time necessary to safeguard their safety and security.



## Summary of Key Findings by Country of Origin

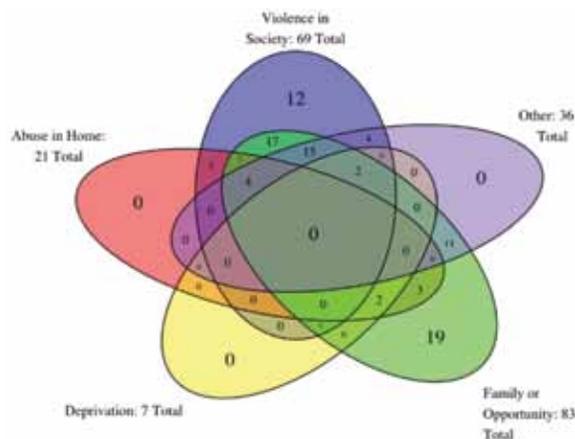
A closer examination of the responses of the children from each of the four countries reveals the similarities and differences in their situations in relation to these prevailing types of harm.

### El Salvador

Of the 104 children from El Salvador UNHCR interviewed, 72% provided responses that raised potential international protection needs. Sixty-six percent of the children cited violence by organized armed criminal actors as a primary motivator for leaving, and 21% percent discussed abuse in the home. Fifteen percent of the children discussed both violence in the society and abuse in the home. Seven percent pointed to situations of deprivation. Only one child mentioned the possibility of benefiting from immigration reform in the U.S. Twenty-eight percent of these children did not mention any serious harm as a reason for leaving.

The predominant narrative of harm suffered by the children of El Salvador was that of violence and threats of violence by organized armed criminal actors. The children described their everyday challenges of evading extortion; witnessing murders; and navigating threats to themselves and their families, friends and neighbors. Children who had not yet been victims of violence spoke of their own fears and their families' fear with the same inevitability. The girls shared their fears of sexual violence.

#### Children's Reasons for Leaving Home - El Salvador



I am here because I was threatened by the gang. One of them “liked” me. Another gang member told my uncle that he should get me out of there because the guy who liked me was going to do me harm. In El Salvador they take young girls, rape them and throw them in plastic bags. My uncle told me it wasn’t safe for me to stay there and I should go to the United States.

MARITZA, EL SALVADOR, AGE 15

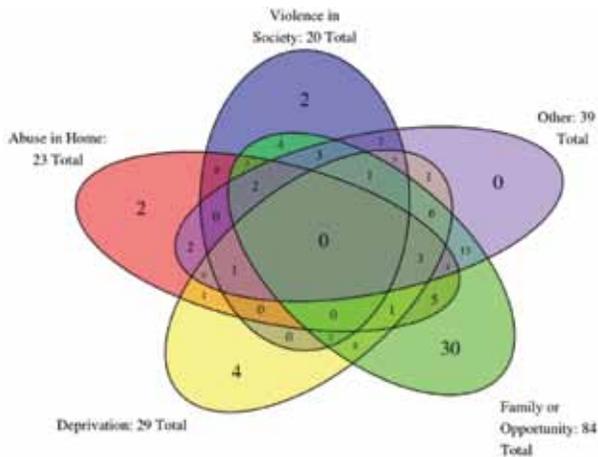
The problem was that where I studied there were lots of M-18 gang members, and where I lived was under control of the other gang, the MS-13. The M-18 gang thought I belonged to the MS-13. They had killed the two police officers who protected our school. They waited for me outside the school. It was a Friday, the week before Easter, and I was headed home. The gang told me that if I returned to school, I wouldn’t make it home alive. The gang had killed two kids I went to school with, and I thought I might be the next one. After that, I couldn’t even leave my neighborhood. They prohibited me. I know someone whom the gangs threatened this way. He didn’t take their threats seriously. They killed him in the park. He was wearing his school uniform. If I hadn’t had these problems, I wouldn’t have come here.

ALFONSO, EL SALVADOR, AGE 17

### Guatemala

Thirty-eight percent of the 100 children from Guatemala raised international protection concerns. Overall, the three dominant themes that emerged were deprivation, discussed by 29% of the children; abuse in the home, discussed by 23%; and violence in society, discussed by 20%. Almost half of the children interviewed, 48%, were members of an

## Children's Reasons for Leaving Home - Guatemala



Gangs in a nearby neighborhood wanted to kill me and some other people. They wanted me to give them money, but what money was I supposed to give them? I didn't have any. They asked me a bunch of questions, like who was my father, and who was my family. I told them my father was dead. They told me to say goodbye because I was going to join my father. They asked me if I knew who they were, if I could identify them. I said no, because I knew if I said yes they would kill me. They held my cousin and me for three hours, tied up. My cousin was able to untie the rope and he helped me untie mine. We heard gun shots and we ran. They kept looking for us, but we escaped.

DAVID, GUATEMALA, AGE 16

My grandmother is the one who told me to leave. She said: "If you don't join, the gang will shoot you. If you do, the rival gang or the cops will shoot you. But if you leave, no one will shoot you."

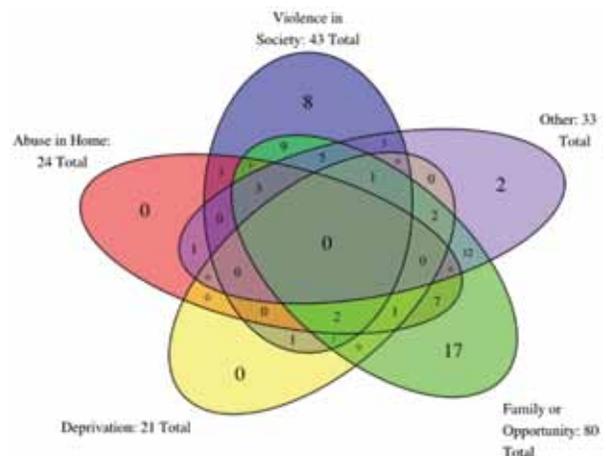
KEVIN, HONDURAS, AGE 17

indigenous population, yet they represented 55% of the Guatemalan children who discussed issues of deprivation, 30% of those who discussed abuse in the home and 25% of those who discussed violence in society. Five percent of the Guatemalan children reported that they had been victims of both violence in society and abuse in the home. Sixty-two percent of the children did not mention serious harm as a reason for leaving. Eighty-four percent of the children shared hopes for family reunification, better opportunities for work or study, or helping their families as a reason for coming to the U.S.

## Honduras

Of the 98 children from Honduras, 57% raised potential international protection concerns. Forty-four percent of these displaced children were threatened with or were victims of violence by organized armed criminal actors. Twenty-four percent of the children reported abuse in the home. Eleven percent reported that they had been victims of both violence in society and abuse in the home. Forty-three percent of the Honduran children did not mention serious harm as a reason for leaving. Twenty-one percent of the children discussed situations of deprivation. Similar to the children from Guatemala, 80% of the Honduran children shared their hopes for family reunification, better opportunities to work or study, or to help their families as a reason for leaving, but very few gave one of these as the only reason.

## Children's Reasons for Leaving Home - Honduras



## Mexico

Out of the 102 Mexican children interviewed, 64% raised potential international protection needs. Thirty-two percent spoke of violence in society, 17% spoke of violence in the home and 12% spoke of both. Seven percent discussed situations of deprivation. Unlike children from the other three countries, Mexican children are frequently recruited by organized crime and other criminal actors to work as guides in the human smuggling industry. In addition to their smaller size and greater tolerance for risk taking, it is widely understood that if these children are caught, they will simply be returned to Mexico. A striking 38% of the children from Mexico had been recruited into the human smuggling industry – precisely because of their age and vulnerability.<sup>23</sup> These children have a unique set of potential protection needs that includes entrapment in criminal conduct, the worst forms of child labor, and exposure to dangerous situations that are harmful to their safety and well-being. Given these children's youth, the rampant poverty, the lack of opportunity and often unchecked crime-related violence in at least some parts of Mexico, serious questions are raised as to the coercion and exploitation of these children and whether, even among those children who indicated they became involved in human smuggling by their own decision, they were able to make a truly informed and voluntary decision to participate in this often dangerous criminal activity. Some of these children

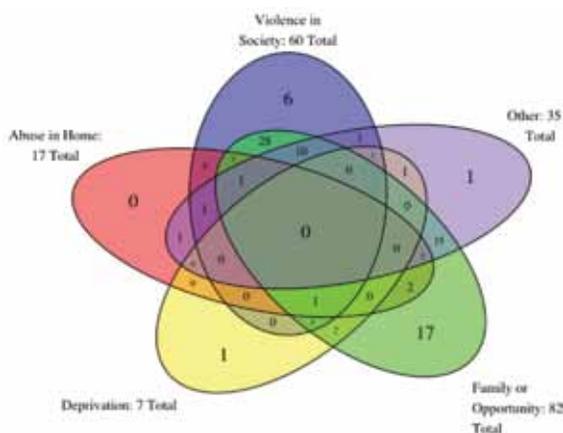
explicitly stated they were recruited under false pretenses, and others made it clear that, however they first became involved, they were forced to continue even if they expressed a desire to stop.

## Conclusion

The responses of the 404 children from El Salvador, Guatemala, Honduras and Mexico interviewed for this study lead to several significant conclusions. First, the reasons these children have for leaving their countries of origin are complex and interrelated and can be understood only when examined from a child-sensitive perspective and taken as a whole and in context. Related to this multiplicity of reasons, there is no single dominant place of origin within or among the different countries from where these children are coming. Second, across the broad array of their responses, these children also clearly share commonalities within and among all four countries. Third, the many compelling narratives gathered in this study – only some of which are relayed in this report – demonstrate unequivocally that many of these displaced children faced grave danger and hardship in their countries of origin. Fourth, there are significant gaps in the existing protection mechanisms currently in place for these displaced children. The extent of these gaps is not fully known because much of what happens to these children is not recorded or reported anywhere. As such, it is reasonable to infer that the gaps may be even wider than what the available data indicates. By all accounts, children arriving to the U.S. from these four countries continue to rise in numbers as do the numbers among them with potential international protection needs.

Through the children's own words, the critical need for enhanced mechanisms to ensure that these displaced children are identified, screened and provided access to international protection is abundantly clear. The question now is how the five States, civil society and UNHCR can work together to best ensure that these children are carefully screened and provided the protection they so desperately need and deserve.

### Children's Reasons for Leaving Home – Mexico





## Requests and Concerns Raised by Governments, Civil Society and Other Stakeholder Participants at the UNHCR Roundtable on the Displacement of Unaccompanied and Separated Children from El Salvador, Guatemala, Honduras and Mexico

Before providing its recommendations to the Governments of El Salvador, Guatemala, Honduras, Mexico and the United States, UNHCR wishes to acknowledge a number of the requests and concerns raised by Government representatives, civil society and other stakeholder participants from these countries at the Roundtable on the Displacement of Unaccompanied and Separated Children, hosted by UNHCR in San Juan, Puerto Rico, 22-23 January 2014, which reflect issues of great importance but are beyond the scope of the findings and conclusions of this study. These include:

### **Providing Essential Services and Access to Justice for Children by**

Creating, strengthening and promoting comprehensive child protection mechanisms, including children's access to justice, on the national and local levels that meet the general protection needs of children in their home communities, those who are displaced – within and outside their countries of origin – and those who are repatriated to their countries of origin.

Establishing formal bilateral and multilateral agreements on repatriation that include mechanisms to facilitate the safe return and reintegration of unaccompanied and separated children when

such return is formally determined to be in the best interests of the child.

Developing capacity for reception and social reintegration, especially for family reunification, access to psychosocial services and education, and employment and training opportunities appropriate for young people and their families.

### **Ensuring Liberty by**

Refraining from practices that unnecessarily restrict children's liberty. This is particularly important with regard to detention, given the continued harm and detrimental impact of detention on the well-being of the child. Detention also impedes access to asylum and other forms of international protection, and may also be used as a tool to illegitimately discourage a child from seeking international protection.

## Recommendations

Regarding the potential or actual international protection needs of unaccompanied and separated children from El Salvador, Guatemala, Honduras and Mexico, UNHCR recommends that the Governments of El Salvador, Guatemala, Honduras, Mexico and the United States:

### **Recognize Newly Emerging Forms of Displacement in Central America and the Emergence of International Protection Issues**

1. Recognize that the violence and insecurity within El Salvador, Guatemala, Honduras and Mexico, as well as across their borders, have led to the displacement of children and others in the region; have implications as foreign policy and political issues; and have connections with international protection needs.
2. Recognize the international protection needs – actual and potential – at stake and the need to ensure that these displaced children are provided safety upon arrival, screened for any international protection needs, and provided access to the assessment and provision of international protection.
3. Bring the international protection needs of these displaced children to the forefront and ensure their inclusion to the fullest extent possible in all national and regional efforts.
4. Incorporate formally the international protection needs of these displaced children into the official discussions concerning displaced children in the region and incorporate them into the final guidelines to be published by the Regional Conference on Migration.

### **Strengthen and Harmonize Regional and National Frameworks for Ensuring International Protection**

5. Establish and promote more uniform responses and approaches to displaced children in the region through the development of regional protocols for addressing the international protection needs of children that incorporate the principle and practice of determining the best interests of the child at all decision points that affect the well-being of the child, beginning with the first encounter of authorities with the child.
6. Ensure that the principle of the best interests of the child is a central component of all responses, approaches, guidelines and tools concerning the protection needs of children, including the assessment of a claim for refugee status, asylum or any other form of international protection.

7. Enhance capacity, through increased staff and training and other mechanisms, to ensure the systematic identification of children with potential international protection needs, in particular children in high-risk situations; appropriate referrals for their care and assessment of their international protection needs; and access to guardians and legal representation.
8. Develop and disseminate common tools to support the government function of screening for international protection needs, with special attention paid to methods and practices that promote a child-sensitive environment.
9. Harmonize national legislation, policies and practices with the resulting regional framework and tools.
10. Develop and implement mandatory training for all authorities engaged in activities relating to the protection and other assistance of children with potential or actual international protection needs on the basic norms and principles of international human rights and refugee law, including the fundamental principles of non-discriminatory treatment, best interests of the child, non-refoulement, family unity, due process of law, and non-detention or other restriction of liberty.
11. Strengthen collaboration, exchange of information and sharing of best practices relating to the identification, referral and assessment of children with potential international protection needs between Governments and UNHCR and between Governments and civil society.

### **Address Root Causes**

12. Undertake measures both regionally and nationally to address the root causes of flight of these displaced children, in an effort to reduce – if not eliminate – the factors that lead to their forced displacement.
13. Engage the Commission on Security for Central America of the Central American Integration System to address the issues of children displaced due to violence and insecurity in further support of State efforts concerning these issues.



## BACKGROUND AND OVERVIEW

Since 2009, UNHCR has registered an increased number of asylum-seekers – both children and adults – from El Salvador, Honduras and Guatemala lodging claims in the Americas region.<sup>24</sup> The United States recorded the largest number of new asylum applications out of all countries of asylum, having received 85% of the total of new applications brought by individuals from these three countries in 2012. The number of requests for asylum has likewise increased in countries other than the U.S. Combined, Mexico, Panama, Nicaragua, Costa Rica and Belize, documented a 432% increase in the number of asylum applications lodged by individuals from El Salvador, Honduras and Guatemala. In the United States, the number of adults claiming fear of return to their countries of origin to government officials upon arriving to a port of entry or apprehension at the southern border increased sharply from 5,369 in Fiscal Year (FY) 2009 to 36,174 in FY 2013.<sup>25</sup> Individuals from El Salvador, Honduras and Guatemala and Mexico account for 70% of this increase.

Beginning in October 2011, the U.S. Government recorded a dramatic rise – commonly referred to in the United States as “the surge” – in the number of unaccompanied and separated children arriving to the United States from these same three countries – El Salvador, Guatemala, and Honduras. The total number of apprehensions of unaccompanied and separated children from these countries by U.S. Customs and Border Protection (CBP) jumped from 4,059 in FY 2011 to 10,443 in FY 2012 and then more than doubled again, to 21,537, in FY 2013.

## NUMBER OF APPREHENSIONS OF ARRIVING UNACCOMPANIED CHILDREN<sup>26</sup>

Country	FY 2011		FY 2012		FY 2013	
	USBP	OFO	USBP	OFO	USBP	OFO
El Salvador	<b>1,394</b>	<b>58</b>	<b>3,314</b>	<b>123</b>	<b>5,990</b>	<b>230</b>
Guatemala	<b>1,565</b>	<b>43</b>	<b>3,835</b>	<b>80</b>	<b>8,068</b>	<b>194</b>
Honduras	<b>974</b>	<b>25</b>	<b>2,997</b>	<b>94</b>	<b>6,747</b>	<b>308</b>
Mexico <sup>27</sup>	<b>11,768</b>	<b>1,232</b>	<b>13,974</b>	<b>1,735</b>	<b>17,240</b>	<b>1,514</b>
All Others	<b>355</b>	<b>361</b>	<b>361</b>	<b>540</b>	<b>788</b>	<b>811</b>
<b>Total</b>	<b>16,056</b>	<b>1,719</b>	<b>24,481</b>	<b>2,572</b>	<b>38,833</b>	<b>3,057</b>

U.S. Border Patrol (USBP); Office of Field Operations (OFO)

At the same time, a tremendous number of children from Mexico have been arriving to the U.S. over a longer period of time, and although the gap is narrowing as of FY 2013, the number of children from Mexico has far outpaced the number of children from any one of the three Central American countries. For example, in FY 2011, the number of Mexican children apprehended was 13,000, rising to 15,709 in FY 2012 and 18,754 in FY 2013. Most of these children were promptly returned to Mexico after no more than a day or two in the custody of the U.S. authorities, and as such, both the number of their arrivals and the extent of their protection needs are virtually invisible to much of the U.S. Government and to the social and legal service providers in the U.S., who never have the opportunity to meet these children. This lack of visibility and access to children from Mexico makes it difficult to obtain a full picture of who these children are and why they are coming to the U.S.

Over the past several years, UNHCR has been closely examining the evolving nature of harms that children and adults are experiencing in parts of Central America and Mexico in order to more fully

understand and demonstrate the extent to which these harms – including the escalating violence due to armed organized criminal actors and the increasing inability of the Governments to stem this growing tide, redress harms committed and protect others from these harms – give rise to international protection concerns.<sup>28</sup> One study, *Forced Displacement and Protection Needs produced by new forms of Violence and Criminality in Central America*, commissioned by UNHCR and issued in May 2012 by the International Centre for the Human Rights of Migrants (CIDEHUM), demonstrated the pervasive, pernicious and often uncontrollable violence and disruption in the region perpetrated by these largely transnational criminal actors, including gangs.<sup>29</sup>

This study and the few others undertaken in recent years point to, but do not fully discuss, the potential reasons why children from the region have been arriving to the U.S. in such dramatically high numbers. Criminal threats inflamed by drug trafficking, polarized political systems, weak law enforcement and social hardships – such as poverty and unemployment – contribute to the well-documented security crisis in the Central American

region. The effects of violence influence every pillar and institution in the affected countries, and within this context, violation of human rights is accompanied by a lack of State protection. Protection mechanisms are weak, and there is substantial evidence that the State has been co-opted and corrupted by highly organized non-State criminal actors in many areas, creating “zones of impunity.” Victims of criminal armed actors are likely to experience a high level of harm, deprivation of life and liberty, and the State cannot provide the required individual protection, particularly in the most affected areas.

With a grant from the John D. and Catherine T. MacArthur Foundation, UNHCR Washington undertook an extensive study to examine the reasons why children are displaced from the four countries. While recognizing a significant contextual difference between the situation in Mexico and in the Northern Triangle of Central America, the common denominator is that all four countries are producing high numbers of unaccompanied and separated children seeking protection at the southern border of the United States. UNHCR’s research was to ascertain the connection between the children’s stated reasons, the findings of recent studies on the increasing violence and insecurity in the region, and international protection needs.<sup>30</sup> UNHCR Washington conducted individual interviews with 404 unaccompanied or separated children – approximately 100 from each country – who arrived to the U.S. during or after October 2011.

In the context of the current regional and national environments and the tremendous number of displaced children arriving to the U.S. from El Salvador, Guatemala, Honduras and Mexico, this report analyzes the children’s responses in an effort to address two questions:

Why are these children leaving their countries of origin?

Are any of these children in need of international protection?

UNHCR found that the large majority of children interviewed from all four of these countries provided information that clearly indicates they may well be in need of international protection.<sup>31</sup> The responses

of these children were complex and multifaceted and in many cases included both protection-related and non-protection-related concerns. Significantly, protection-related reasons were very prominent, and this report focuses on those reasons.<sup>32</sup> Our data reveals that no less than 58% of the 404 children interviewed were forcibly displaced because they suffered or faced harms that indicate a potential or actual need for international protection. The study was specifically designed to be representative and statistically significant for drawing conclusions and inferences, and as such, this finding that 58% of the children raised potential international protection means that in general, 58% of all the unaccompanied and separated children in the same age range, from these four countries, arriving to the U.S. would likewise raise potential international protection needs.<sup>33</sup> Other findings of the study would also be reflected in the same population at large, such as, for example, the percentage of children with family members in the United States.<sup>34</sup> The central conclusion of this study is that given the high rate of children who expressed actual or potential needs for protection, all unaccompanied and separated children from these four countries must be screened for international protection needs.



## METHODOLOGY

This report is based on in-depth, individual interviews UNHCR conducted May – August 2013 with 404 unaccompanied or separated children ages 12-17<sup>35</sup> from El Salvador (104 total: 37 girls, 67 boys), Guatemala (100 total: 21 girls, 79 boys), Honduras (98 total: 29 girls, 69 boys) and Mexico (102 total: 4 girls, 98 boys).<sup>36</sup> All the children interviewed were part of the surge that began in October 2011.<sup>37</sup>

In light of the special vulnerability of children, in particular unaccompanied and separated children for whom there is no parent or lawful guardian present to protect their interests, the design and implementation of this study were guided by the following fundamental principles: the best interests of the child, “do no harm” to any child in the course of conducting any research involving children, nondiscrimination, confidentiality, and voluntary and informed participation.<sup>38</sup>

Nearly all of the children from Central America were interviewed while in the custody of the Office of Refugee Resettlement (ORR), the agency within the Department of Health and Human Services to which unaccompanied and separated children apprehended by U.S. immigration authorities are referred for custody and care until the children can be released to the care of adults while such claims for status are pending or after lawful status to remain in the U.S. is granted.<sup>39</sup> After accounting for the parameters set for nationality, age, sex, date of arrival to the U.S. and type of federal custody, the children interviewed were identified by a random selection process. Unlike unaccompanied and separated children from all other countries, children from Mexico are not automatically referred to ORR custody unless they state a fear of return to Mexico, have been or are at risk of being trafficked, or are

deemed unable to make an independent decision to return to Mexico. Instead, the vast majority of these children are returned directly to Mexico. The very small number of Mexican children screened into ORR custody required UNHCR to conduct most of its interviews with Mexican children who were at the U.S. border with Mexico in the custody of CBP before they were returned to Mexico. As a result, after accounting for nationality, age and date of arrival, the Mexican children were interviewed soon after they were taken into CBP custody.<sup>40</sup> The setting and timing of UNHCR's access to children from Mexico also resulted in an inability to ensure that the breakdown by boys and girls was proportionate to their numbers of arrivals, unlike for the children from the other three countries, who were interviewed proportionately to the sex distribution of these children found in the ORR custody.

The interview process included two components: an introductory overview, either in small groups or, on a few occasions, individually, which underscored the voluntary nature of the children's participation, the confidentiality of their identity and answers, and the purpose of the interview; followed by an interview conducted by two members of the UNHCR team individually with each child who agreed and signed a written consent to participate in the study. One UNHCR team member conducted the interview; the other took notes. The interview was conducted based on a questionnaire of 73 open- and closed-ended questions to ensure that both qualitative and quantitative data would be provided.<sup>41</sup>

The heart of the interview was to learn from the children in their own words the reasons behind their decision to leave their countries of origin. The ultimate goal of this study was to ascertain whether the recent surge in unaccompanied and separated children from El Salvador, Guatemala and Honduras to the United States reflects an increase in children from these countries with international protection needs. And although there has not been a similar surge in arrival of children from Mexico, given that their numbers have been consistently high over several years, the goal was the same – to ascertain whether they too are increasingly in need of international protection. As such, in addition to asking the children two questions about their reasons for leaving, a series of three questions was asked as to whether the children had ever experienced harm, been made to suffer or been in danger in their home countries.<sup>42</sup> The children's responses to both sets of questions were considered in the analysis of the nature and extent of their potential international protection needs. The children's narrative responses to each of these five questions were organized thematically under a series of broad categories and narrower sub-categories to facilitate the ability to identify trends or patterns in the responses. Among the broader categories of reasons are those related to family reunification and better opportunity; violence in society, including by organized armed criminal actors; abuse in the home; and deprivation and social exclusion.

In further preparation for this study, UNHCR conducted a review of the literature from 2004 to 2013 discussing the reasons why unaccompanied and separated children were migrating from El Salvador, Guatemala, Honduras and Mexico, with a focus on those studies that discussed children who made their way to the United States.<sup>43</sup> Only four of the many reports UNHCR found were written after

## CHARACTERISTICS OF THE CHILDREN INTERVIEWED

### Country of Origin and Number of Children:

El Salvador	104	67 Boys	37 Girls
Guatemala	100	79 Boys	21 Girls
Honduras	98	69 Boys	29 Girls
México	102	98 Boys	4 Girls
Total	404	313 Boys	91 Girls

- Ages 12-17
- Entered the U.S. during or after October 2011
- Held at some point in U.S. federal custody
- Gender distribution mirroring that represented in ORR custody by nationality
- Those in U.S. Government shelters present for more than five days in order to acclimate<sup>48</sup>
- Randomly selected within these parameters and voluntarily participated

the October 2011 surge began, and only two, both produced in the U.S., addressed the current dramatic increase in the arrival of unaccompanied and separated children to the U.S. from El Salvador, Guatemala and Honduras, with limited discussion about unaccompanied and separated children arriving from Mexico.<sup>44</sup> One of these two post-surge reports, *The Time Is Now: Understanding and Addressing the Protection of Immigrant Children Who Come Alone to the United States*, focuses on the treatment of the children upon their arrival to the United States but does contain a short section on the reasons why the children were leaving the countries of origin.<sup>45</sup> The second, *Forced From Home: The Lost Boys and Girls of Central America*, examines more closely the reasons for the migration of these children to the U.S.<sup>46</sup> These two reports in particular provide valuable insight into the protection-related reasons these children have for coming to the U.S., and their findings are consistent with the findings of this report.<sup>47</sup> The study conducted by UNHCR is much more comprehensive and in-depth, contains data collected from a later period of time, and, most important, as discussed above, is representative and statistically significant.

### Understanding the Perspective of the Child

In recognition of the significance of age, development, maturity and vulnerability of children, a child-sensitive approach was a central component in the development, implementation and analysis of this study.<sup>49</sup> International standards as well as the policies and practices of many States, among them the United States, recognize that any assessment of the protection needs of children – in particular international protection – must take into account age, development, vulnerability, psychological state and other factors relating to a child's ability to identify and articulate what are often complex and intertwined aspects of their young lives.<sup>50</sup> Children cannot be expected to provide adult-like accounts of situations they have faced and may have difficulty articulating their fears. They may be too young or immature to be able to evaluate what information is important or to interpret and convey what they have witnessed or experienced in a manner that is easily understandable to an adult. These factors can affect children of all ages – even those 12 years or older. Older children may also provide superficial or even artificial answers about experiences or events that were harmful or traumatizing. They may wish to avoid talking about difficult subjects, or they may not

## QUESTIONS ASKED TO EACH CHILD RELATING TO REASONS FOR LEAVING AND HARM EXPERIENCED IN THE COUNTRY OF ORIGIN

Why did you want to leave your country?

What was the most important reason?

Were there any other reasons?  
What were they?

Did anyone make you suffer at some point in your country or in your home?

Did anyone hurt you at some point in your country or in your home?

Were you in danger at some point in your country or in your home?

directly connect hardships or other experiences or fears with the questions they are being asked.

Children's responses to questions, such as why they left home, are often layered, with easier responses shared first. When questioned by officials of a foreign country about situations or experiences that may be difficult or traumatic to discuss, children may provide answers that are simple, "safe" and more easily repeated. Sometimes children provide information based on what they have heard from someone else. They may feel ambivalent about their decision to leave their homes or despondent about being apprehended by immigration officials, both of which may impact how they relate their situations, experiences, fears and concerns.

In light of these challenges, children may well be more forthcoming in an interview conducted in the context of a study such as this one, due to many of the following considerations. Before each individual interview, all the children were assured of, first in a group overview and then individually, the voluntary nature of their participation, including the ability to stop the interview at any time; the confidentiality and anonymity of the one-time-only meeting; the lack of any connection of the interviewer to any government or other official; and the fact that their responses would have no bearing whatsoever on their ability to

remain in the U.S. or to seek or be eligible for any form of protection from return to their countries of origin and would not be shared with any government official.

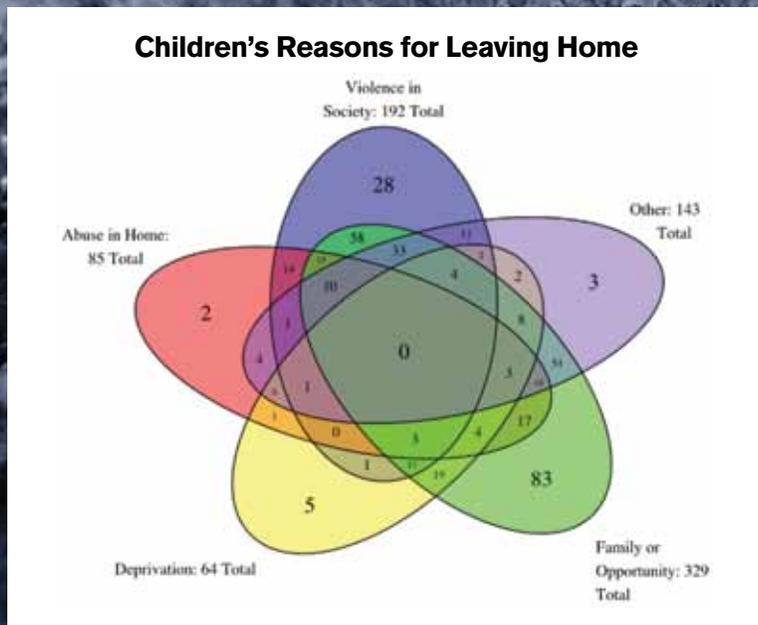
The questions employed in this study and the manner in which they were presented to each child were designed to best address the difficulties that frequently arise when interviewing children. Children were first asked basic and less potentially traumatic questions regarding their background before reaching the more involved and potentially sensitive questions about their reasons for leaving. After this initial questioning, the children were asked five different open-ended questions related to reasons for leaving their countries of origin.<sup>51</sup> This approach provided greater opportunity to build rapport with and increase trust and confidence in the interviewer and the interview process and ensured that each child had more than one opportunity to reflect on, share the factors and articulate the reasons that influenced the decision to leave. This interview format also better accommodated the sometimes-haphazard and other times fluid way children often have of telling their stories and recounting events – especially when these events might be painful or difficult to recall or to disclose out loud, in particular to a stranger from a different culture in the context of being at the mercy of a foreign government authority.



## WHY DID THESE 404 CHILDREN LEAVE?

The children's responses to the questions about why they left and whether they had experienced any suffering, harm or danger are as complex as the children themselves. Eighty-three percent of these children shared more than one reason for leaving their home countries. When the children's responses are filtered through the five broad thematic categories – violence in society, abuse in the home, deprivation and social exclusion, family reunification or better opportunity, and other – 70% of the children expressed reasons falling under more than one of these thematic categories.

The questions asked of the children were designed to maximize the children's opportunity to discuss their reasons for leaving and to identify any suffering, harm or danger they may have experienced before deciding to leave their countries of origin. The purpose was not to make a firm determination as to whether any given child did, in fact, have a need for international protection but rather to determine whether the children's responses indicated a need for a more in-depth investigation as to any protection needs they may have. The children's responses revealed patterns of harm, and an unsettling number of children disclosed that they had suffered more than one type of international protection-related harm discussed in this report.



If they really do want to know how hard life is down there, they should go see it. There are kids who don't make it past five [years old] because they die of hunger. Their parents can't work because there are no jobs. Just give us a chance. Let us better ourselves so we can be something better than what we are today.

MAURICIO, HONDURAS, AGE 17

In the context of entrenched poverty, an escalating threat posed by drug trafficking, polarized political systems, weak law enforcement and social hardships – such as poverty and unemployment – insecurity is on the rise in communities and in homes in the region. The humanitarian impact of this situation includes the displacement of a record number children who separate from their families and flee unaccompanied. In 2006, only 13% of the unaccompanied and separated children that UNHCR interviewed presented any indication of international protection concerns – that is, 11 of the 75 children who were interviewed at that time. The large majority of these children, all of whom were interviewed at the southern border of Mexico with Guatemala, left their homes to reunify with family members or for better opportunities, including access to education and work.

In contrast, of the 404 children interviewed for the current study in 2013, over half (53%) of those who mentioned family reunification, school or better opportunities, deprivation, or other reasons also gave international protection–related reasons for leaving their countries, among them violence in society predominantly by armed criminal actors, and abuse in the home. For example, one boy spoke first about the danger he faced in El Salvador from gang-related violence, and only when asked if he had any other reasons for leaving did he mention that his mother was in the U.S. Even those children who originally said that they had come to the U.S. to reunite with family or hoping to attend school also spoke of fear of criminal violence by gangs or other actors.

Among the 81% of the unaccompanied and separated children who said they would join a family member in the U.S. or left to pursue better opportunities as part of their reasons for deciding to travel to the United States, 51% also raised at least one international protection–related concern. In many cases, the children raised more than one of these factors. Thirty-six percent (146) of the children stated that one or both of their parents lived in the U.S., yet only 59% (86) of these 146 children gave joining a family member as one of their reasons for leaving their home countries, and many left a parent or grandparent to make the journey.<sup>52</sup> Family separation and family unity were recurrent themes in the majority of children's narratives.

Just over half of the children, 51%, gave economic opportunity as a reason for coming to the U.S. One quarter of the children stated they were seeking a better future, and 19% gave attending school as a reason. A significant number of the children mentioned issues related to poverty and lack of meaningful opportunity as one reason – but in very few cases the only reason – for leaving. At first glance, it may appear that these children should be considered “economic migrants” rather than children in need of international protection. This is a short-sighted view when taken in deeper context.

At the very core of what could be called root causes for children leaving these four countries and coming to the U.S. are issues of entrenched poverty and deep lack of meaningful opportunity for education and employment. This is compounded by, in the cases of El Salvador, Guatemala and Honduras, the long-term effects of years of civil war and repression and the long-standing climate of violence engendered by this strife; in Mexico, by the ever-escalating violence related in particular to drug cartels; and in all four countries, by the lack of the consistent effective ability to stem the escalating violence, to prosecute and punish appropriately the perpetrators of this widespread criminal violence, and perhaps most important from the perspective of UNHCR's mandate, to provide meaningful and adequate protection and redress to members of these societies affected by this violence.<sup>53</sup>

HARM EXPERIENCED OR FEARED BY THE CHILDREN			
Total Number of Children Interviewed by Country of Origin	Number of Children Who Mentioned Violence in Society	Number of Children Who Mentioned Abuse in the Home	Exploitation by Smuggling Industry
El Salvador 104	69	21	0
Guatemala 100	20	23	0
Honduras 98	43	24	0
Mexico 102	60	17	39 (38%)
<b>TOTAL 404</b>	<b>192 (48%)</b>	<b>85 (21%)</b>	<b>39 (10%)</b>

Across the board, 58% of the children expressed that before leaving their countries of origin they had suffered, been threatened or feared serious harm of a nature that raises international protection concerns. This result stands in stark contrast to the finding of a 2006 study conducted by the UNHCR Regional Office for Mexico, Cuba and Central America with the cooperation of Save the Children. The 2006 study found that only 13% of the 75 children interviewed at that time described harms that warranted further review for the need for international protection.<sup>54</sup>

The responses of the children reveal both a tremendous overlap and commonality in the concerns raised by the children from all four countries as well as significant differences in the issues raised among the children from each of the four countries. As such, the most complete and nuanced understanding of the reasons why children are leaving their home countries is best revealed in a country-by-country examination. A brief overview of the themes, trends, points of commonality and departure and protection needs taken from what the children said as a whole is presented here first to provide a broader context and points of reference for the country-by-country discussion that follows.

Josefina lived with her mother and two younger siblings. Her biological father abandoned her mother when she was pregnant with Josefina. Josefina has a warm relationship with her stepfather, who has lived in the U.S. for eight years. She described her main reason for coming to the U.S. as joining her stepfather here. After talking for almost an hour, Josefina began to talk about the threats made to her that led her to flee when she did. The head of the gang that controlled her neighborhood wanted Josefina to be his girlfriend and threatened to kidnap her or to kill one of her family members if she didn't comply. Josefina knew another girl from her community who had become the girlfriend of a gang member and had been forced to have sex with all the gang members. Josefina didn't want this for herself. Once the gang started harassing her, she didn't feel safe, so she stopped going to school and stayed at home until her family was able to make arrangements for her to travel to the U.S.

JOSEFINA, EL SALVADOR, AGE 16

## Violence in Society

One hundred ninety-two (48%) of the children interviewed shared that they had experienced or been threatened with serious harm by organized armed criminal actors (groups that are largely transnational and may work collaboratively within countries and across the region), state actors or other actors within the community or that they had suffered such harm due to a lack of sufficient protection by the State. Over a quarter of the children, 31%, or a total of 125, discussed violence or threats of violence by gangs or cartels. Of these 125 children, 108 spoke specifically about gangs: 64 were Salvadoran, 33 were Honduran, 10 were Guatemalan and one was Mexican. The pervasive presence of gangs and their interrelationship with other forms of organized criminal entities, along with the inability of States to provide effective protection, are discussed in the “Violence in Society” subsection of the “Protection-Related Reasons for Leaving – Connecting the Dots” section below. Because gang-related violence is the most prevalent form of criminal conduct, this issue is discussed here in greater detail than are the other types of criminal-related violence.

The gang-related issues include a range of threats and harms to the children. The majority of the 108 children who discussed gang violence – 75 children, or 69% – talked about at least one

I left because I wanted to be with my mother. I miss her a lot. My grandmother mistreated me. She was mean to me. She told me to leave the house, but where was I supposed to go? The only place I could go was here. She forced me and my siblings to work. I couldn't stand to be there anymore.

OSCAR, HONDURAS, AGE 12

specific incident, such as having been beaten, robbed or threatened by gangs. More than half of the children who discussed gang violence issues – 64 children, or 59% – talked about the rampant threat of harm by armed criminal groups in their communities, including inter-gang conflict<sup>55</sup> and the extent of the control gangs exercise in different neighborhoods, such as determining who may enter and exit these neighborhoods – even among residents and relatives of residents in the community. Some children described the potentially life-threatening dangers of being misidentified as a member of one gang while in rival territory of another gang. Children shared the dangers they faced through their efforts to avoid gang recruitment, harassment by gangs while commuting to school, and the extortion exacted by gangs on children and their families.<sup>56</sup>



SELECT EXAMPLES OF GANG-RELATED HARM BY GENDER		
Type of Gang-Related Harm	Number and Percentage of Girls (24 Total)	Number and Percentage of Boys (74 Total)
Violent Forced Conscription	2 8%	29 39%
Rape, Other Sexual Violence or Threats of Same	7 29%	1 1%
Extortion	7 29%	11 15%
School-Related Danger	7 29%	12 16%
Gang Violence in the Community	16 67%	48 65%
Specific Fearful Incident	20 83%	55 74%

Twenty-four girls and 74 boys spoke of gang-related violence concerns. Although the harms and threats by gangs were shared by both boys and girls, there was a gender difference in the frequency of certain types of harm. For example, 29 of the 31 children who discussed violent forced conscription into gangs were boys. On the other hand, seven of the eight children who reported rape, other sexual violence or threats of such violence were girls.

Of the 21 children who mentioned concerns about cartels, 15 of them were from Mexico, four from Guatemala, one from Honduras and none from El Salvador. A total of 10 children, all of whom were from Mexico, mentioned harm at the hands of State actors. Sixteen children from Honduras expressed concern about generalized violence, as did 11 children from Mexico, eight from Guatemala and six from El Salvador. Interestingly, concerns about insufficient State protection were most frequently mentioned by the Salvadoran children (13), followed by three from Honduras, one from Guatemala, and none from Mexico.

Crime-related harm based on involvement in the human smuggling industry affected 39 of 102

The problem was that where I studied there were lots of M-18 gang members, and where I lived was under control of the other gang, the MS-13. The M-18 gang thought I belonged to the MS-13. They had killed the two police officers who protected our school. They waited for me outside the school. It was a Friday, the week before Easter, and I was headed home. The gang told me that if I returned to school, I wouldn't make it home alive. The gang had killed two kids I went to school with, and I thought I might be the next one. After that, I couldn't even leave my neighborhood. They prohibited me. I know someone whom the gangs threatened this way. He didn't take their threats seriously. They killed him in the park. He was wearing his school uniform. If I hadn't had these problems, I wouldn't have come here.

ALFONSO, EL SALVADOR, AGE 17



children from Mexico and none of the children from the other countries. This issue is discussed below in the section on children from Mexico.

### **Abuse in the Home**

Eighty-five children, slightly more than a fifth of the total number interviewed, revealed some form of abuse in the home, including physical abuse, emotional abuse, sexual abuse, sibling violence, intimate partner violence and abandonment. The children identified a range of abusers, including parents, siblings, grandparents, other caregivers and domestic partners. Across all nationalities except Guatemalans, children discussed abuse in the home much more frequently as a form of suffering or harm than as an explicit reason for leaving.<sup>57</sup> Although less than half of the children who reported some form of maltreatment or abuse were female, the 36 girls who reported maltreatment or abuse represent 40% of all the girls interviewed, whereas the 49 boys who reported some form of abuse in the home represent only 16% of all the boys interviewed. Twenty-two children spoke of caregivers getting ill, dying or being otherwise unable to care for the children as a reason for leaving, and 10 of these children were also among those who reported abuse in the home.

The issue of abuse, especially in the context of occurring in the home, highlights some of the key reasons why both the process of eliciting information

from children and the analysis of the information they provide require a clear understanding of a child's ability to talk about such issues. Children may feel ashamed to discuss experiences of abuse or may have difficulty articulating or recounting an experience. A child may feel that discussing abuse in the home will bring shame on her or his family. Children may not consider it relevant, important or safe to mention. Some children may not even recognize their experiences as abusive because it is all they have known. For example, one 17-year-old from Honduras gave a variety of reasons for leaving, including numerous attempts by a gang to recruit him, lack of work and wanting to help his mother. When later asked whether anyone had ever made him suffer, he replied simply that his father beat him regularly.

Twenty-four percent of the Honduran children disclosed abuse in the home, along with 23% of the Guatemalan children, 20% of the children from

**My father would get mad at me and beat me all the time. Sometimes he would beat me with a belt every day. My mother couldn't really defend me because he would beat her, too.**

**ANGELO, HONDURAS, AGE 17**

El Salvador and 17% of the children from Mexico. Salvadoran girls reported the highest rate of abuse in the home, at 14 girls, constituting 67% of all the Salvadoran children who mentioned this form of abuse. The 11 girls from Honduras made up 46% of the total number of Honduran children facing abuse in the home out of a total of 24 children who mentioned this issue. Of the 23 Guatemalan children who reported abuse in the home, nine, or 39%, were girls. Seventeen Mexican children reported abuse in the home, and 15 of these were boys.<sup>58</sup>

**Sexual Violence**

Sexual abuse revealed by children during their interviews was recorded under three categories: violence by armed criminal actors, violence in the community and abuse in the home. A relatively small number of children disclosed that they had suffered some form of sexual violence, including rape. Twenty children in all, 19 of whom were girls, mentioned this issue.<sup>59</sup> Four of these children reported two different types of sexual violence: two were abused by both a gang member and a family member, and

the other two suffered sexual violence by someone in the community and by a family member. More Honduran and Salvadoran children, nine and seven, respectively, revealed sexual violence than did Guatemalan and Mexican children, three and one, respectively. Although only a few children discussed issues relating to sexual violence, it is difficult, if not impossible, to draw clear conclusions about the extent of sexual abuse these children as a whole may have suffered. This is because, as is well documented, among all forms of violence, sexual violence is generally the most difficult to disclose – by children and adults – due to its highly sensitive nature and the stigma and shame felt by many of its victims.<sup>60</sup> For these reasons, even though sexual violence was seldom disclosed, it is included here to highlight the need for further exploration and analysis in the future.

With this broad contextual backdrop in mind, the next section discusses the responses of the children from each country separately.

CHILDREN REPORTING ABUSE IN THE HOME BY COUNTRY AND GENDER				
Nationality	Number of Girls	Percentage of Girls to Total Number by Country	Number of Boys	Percentage of Boys to Total Number by Country
El Salvador 21 out of 104	14	67%	7	33%
Guatemala 23 out of 100	9	39%	14	61%
Honduras 24 out of 98	11	46%	13	54%
Mexico 17 out of 102	2	12%	15	88%
TOTALS	36	40%	49	16%



## WHAT THE CHILDREN FROM EACH COUNTRY ARE SAYING

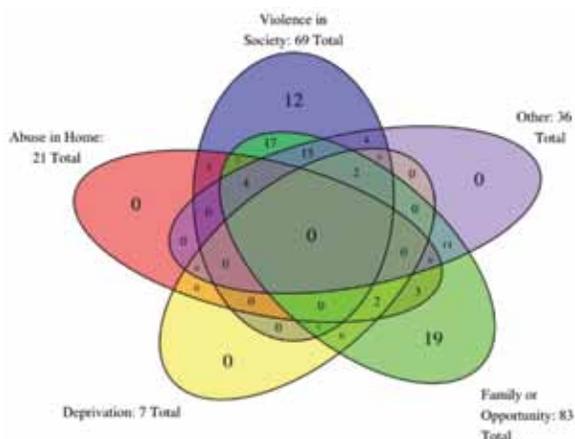
The 404 children interviewed came from diverse countries, cities, towns and villages. Some had close family members living in the United States, while others left behind the only family they ever knew. They were girls and boys ages 12 to 17. Many feared violence at the hands of gang members, cartel affiliates or their own family members. Others feared a life of deprivation and desperation due to lack of food, education and hope. Yet they all shared two things: alone and uncertain, they were forced to make a decision no child should ever face, and they all chose escape.

### El Salvador

Seventy-five (72%) of the 104 Salvadoran children were forcibly displaced because of severe harm that requires a closer review for international protection needs, representing the largest group among the four countries. While 83 children from El Salvador shared their hopes for reuniting with a relative, finding better opportunities to work or study, or helping their families as a reason for going to the U.S., 69 (66%) of the children from El Salvador reported having left because of some form of violence in society at the hands of organized armed criminal actors or others in the community, or due to lack of State protection from these types of harm. Twenty-one children (20%) disclosed abuse in the home. Only one child mentioned the possibility of benefiting from immigration reform in the U.S. Sixteen children (15%) reported being the victims of more than one of these categories of harms. Twenty-nine (28%) of the children did not mention any serious harm as a reason for leaving.

The predominant narrative of harm suffered by the children of El Salvador was due to criminal armed actors, particularly for those children who were socially vulnerable. The children described their everyday challenges of evading extortion; witnessing murders; and navigating threats to themselves and their families, friends and neighbors. Most children described their flight with urgency, without having planned the details in their attempt to survive, and finding little hope for resolution or protection from the adults in their lives, including caretakers, teachers and government authorities.

## Children's Reasons for Leaving Home – El Salvador



### Violence in Society

Out of the 69 Salvadoran children who reported violence in society, 65 of them mentioned gang-related violence specifically as the source of the harm experienced or threatened, constituting 63% of all the children from El Salvador.

Salvadoran girls expressed fears of sexual violence in particular. One 16-year-old told of having been approached by a gang member because the leader wanted her as his girlfriend. She was told that she and her family would be killed if she resisted his sexual advances. Out of fear, she stopped attending school and eventually fled to the U.S. Other

girls shared witnessing their friends being directly victimized and expressed fears of sharing the same fate. The fears of one 14-year-old girl that led to her leaving El Salvador provide a vivid example:

*There are problems in my country. The biggest problem is the gangs. They go into the school and take girls out and kill them. They were killing them in nearby towns, like in San Miguel. Sometimes girls are involved in gangs and other gangs kill them. Or sometimes girls are dating boys who are in the gangs and members from other gangs kill them. Or sometimes gangs hate a girl's family and they kill her because of that. I used to see reports on the TV every day about girls being buried in their uniforms with their backpacks and notebooks. I had to go very far to go to school and I had to walk by myself. There was nowhere else I could go where it would've been safer. I lived in a village and it was even worse in cities.*

The boys also spoke of fear of gang recruitment and retaliation based on the experiences of their friends and others. One 14-year-old boy reflected what he saw in his community:

*In the gangs, someone would go up to my village once a week to see what was going on. Sometimes they would approach the young guys and put them*

### MARIO, EL SALVADOR, AGE 17

I left because I had problems with the gangs. They hung out by a field that I had to pass to get to school. They said if I didn't join them, they would kill me. I have many friends who were killed or disappeared because they refused to join the gang. I told the gang I didn't want to. Their life is only death and jail, and I didn't want that for myself. I want a future. I want to continue studying and to have a career. That isn't possible when you're in the gang. I didn't want that for my family either. I didn't want my mother to suffer the way mothers of gang members suffer. The more they saw me refusing to join, the more they started

threatening me and telling me they would kill me if I didn't. They beat me up five times for refusing to help them. The pain from the beatings was so bad, I couldn't even stand up. They killed a friend of mine in March because he didn't want to join, and his body wasn't found until May. I went to the police twice to report the threats. They told me that they would do something; but when I saw that they weren't doing anything to help, I knew I had to leave. I even brought a copy of the police report I made; but U.S. immigration took it from me and threw it away. They said that it wasn't going to help me in this country.

*on the phone with the boss. The boss would say to the young guys that they must join, and if they don't they would kill his family. They beat up one of my friends who wouldn't join. You can't say anything to the police because the gangs are capable of coming and killing you.*

The threat of serious harm at the hands of armed criminal actors was pervasive throughout the children's interviews. The children from El Salvador who had not yet been victims of the violence spoke of their and their families' fear with the same inevitability.

*There are lots of gangs in my country. They force you to do bad things to other people, or they force you to get involved with them or to use drugs, said one 16-year-old boy. I didn't want to do that, and so my whole family agreed that I should come here [to the United States].*

Thirteen Salvadoran children, by far the highest number of all the countries, spoke about concerns related to insufficient State response to reports of threats or harm or an inability to protect from these harms. These concerns include children who unsuccessfully approached the authorities to report a crime and seek protection, as well as those children who explained why it was not realistic for them to

even attempt to ask the police or other authorities for protective action.

### **Abuse in the Home**

Twenty-one (20%) of the Salvadoran children said they made the journey north at least in part because of abuse they suffered at home. These children were primarily girls who spoke of abuse by family members or by their boyfriends. One 15-year-old spoke of being raped by her boyfriend, only to have him threaten to take her child from her when she got pregnant as a result. Another girl, this one 17 years old, spoke of an abusive stepfather from whom neither her mother nor the authorities protected her:

*My stepfather tried to rape me a few times. This started in October 2011. I told my mother, but she didn't believe me. She beat me as well. I reported my stepfather to the police, and there was a court case. He didn't end up in prison. I had to leave my house and go live with my neighbor and then with my brothers.*

One 17-year-old Salvadoran boy spoke of having been abandoned by his father and beaten often by his mother. Add to this the intimidation and threats of forced recruitment programs by criminal armed actors in his neighborhood, and he felt he had no other choice than to set out on his own for safety.



MARITZA, EL SALVADOR, AGE 15

I am here because the gang threatened me. One of them “liked” me. Another gang member told my uncle that he should get me out of there because the guy who liked me was going to do me harm. In El Salvador they take young girls, rape them and throw them in plastic bags. My uncle told me it wasn’t safe for me to stay there. They told him that on April 3, and I left on April 7. They said if I was still there on April 8, they would grab me, and I didn’t know what would happen. I also wanted to come because I was excited about seeing my mother. But I was also sad about leaving my grandmother. My mother’s plan was always for the four of us – her, my two sisters and me – to be together. But I wasn’t sure I wanted to come. I decided for sure only when the gang threatened me.



## Guatemala

Thirty-eight percent of the 100 children interviewed from Guatemala raised international protection concerns. The three dominant themes that emerged from their responses were deprivation, at 29%; abuse in the home, at 23%; and violence in society, at 20%. Five percent of the children reported that they had been victims of more than one of these harms. Eighty-four percent of the children expressed hopes for family reunification, better opportunities for work or study, or helping their families as one of their reasons for coming to the U.S. Sixty-two percent of the children did not mention any serious harm as a reason for leaving.

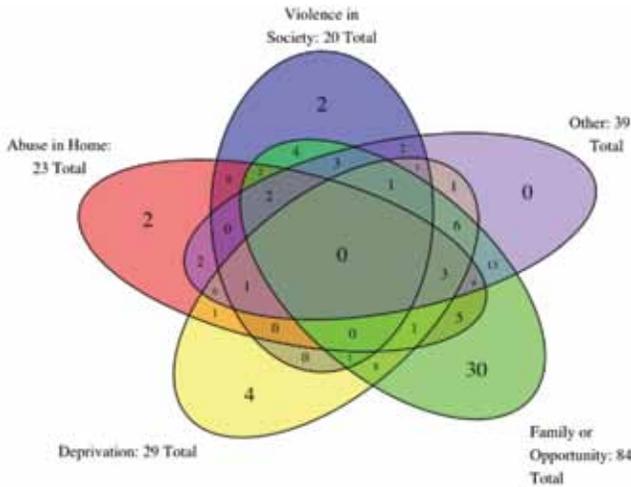
Almost half of the Guatemalan children, 48% – 41 boys and seven girls – were from indigenous populations.<sup>61</sup> The protection-related concerns discussed by these children were similar to those discussed by the Ladino Guatemalan children overall, with some notable differences. The indigenous children composed 55% of all the Guatemalan children who discussed deprivation and social exclusion. Thirty percent of the children who mentioned abuse in the home were indigenous, and 25% of those who discussed violence in society were indigenous children.

### Abuse in the Home

Twenty-one percent of the Guatemalan children mentioned abuse in the home by a family member or other caregiver. One young girl confided that her stepmother beat her several times a week and forced her to quit her studies so she could begin working. Another girl talked about a cycle of violence within her family:

*I had problems with my grandmother. She always beat me from the time I was little. That’s why I went to live with my boyfriend – and because I was lonely and sad. But after we had been living together for about a month, my boyfriend also beat me. He beat me almost every day. I stayed with him for four months. I left because he tried to kill me by strangling me. I left that same day.”*

## Children’s Reasons for Leaving Home – Guatemala



One 16-year-old boy stressed his desire to study, earn a living and reunite with his mother as his reasons for leaving. He then went on to say:

*My father was deported from the United States for domestic violence. When he came back he was violent and angry, and he wanted to take his anger out on me. He would insult me and say mean things. He never hurt me physically, but he hurt me psychologically.*

### Violence in Society

Twenty percent of the Guatemalan children suffered or had been threatened with serious harm by some form of violence in society, including gang or other organized crime–related violence, other violence in the community, or failure of the State to protect them against these forms of societal violence. Twelve of the children reported harm or fear of harm by gangs or cartels, another eight discussed generalized violence, and one reported insufficient protection from the State.

Some of the children spoke about the impact of the violence on their daily lives. As one boy said, “It was hard for me to study because of the gangs. It didn’t happen to me, but sometimes they assaulted people. They did it to my friends. They were always on the road leading into the school, watching to see who they could assault.”

Gangs in a nearby neighborhood wanted to kill me and some other people. They wanted me to give them money, but what money was I supposed to give them? I didn’t have any. They asked me a bunch of questions, like who was my father, and who was my family. I told them my father was dead. They told me to say goodbye because I was going to join my father. They asked me if I knew who they were, if I could identify them. I said no, because I knew if I said yes they would kill me. They held my cousin and me for three hours, tied up. My cousin was able to untie the rope and he helped me untie mine. We heard gun shots and we ran. They kept looking for us, but we escaped.

DAVID, GUATEMALA, AGE 16

I had problems with my grandmother. She always beat me from the time I was little. That’s why I went to live with my boyfriend – and because I was lonely and sad. But after we had been living together for about a month, my boyfriend also beat me. He beat me almost every day. I stayed with him for four months. I left because he tried to kill me by strangling me. I left that same day.

LUCIA, GUATEMALA, AGE 16



## Abuse in the Home

Twenty-four (24%) Honduran children talked about abuse at the hands of family members or other caregivers. One 16-year-old girl spoke of abuse by her stepfather when she was young. He threatened to kill her when her mother decided to leave him. For years afterward, the girl continued to feel afraid and spoke of this when she described her reasons for leaving Honduras. Another girl fled when she was 17, after her abusive father was released from prison:

*My father beat me my whole life. He abused me and my sister. He was an alcoholic. He raped my sister and got her pregnant. He was in jail for five years, even though it was supposed to be nine years. He got out of jail in March 2012. I didn't want to be around him because I was afraid he would beat me and mistreat me again, so I decided to leave.*

Another girl spoke of abuse at the hands of her boyfriend:

*When I was 16, I went to live with my boyfriend. He was fine until I got pregnant. Then he changed. After I got pregnant, when I didn't want to have relations with him he would beat me. He would throw me against the wall or against the bed.*

## Mexico

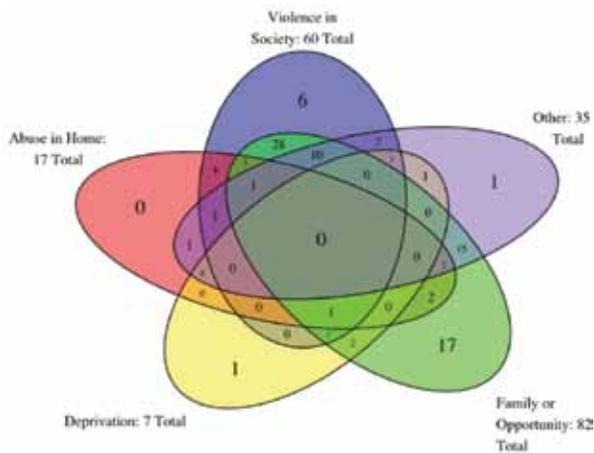
As is true of all the children, Mexican children gave a broad range of factors driving their departures. Eighty percent of these children spoke of the desire to reunite with family, study, help their families or pursue other opportunities. Thirty-three (32%) of the children spoke of the inescapable violence in Mexican society wrought by the drug cartels and other criminal actors, and of these 33 children, 12 had been recruited into the human smuggling industry.<sup>62</sup> Seventeen (17%) children disclosed abuse in the home. One 16-year-old boy described the violence, desperation and deprivation he faced:

*It's really bad over there, with the violence and gunfire and everything. It's hard to live there. If you don't have a good job, you have to work in bad things. And if you don't or can't do either, you have to come here.*

The children from Mexico presented a particular protection-related concern not raised by children from any of the other countries – being used as “guides” for human smuggling operations to bring people across the border from Mexico into the U.S. Because the vast majority of unaccompanied



## Children's Reasons for Leaving Home – Mexico



children from Mexico arriving to the U.S. are returned directly to Mexico and are not referred into the U.S. immigration system, almost all of the Mexican children interviewed for this study – 84 of 102 (82%) – were in the custody of the U.S. Border Patrol, waiting to be returned to Mexico.<sup>63</sup> To best ensure a sufficient number of Mexican children were included in this study, these interviews were held in the Rio Grande Valley in South Texas, where UNHCR was informed there was regularly a high volume of Mexican children. This region has one of the highest rates

of crossings from Mexico into the U.S.<sup>64</sup> and an accompanying high volume of child guides for human smuggling operations.<sup>65</sup> An unanticipated consequence of this was that a large number of the Mexican children interviewed for this study were ensnared in the human smuggling industry, representing the single largest protection-related category for the children from Mexico.

### Recruitment and Exploitation in the Human Smuggling Industry

Mexican children – precisely because of their age and vulnerability – are frequently recruited by criminal rings and other adults to work as human smuggling guides, because if caught, they are typically returned to Mexico without delay. These factors led to the result that 39 – almost half – of the 84 Mexican children interviewed while in the custody of the Border Patrol in South Texas were involved in the human smuggling industry. The reasons these children gave for entering the U.S. were largely related to their work as guides for human smuggling operations. As such, these children have a unique set of protection needs and can be understood as akin to children who are trafficked for work and who require a similarly specialized analysis and understanding. In both



situations, children are exploited by adults – including the cartels that control the human smuggling industry – and are made to engage in unlawful and dangerous activities.

Children are lured in with the promise of money, the likes of which cannot be earned through what few legitimate work opportunities might be available to these children. Once ensnared, the children are not easily allowed to stop performing the smuggling tasks and are caught in a web of criminal activity and threats to their safety and well-being. Given their young ages, rampant poverty, lack of opportunity and often-unchecked crime-related violence in at least some parts of Mexico, serious questions are raised as to the coercion and exploitation of these children as opposed to a true informed and voluntary decision to participate in this often-dangerous criminal activity.

Over and above the international protection implications for the 39 Mexican children who were caught up in the human smuggling industry, 21 of them identified one or more of the other protection-related concerns, in addition to the 26 other Mexican children who mentioned international protection needs and who were not involved in human smuggling, for a total of 47 (46%) children from Mexico raising international protection-related concerns apart from being recruited into the smuggling industry.

One 15-year-old boy involved in human smuggling reported being afraid of Mexican soldiers and revealed the extent to which these children are at the mercy of the adults who recruit and exploit them: “I’m afraid of the soldiers. They can beat you. It depends on your ‘boss.’ Your ‘boss’ will sometimes pay the soldiers to set you free.” Another boy, only 14 years old, shared similar fears of the soldiers, stating: “I was shot at by the Mexican soldiers about three months ago. They do not like us, the people who do my ‘work.’”

An additional harm these children face as a result of having been ensnared in the human smuggling industry is that they are also subject to abuse by the Mexican military. Among the responses of the Mexican children, 10 (10%) spoke of being harmed

or threatened with harm by the Mexican military. The common theme throughout the responses of all 10 was being targeted because of their actual or presumed work in human smuggling. Eight of the 10 children had been recruited into the smuggling industry. Of the eight, three were beaten or tortured by the military soldiers, two were shot at by them and three feared such abuse. Of the two children who were not working in the human smuggling industry but who discussed abuse by the military soldiers, both were accused of working for a cartel and were beaten for it by the soldiers.

### **Violence in Society**

Twelve of the Mexican children who had not been recruited into smuggling identified risks from cartels or dangers they experienced as reasons for coming to the U.S. Three of the four Mexican girls interviewed spoke of cartel violence. Ten of the children spoke of fears due to generalized violence, and two spoke of harm at the hands of State actors.

### **Abuse in the Home**

Seventeen (17%) of the Mexican children – two girls and 15 boys – spoke of abuse in the home. Nine of them were children also exploited by the human smuggling industry.

I’m tired of so much crime, of so much blood on the streets. Reynosa – it’s hell for a young person.

MIGUEL, MEXICO, AGE 14

I like playing football [soccer] outside, but I can’t really play anymore. My friends from my neighborhood all moved because their brothers were killed. The cartel killed them, and the entire family left. So now I don’t have anyone to play soccer with.

JUAN, MEXICO, AGE 13



## PROTECTION-RELATED REASONS FOR LEAVING – CONNECTING THE DOTS

The information gathered and analyzed in this study leads to a singular conclusion: a significant majority of the displaced children from El Salvador, Guatemala, Honduras and Mexico interviewed for this study – 58% – may well have international protection needs.<sup>66</sup> In order to fully appreciate this conclusion and its implications, it is essential to have an understanding of the data that takes into account both the autonomy and the vulnerability of children.

Three essential dimensions must be taken into account to fully understand the ways in which these children's narratives give rise to international protection concerns: the meaning and purpose of international protection and in particular refugee protection; the fears expressed by the children in the context of the current situation in each of the four countries of origin and within the region; and the unique ways that unaccompanied and separated children fear and experience harm. This section of the report addresses these three facets and provides an overview of the relationship between the types of harm most commonly experienced or feared by these children and the potential need for international protection that flow from them.

### **The Meaning of International Protection**

Because the potential need for international protection of so many of these children is a core finding of this study, the term is defined here to ensure that its meaning is clearly understood. International protection is the responsibility of States to protect their citizens, but when Governments are unwilling or unable to protect their citizens or others who reside in their territory, individuals may suffer such serious violations of their rights that they are forced to leave their homes and often even their families to seek safety in another country. Because, by definition, the Governments of their home countries no longer protect the basic rights of these individuals, the international community must step in to ensure that those basic rights, as articulated in numerous international and regional instruments, are respected.

The principal means for providing international protection to individuals unable to receive protection in their countries of origin is the *1951 Convention relating to the Status of Refugees (1951 Convention)* as amended by the *1967 Protocol relating to the Status of Refugees (1967 Protocol)*. To receive protection under these instruments, an individual must satisfy the definition of a “refugee,” and there must not be any reason, as articulated in the *1951 Convention*, to exclude an individual from such protection. Once found to be a refugee, protection under the *1951 Convention* and *1967 Protocol* must be granted. The foremost protection is the guarantee against return to danger or non-refoulement – the cornerstone of international refugee protection, which is the ability to remain lawfully in the country of asylum. Other fundamental human rights as articulated in these and other international and regional instruments, among them the rights to livelihood, education and exercise of religious beliefs, must also be respected.

The term “international protection” was originally crafted and associated with refugee protection. With the progressive development of international law, the term now refers to a broader range of protection for those who may not meet the refugee definition but nevertheless do not enjoy the protection of their countries of origin and are in need of international protection. As discussed below, other international instruments also call for providing international protection for certain

individuals who have crossed a border from their own State into another.

### **The Refugee Definition**

The refugee definition contained in the *1951 Convention* and its *1967 Protocol*, provides that a refugee is any individual who has a well-founded fear of being persecuted based on race, religion, nationality, membership of a particular social group or political opinion; is outside the country of origin; and the country of origin is unwilling or unable to provide protection to that individual.<sup>67</sup> All of the five countries discussed in this report have adopted a refugee definition consistent with the *1951 Convention* and its *1967 Protocol*. The core of the *1951 Convention* and its *1967 Protocol* is the obligation to provide protection to refugees; to ensure that their human rights are respected; and to safeguard the principle of non-refoulement, which is the obligation not to return a refugee to any country where she or he would face danger.<sup>68</sup> Each of the key terms of the refugee definition has been subject to interpretation, and UNHCR provides the key international sources for such interpretation through the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*.<sup>69</sup> For purposes of this report, the key issues to understand are, first, that the harm feared or experienced by these displaced children may rise to the level of persecution; second, that the



harm may have been or may be directed at these children due to one of the five protected grounds – race, religion, nationality, membership in a particular social group and political opinion; and third, that the State is responsible for the harm or is either unwilling or unable to provide protection from it.<sup>70</sup>

### **Complementary Forms of International Protection**

There may be individuals who are found not to meet the refugee definition contained in the *1951 Convention* or *1967 Protocol* but are nevertheless in need of international protection due to their lack of safety or security and their inability to receive State protection in their countries of origin. Some of these individuals may fall within the broader refugee definitions contained in the *Organization of African Unity Convention* or the *Cartagena Declaration*. Others may not meet one of these broader refugee definitions or may be in a location where neither of these broader definitions applies. In general, these are persons fleeing armed conflict, serious internal disorder, massive human rights violations, generalized violence or other forms of serious harm with no link to a refugee protection ground as contained in the international refugee definition. Such individuals should be given a formal, legal – complementary or subsidiary – status, with defined rights and obligations, for the period of time necessary to safeguard their safety and security. These obligations emanate from a range of human rights instruments, among them the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.<sup>71</sup>

### **The Particular Vulnerabilities and Perspectives of Children**

The “best interests of the child” principle requires assessing protection needs from the child's perspective, which encompasses an examination of the impact of the harm – already experienced or potential – on the child's rights or interests. This means that any assessment of potential protection

needs must be conducted in a child-sensitive manner in view of the child's age and maturity, as well as other factors relating to a child's development and ability to identify and articulate what are often complex and intertwined aspects of their young lives. These same factors relating to a child's stage of development and vulnerability may also be directly related to how a child experiences, fears or articulates harm. A full consideration of the unique perspectives of children is essential not only in the interview process but equally so in the context of assessing their experiences and fears to best ensure that no child is denied international protection in error.<sup>72</sup>

Children are more susceptible to harm and often experience it differently than adults. “Actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child.”<sup>73</sup> At the same time, children may be subject to specific forms of harm or to types of harm that apply only to or disproportionately affect children precisely because of their age, lack of maturity or vulnerability, such as physical and mental violence, abuse, neglect and exploitation. Because of children's vulnerability and susceptibility, the very fact of being a child may itself be a key factor in the harm they have experienced or fear.<sup>74</sup>

Children are more likely to be emotionally affected by hostile situations. Memories of traumatic events may linger in a child's mind and may result in ongoing, long-term psychological harm. Even where a child's experience is comprised of isolated incidents of lesser forms of harm, the cumulative effect of these incidents could give rise to persecution. Children are also more sensitive to acts that target close relatives, and witnessing such acts may traumatize a child and give rise to international protection needs even if the child was not the direct target of such acts. For example, witnessing the destruction of the home or harm to a close family member or friend is a traumatic experience that could give rise to a protection need for a child. Similarly, a fear of harm that is so great that the child must remain indoors for her or his safety and well-being could also serve as a basis to provide a child international protection.

Children are often subject to harm by non-State actors, such as, for example, militarized groups; members of organized criminal gangs or cartels; close family members, including parents; and other caregivers. Where the harm is feared or experienced at the hands of a non-State actor, consideration as to whether the State is unable or unwilling to provide protection would be appropriate only in the context of a full assessment of a claim and not at the identification and screening of a child's potential international protection needs.

At the initial stage of protection screening, when a child first arrives or comes to the attention of State authorities, only the most elemental threshold screening standard should be required in order to refer a child for further protection screening and access to the full adjudication process. A child's indication of a potential need for international protection should be sufficient to refer that child to an agency with specially trained officers who can conduct a more detailed interview under more secure and less threatening or traumatic circumstances. It is only at the point of a full assessment of a claim for international protection that all the elements of the refugee definition would need to be brought to bear, such as whether the harm feared or experienced rises to the level of persecution, the connection of the harm to a protected ground under the refugee definition, or, in the case of a non-State actor, whether the State is unable or unwilling to accord protection to a child from such harms.

The types of harms most frequently raised by the children interviewed for this study that reflect potential – if not actual – international protection needs are violence in society; abuse in the home; deprivation of basic survival necessities; and, for the Mexican children alone, recruitment and exploitation in the human smuggling industry. The children largely – but not exclusively – had already suffered harm or feared it at the hands of non-State actors, among them organized armed transnational criminal actors, including gangs and cartels; criminal actors engaged in human smuggling; close family members; and non-family caretakers.

A small number of children mentioned issues relating to violence by State actors. What follows is a discussion of the key protection-related issues set out by the children interviewed for this study and the basis for which such circumstances could give rise to a need for international protection.

### **Violence in Society**

Forty-one percent of the children interviewed disclosed they feared or had already experienced harm related to violence in society due to organized armed criminal actors, including gangs and cartels; State actors; generalized violence; and ineffective – if any – protection on the part of law enforcement. When the 39 Mexican children who were recruited into the smuggling industry are added to this number, a full 48% of the children raised international protection-related concerns. These children spoke of a range of criminal-related violence among them: forced recruitment; physical violence, including rape and severe beatings; threats of violence; and extortion. An understanding of the transnational nature of these various criminal entities and actors, the political power they wield and their influence and control in the societies of the four countries the children interviewed for this study are from is essential to recognize the international protection needs that stem from these forms of violence. There are important distinctions between the various organized armed criminal actors, such as, for example, the drug cartels and the gangs, yet at the same time, they often work collaboratively, and their activities overlap. Significantly, because of the pervasive presence and interconnectedness of these various criminal elements, many people – adults and children – are not always clear which entity the criminal actors represent. Perhaps most importantly, it must be understood that given the strong, powerful hold these criminal entities have in the various countries in the region, the States are often not able to provide meaningful protection from the entities' activities.

The *Forced Displacement and Protection Needs* study by UNHCR and CIDEHUM in 2012 makes a number of findings relevant to the concerns of the children discussed here. For example, the study explains that organized crime [OC] “forms

an organized and internally coordinated structure, which includes drug trafficking networks, gangs and criminal groups that operate from the local to the transnational level” and that have functional systems to exert control in strategic territories. It further discusses that organized crime activities generate forced displacement, which “has been seen with greater intensity in the last three years,” and that the increased presence and negative effects of organized crime “can be seen through extortion, killings, forced recruitment, strategic control of territory, generalized fear among the population, the rise in violence levels (historically high in these countries) and collusion within and weakening of the States’ structure,” which is “reflected in the rise in the levels of violence (homicides, criminality) precisely in the zones of impact and the zones of risk of OC activities.”<sup>75</sup>

The study observes a “lack of infrastructure and empowerment of local Migration and Police authorities . . . to control and protect victims and those vulnerable to being caught up in OC,” finding that “[n]ational protection mechanisms are undeveloped and insufficient.”<sup>76</sup> It acknowledges that this lack of effective protection exists “not for lack of political will on the part of the States, but because of the greater presence of organized crime and the violence generated by its activities.”<sup>77</sup> Leading to perhaps one of its most striking findings, the study urges, “The OC phenomenon must be urgently repositioned and reconceptualised in the international political agenda. It must be understood

that OC’s activity and scope is [sic] transnational, which means responses must occur at binational, regional and international levels and should not [be treated] as if it were only a question of domestic crime limited by a national sovereignty focus; this lack of visibility of the phenomenon could work to strengthen organized crime and its greater spread throughout the region.”<sup>78</sup>

Significantly, the *Forced Displacement and Protection Needs Study* identifies unaccompanied and separated children along with single women and women heads of household with young children as the populations most vulnerable to organized criminal elements and asserts that the international protection needs at stake “are related to protecting their lives and personal integrity.”<sup>79</sup> Equally important, the study underscores the concern that “[t]he international protection needs of victims as refugees are not being assessed through the prism of applicable international instruments, obscuring more and more the forced displacement caused by OC and the situation of people needing international protection.”<sup>80</sup>

The displaced children from El Salvador had the highest number of organized criminal–related violence, at 66%, followed by 44% of the children from Honduras, 32% of the children from Mexico and 20% of the children from Guatemala. Thirty-eight percent of the children from Mexico (39 children) were caught up in the human smuggling trade. Of these 39 children, 12 also reported harm from other criminal elements. When these 39 children involved in smuggling are added to the 33 Mexican children



affected by other crime-related entities, minus the 12 who fell in both categories, so as to avoid counting them twice, the total number of Mexican children affected by criminal elements rises considerably to 60, or 59%.<sup>81</sup>

The fact that the harm stemming from organized crime-related violence typically emanates from non-State actors does not detract from the legitimacy or primacy of international protection needs in this context. The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* recognizes that protection-based harms may “emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”<sup>82</sup> The Handbook further provides that “[w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.”<sup>83</sup>

Forced recruitment of any child below the age of 18 years by a non-State armed group would be considered persecution.<sup>84</sup> Children may also have protection-related fear of return arising from the treatment they are subjected to or conduct they are required to engage in by such armed groups. Girls, in particular, may be forced into sexual relations with members of these groups, a situation feared by a small number of girls in this study.<sup>85</sup>

### **Abuse in the Home**

“All violence against children, including physical, psychological and sexual violence, while in the care of parents or [other caregivers], is prohibited [under international law].”<sup>86</sup> Such harm is recognized as a potential basis for providing international protection because of the child’s vulnerability, dependency and, in many cases, lack of ability to seek – or be provided – recourse or protection by the State. A child who discloses abuse in the home has raised a potential protection need and should be referred to the full protection adjudication process. Questions such as the severity of the abuse, whether the State is willing or able to provide protection to the child from it, and whether the actual or feared harm is connected to one of the five grounds in the refugee definition are

all factors that would appropriately be considered in the context of an assessment of a full protection claim. Just over one-fifth of the children, 85 in all (21%), revealed that they had experienced some form of abuse by a family member, another adult responsible for their care or a domestic partner.

### **Deprivation and Social Exclusion**

It is understood that not all children leaving situations of poverty warrant international protection. This section discusses the circumstances that may give rise to international protection needs in the context of deprivation of basic survival necessities. Children’s very survival and development depend on their ability to access adequate food, shelter, health care and education. Human rights also protect the enjoyment of basic economic, social and cultural rights, which include the ability to meaningfully engage in social, cultural and religious activities. Violation of any of these rights may cause the need for international protection where not realizing minimum core standards, such as, for example, denial of a child’s right to an adequate standard of living, including access to food, water or housing, could lead to an intolerable situation threatening that child’s development and survival.<sup>87</sup>

A significant number of the children, 53%, discussed issues related to poverty and lacking basic survival necessities, needing to provide support to family members, or lacking meaningful opportunity for work or education as one reason – but in only 55 cases as the *only* reason – for leaving. Entrenched poverty and deep lack of meaningful opportunity for education and employment lie at the very core of what could be called root causes for children leaving these four countries and coming to the U.S. Apart from this intrinsic connection to root causes, these forms of deprivation and, in some cases, discrimination may also give rise to international protection needs, especially when considered in the context of children’s experiences. “Children’s socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to

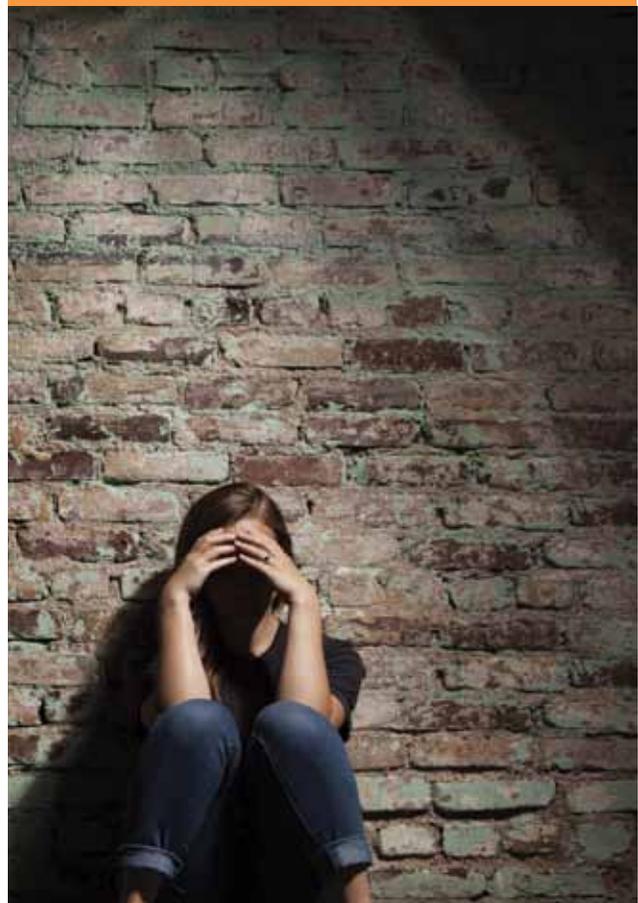
the assessment of a child's [international protection needs] as that of civil and political rights. It is important to . . . assess the overall impact of the harm on the child. The violation of one right often may expose the child to other abuses; for example, a denial of the right to education or an adequate standard of living may lead to a heightened risk of other forms of harm, including violence and abuse."<sup>88</sup> An accumulation of less serious violations may also give rise to international protection needs, as can discriminatory acts when they may lead to seriously prejudicial consequences for the child. As with other types of harm to a child, it is essential to assess the consequences of such acts for the child concerned – now and in the future.<sup>89</sup>

### **Recruitment and Exploitation in the Smuggling Industry**

In this study, concerns about exploitative labor arose predominantly in the context of Mexican children who had been recruited into human smuggling. Thirty-eight percent of the Mexican children stated they had come into the U.S. as part of their “duties” as smugglers.<sup>90</sup> All of these children stated they were doing this on behalf of an adult. The *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* includes in the definition of “worst forms of child labor” “the use, procuring or offering of a child for illicit activities . . . [and] work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”<sup>91</sup> These Mexican children were placed in a situation of danger to their safety and well-being and in direct conflict with their moral development and were repeatedly exposed to the dangerous and often-violent world of unlawful border crossings. They were rarely given the option to stop and, in combination with the poverty, lack of opportunity and lack of protection from the State, these children were caught in a vicious cycle.<sup>92</sup> The exploitation of the children subject to these practices represents serious human rights violations and is a strong indication that these children may be in need of international protection.<sup>93</sup>

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I don't understand why there are so many criminals who want to be more powerful than the authorities in our countries. If the authorities are afraid of the criminals, then our country will never get ahead. We have to work hard and reduce the violence and the criminal organizations. Also, the lack of jobs causes problems. Many people can't get a job no matter how hard they try. They need to work to support their families, and the families there are bigger than the families here. Also, many people can't complete their education because of the social instability and school closing. Our countries are allowing themselves to be controlled by the gangs and by people who only think about themselves and not the well-being of their own country. I want the president of this country to help us because all we want is a better future.





## CONCLUSION

The responses of the 404 children from El Salvador, Guatemala, Honduras and Mexico interviewed for this study lead to several significant conclusions. First, the reasons these children have for leaving their countries of origin are complex and interrelated and can be understood only when examined from a child-sensitive perspective, and taken as a whole and in context. Related to this multiplicity of reasons, there is no single dominant place of origin within or among the different countries from where these children are coming. Second, across the broad array of their responses, these children also clearly share commonalities within and among all four countries. Third, the many compelling narratives gathered in this study – only some of which are relayed in this report – demonstrate unequivocally that many of these displaced children face grave danger and hardship in their countries of origin. Fourth, there are significant gaps in the existing protection mechanisms currently in place for these displaced children. The extent of these gaps is not fully known because much of what happens to these children is not recorded or reported anywhere. As such, it is reasonable to infer that the gaps may be even wider than what the available data indicates. By all accounts, children arriving to the U.S. from these four countries continue to rise in numbers and in the numbers among them with potential international protection needs.

Through the children's own words, the critical need for enhanced mechanisms to ensure that these displaced children are identified, screened and provided access to international protection is abundantly clear. The question now is how the five States, civil society and UNHCR can work together to best ensure that these children are carefully screened and provided the protection they so desperately need and deserve.



## Requests and Concerns Raised by Governments, Civil Society and Other Stakeholder Participants at the UNHCR Roundtable on the Displacement of Unaccompanied and Separated Children from El Salvador, Guatemala, Honduras and Mexico

Before providing its recommendations to the Governments of El Salvador, Guatemala, Honduras, Mexico and the United States, UNHCR wishes to acknowledge a number of the requests and concerns raised by government representatives, civil society and other stakeholder participants from these countries at the Roundtable on the Displacement of Unaccompanied and Separated Children, hosted by UNHCR in San Juan, Puerto Rico, on 22-23 January 2014. These requests and concerns reflect issues of great importance but are beyond the scope of the findings and conclusions of this study. These include:

### **Providing Essential Services and Access to Justice for Children by**

Creating, strengthening and promoting comprehensive child protection mechanisms, including children's access to justice, on the national and local levels that meet the general protection needs of children in their home communities, those who are displaced – within and outside their countries of origin – and those who are repatriated to their countries of origin.

Establishing formal bilateral and multilateral agreements on repatriation that include mechanisms to facilitate the safe return and reintegration of unaccompanied and separated children when such return is formally determined to be in the best interests of the child.

Developing capacity for reception and social reintegration, especially for family reunification, access to psychosocial services and education, as well as employment and training opportunities appropriate for young people and their families.

#### **Ensuring Liberty by**

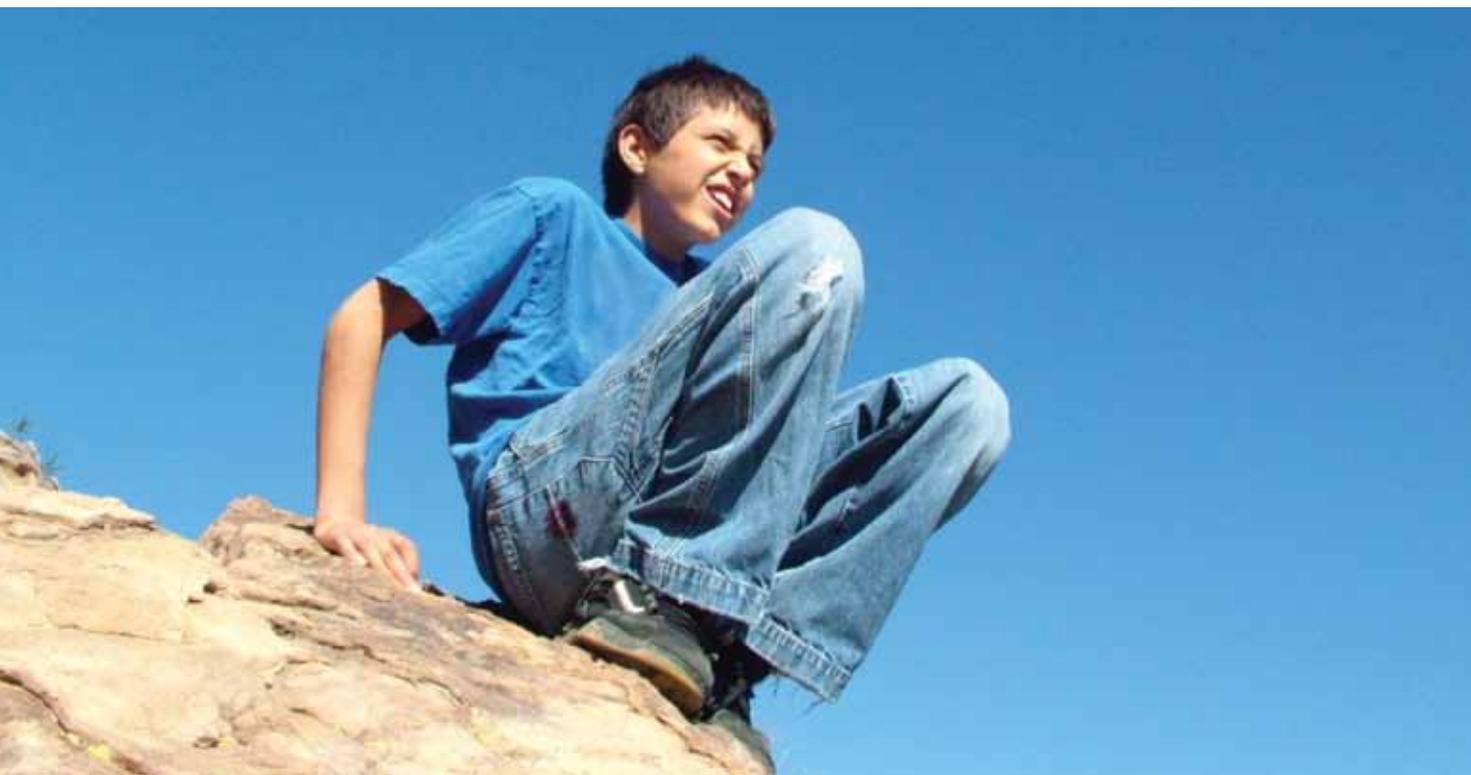
Refraining from practices that unnecessarily restrict children's liberty. This is particularly important with regard to detention, given the continued harm and detrimental impact of detention on the well-being of the child. Detention also impedes access to asylum and other forms of international protection, and may also be used as a tool to illegitimately discourage a child from seeking international protection.





## RECOMMENDATIONS

Regarding the potential or actual international protection needs of unaccompanied and separated children from El Salvador, Guatemala, Honduras and Mexico, UNHCR recommends that the Governments of El Salvador, Guatemala, Honduras, Mexico and the United States:



### **Recognize Newly Emerging Forms of Displacement in Central America and the Emergence of International Protection Issues**

1. Recognize that the violence and insecurity within El Salvador, Guatemala, Honduras and Mexico, as well as across their borders, have led to the displacement of children and others in the region; have implications as foreign policy and political issues; and have connections with international protection needs.
2. Recognize the international protection needs – actual and potential – at stake and the need to ensure that these displaced children are provided safety upon arrival; screening for any international protection needs; and access to the assessment and provision of international protection.
3. Bring the international protection needs of these displaced children to the forefront and ensure their inclusion to the fullest extent possible in all national and regional efforts.
4. Incorporate formally the international protection needs of these displaced children into the official discussions concerning displaced children in the region and incorporate them into the final guidelines to be published by the Regional Conference on Migration.

### **Strengthen and Harmonize Regional and National Frameworks for Ensuring International Protection**

5. Establish and promote more uniform responses and approaches to displaced children in the region through the development of regional protocols for addressing the international protection needs of children that incorporate the principle and practice of determining the best interests of the child at all decision points that affect the well-being of the child, beginning with the first encounter of authorities with the child.
6. Ensure that the principle of the best interests of the child is a central component of all responses, approaches, guidelines and tools concerning the protection needs of children, including the assessment of a claim for refugee status, asylum or any other form of international protection.

7. Enhance capacity, through increased staff and training and other mechanisms, to ensure the systematic identification of children with potential international protection needs, in particular children in high-risk situations; appropriate referrals for their care and assessment of their international protection needs; and access to guardians and legal representation.
8. Develop and disseminate common tools to support the government function of screening for international protection needs, with special attention paid to methods and practices that promote a child-sensitive environment.
9. Harmonize national legislation, policies and practices with the resulting regional framework and tools.
10. Develop and implement mandatory training for all authorities engaged in activities relating to the protection and other assistance of children with potential or actual international protection needs, on the basic norms and principles of international human rights and refugee law, including the fundamental principles of nondiscriminatory treatment, best interests of the child, non-refoulement, family unity, due process of law, and non-detention or other restriction of liberty.

11. Strengthen collaboration, exchange of information and sharing of best practices relating to the identification, referral and assessment of children with potential international protection needs among Governments and UNHCR and between Governments and civil society.

#### **Address Root Causes**

12. Undertake measures both regionally and nationally to address the root causes of flight of these displaced children, in an effort to reduce – if not eliminate – the factors that lead to their forced displacement.
13. Engage the Central American Security Commission to address the issues related to children displaced due to violence and insecurity, in further support of State efforts concerning these issues.



<sup>1</sup> The duties and responsibilities of UNHCR are enshrined in three key documents: the Statute of the Office of the UNHCR, UN Doc. A/RES/428(v) (Dec. 14, 1950) (*UNHCR Statute*); the 1951 *Convention relating to the Status of Refugees*, 28 Jul. 1951, 189 U.N.T.S. 150 (1951 *Convention*); and the 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (1967 *Protocol*). The singular purpose of the 1967 *Protocol* was to universalize the refugee definition by removing any temporal or geographic references to World War II contained in the original 1951 *Convention* definition and otherwise incorporates by reference all the substantive provisions of the 1951 *Convention*. Other persons of concern to UNHCR include stateless individuals, internally displaced individuals, and unaccompanied and separated children with potential international protection needs. The only exception to this broad refugee protection mandate concerns Palestinian refugees in the Middle East, who fall under the ambit of the UN Relief and Works Agency (UNRWA). More information about the work of UNRWA can be found at <http://www.unrwa.org/>.

<sup>2</sup> 1951 *Convention*, Article 33.

<sup>3</sup> See UNHCR, *A Framework for the Protection of Children* (2012) (*Child Protection Framework*) (affirming “the centrality of children’s protection to UNHCR’s work.”), available at <http://www.refworld.org/docid/4fe875682.html>. The *Child Protection Framework* also highlights the fundamental principle to “do no harm” in working with children, which calls for consideration of “the child’s family, culture and social situation and conduct[ing] actions, procedures and programmes in a manner that does not put the child at risk of harm.” *Id.* at 16.

One of the earliest comprehensive guidances concerning children was issued by UNHCR in 1994, *Refugee Children: Guidelines on Protection and Care (Guidelines on Protection)*, available at <http://www.refworld.org/docid/3ae6b3470.html>. In 1997, UNHCR issued *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (Guidelines on Unaccompanied Children)* (Feb. 1997), available at <http://www.refworld.org/docid/3ae6b3360.html>, which provide comprehensive guidance on procedures for receiving, identifying and protecting unaccompanied and separated children arriving to a country in search of safe haven. Among the core provisions of these *Guidelines on Unaccompanied Children* are: “Because of their vulnerability, unaccompanied children seeking asylum should not be refused access to the territory. . . . Children should always have access to asylum procedures, regardless of their age. Children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection. . . . In the examination of the factual elements of the claim [for international protection] of an unaccompanied child, particular regard should be given to circumstances such as the child’s state of development . . . as well as his/her special vulnerability.” *Id.* at 1-3. The UNHCR *Guidelines on Determining the Best Interests of the Child* (May 2008) (*Best Interest Guidelines*), available at <http://www.refworld.org/docid/48480c342.html>, discuss fundamental protection principles concerning children, among them that: “A comprehensive child protection system comprises laws, policies, procedures and practices designed to prevent and respond effectively to child abuse, neglect, exploitation and violence. It is the responsibility of States to promote the establishment and implementation of child protection systems, in accordance with their international obligations.” *Best Interest Guidelines* at 17. Most recently, in 2009 UNHCR issued *Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (Guidelines on Child Asylum Claims)*, available at <http://www.refworld.org/docid/4b2f4fd2.html>. Among the provisions discussed in these *Guidelines* is: “Alongside age, factors such as rights specific to children, a child’s stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered.” *Guidelines on Child Asylum Claims*, ¶ 4 (citation omitted).

<sup>4</sup> UNHCR defines an “unaccompanied child” as any child under the age of 18 who has been “separated from both parents and other relatives and [is] not being cared for by an adult who, by law or custom, is responsible for doing so,” while a “separated child” is one who is “separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives.” UNHCR *Guidelines on Determining the Best Interests of the Child* (May 2008) at 8, available at <http://www.refworld.org/docid/48480c342.html>. All of the five countries covered in this report, El Salvador, Guatemala, Honduras, Mexico and the United States, consider anyone under the age of 18 years old to be a child, consistent with UNHCR. The only slight exception is that some of these countries have two categories of children rather than one – those under 12 years of age and those between ages 12-17, who are referred to as adolescents. This distinction is not relevant for purposes of this study, as it speaks to issues such as appropriate placement and other factors and is not related to the reasons children may have for leaving their countries of origin or to their eligibility for protection.

<sup>5</sup> For a detailed discussion of a child-sensitive approach to interviewing children and to assessing their needs for international protection needs, see generally UNHCR *Guidelines on Child Asylum Claims*.

<sup>6</sup> *Child Protection Framework* at 19.

<sup>7</sup> *Guidelines on Protection* at 19 (citation omitted).

<sup>8</sup> *Child Protection Framework* at 15.

<sup>9</sup> *Convention on the Rights of the Child (CRC)*, Art. 2 and Art. 22, respectively, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. The *CRC* embodies four central principles: the best interests of the child shall be a primary consideration in all actions affecting children (Art. 3); there shall be no discrimination on the grounds of race; colour; sex; language; religion; political or other opinions; national, ethnic or social origin; property; or disability, birth or other status (Art. 2); State parties recognize that every child has the inherent right to life and shall ensure to the maximum extent

possible the survival and development of the child (Art. 6); and children shall be ensured the right to express their views freely in all matters affecting them, with their views being given due weight in accordance with the child’s age and level of maturity (Art. 12). In addition to these four principles, the *CRC* provides a number of fundamental rights, among them the need for protection from abuse, exploitation and neglect, and the importance of the physical and intellectual development of the child. It gives particular attention to the role of the family in providing care to the child and to the special protection needs of children deprived of their family environment and of children who are refugees or are seeking asylum. El Salvador, Guatemala, Honduras and Mexico are all signatories to the *CRC*.

<sup>10</sup> UNHCR *Refugee Protection and Mixed Migration: The 10-Point Plan in Action*, Feb. 2011, at 10, available at <http://www.refworld.org/docid/4d9430ea2.html>. This edition contains the original 2007 *10-Point Plan of Action* and identifies and discusses best practices around the globe relating to each of the 10 points in the plan.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 152-168.

<sup>13</sup> For example, the office worked closely with members of Congress and the Administration, NGOs, and other stakeholders on the provisions relating to refugee and asylum-seeking children included in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law No. 110-457, 122 Stat. 5044 (2008) (TVPPA 2008), its passage into law and its implementation.

<sup>14</sup> Based on a long-standing practice and policy of returning to Mexico unaccompanied and separated children from Mexico without any consistent, meaningful screening, the U.S. Congress included Section 235(a) of TVPPA 2008, which requires that all unaccompanied and separated Mexican children be screened for international protection needs. UNHCR Washington undertook this monitoring to assess the effectiveness of the screening process and to identify good practices to maintain, gaps in the process and measures for improvement. The last of four monitoring site visits was completed in Dec. 2013, and pursuant to long-standing agreement, a confidential report setting forth observations, findings and recommendations will be submitted to the U.S. Government in early 2014.

<sup>15</sup> UNHCR tracks statistical reports on the people of concern to UNHCR: refugees, asylum-seekers, returned refugees, the internally displaced and stateless people. This information includes detailed data on country of asylum, place of origin, gender, age, location and legal status of refugees. For more information see, <http://www.unhcr.org/pages/49c3646c4d6.html>.

<sup>16</sup> The U.S. fiscal year (FY) runs 1 Oct. – 30 Sep. in any given year; thus FY 2012 began on 1 Oct. 2011 and ended on 30 Sep. 2012.

<sup>17</sup> Although this study was conducted and prepared by UNHCR Washington, several other key UNHCR offices played an important advisory or consultative role in the process: Branch Office Mexico, Regional Office Panama and Branch Office Costa Rica. Notably, in 2013, UNHCR began a series of research projects throughout the region to examine the causes for the increasing numbers of displaced people in parts of Central America and Mexico. For one such project, UNHCR is working with the Central American Integration System, States and civil society to analyze new displacement trends in the region. This project includes information gathered on displacement due to the activities of organized armed criminal actors and other situations of violence, identifying profiles of at-risk individuals and developing strategies to strengthen protection mechanisms, in particular for displaced children and other vulnerable persons with special protection needs.

<sup>18</sup> For purposes of protection screening procedures and access to the full asylum process, only a potential relationship between the harm and an international protection need is required. It is then in the course of a full assessment of the claim that a determination is made as to whether in any individual case the child does in fact have a need for international protection.

<sup>19</sup> In addition to the harms in the home country that led to their decision to leave, the children presented a significant number of protection-related concerns that occurred during their journeys northward; the responses to and findings from these questions will be presented in a separate report to be issued later in 2014.

<sup>20</sup> More precisely, given that this study reflects the standard margin of error of plus or minus 5%, between 53% and 63% of children in this same 12-17 age range from these four countries arriving to the U.S. would also have a potential international protection need.

<sup>21</sup> This assertion is based on a 95% confidence and a maximum margin of error of 5% associated with the size of the random sample used in the study. The calculations associated with the maximum margin of error were conducted by German J. Pliego Hernandez, Associate Professor, Department of Computer & Information Sciences, Professor of Statistics, St. Thomas University.

<sup>22</sup> Due to the much lower number of unaccompanied and separated children from Mexico who are referred into the U.S. immigration system and other limitations on UNHCR’s access to these children, the vast majority of these children included in this study, 84%, were interviewed while in the custody of the U.S. Border Patrol at one particular sector along the Texas-Mexico border. This area has the highest number of unlawful crossings from Mexico into the United States, which, in turn, suggests heightened activity by those working in the smuggling industry.

<sup>23</sup> The majority of the Mexican children interviewed were in the custody of Customs and Border Protection (CBP) rather than the custody of ORR, and unofficial CBP statistics show that 11% of Mexican unaccompanied children apprehended in FY 2013 were girls. Importantly, because the Mexican children available to be interviewed depended on CBP’s daily apprehensions,

UNHCR was not able to control the gender distribution of the Mexican children interviewed, and as a result only four out of the 102 Mexican children were girls.

<sup>24</sup> UNHCR tracks statistical reports on the people of concern to UNHCR: refugees, asylum-seekers, returned refugees, the internally displaced and stateless people. This information includes detailed data on country of asylum, place of origin, gender, age, location and legal status of refugees. For more information, see <http://www.unhcr.org/pages/49c3646c4d6.html>.

<sup>25</sup> The U.S. fiscal year (FY) runs 1 Oct. – 30 Sep. in any given year; thus FY 2012 began on 1 Oct. 2011 and ended on 30 Sep. 2012.

<sup>26</sup> Within CBP, the U.S. Border Patrol (USBP) is the agency responsible for screening and processing individuals who have entered or attempted to enter the U.S. unlawfully by evading a lawful port of entry, and the Office of Field Operations (OFO) is responsible for screening and processing individuals seeking to enter the U.S. at a lawful port of entry. These statistics are a compilation from multiple sources. USBP country-specific statistics for FY 2011 and 2012 were previously available on CBP's website; now the annual total, including for FY 2013, *USBP Juvenile and Adult Apprehensions*, are available at [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy11\\_stats/fy\\_profile\\_2011.ctt/fy\\_profile\\_2011.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy11_stats/fy_profile_2011.ctt/fy_profile_2011.pdf) (2011), [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy12\\_stats/usbp\\_juv\\_adult\\_appr.ctt/usbp\\_juv\\_adult\\_appr.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/usbp_juv_adult_appr.ctt/usbp_juv_adult_appr.pdf) (2012) and [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy13\\_stats/usbp\\_fy13\\_profile.ctt/usbp\\_fy13\\_profile.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy13_stats/usbp_fy13_profile.ctt/usbp_fy13_profile.pdf) (2013). The remainder of the USBP figures cited along with the OFO figures are unofficial statistics shared with UNHCR for the purpose of this study.

<sup>27</sup> CBP reports the number of apprehensions made, not the number of children apprehended. Because CBP returns to Mexico most Mexican unaccompanied and separated children directly at the border, unlike the procedures for unaccompanied children from non-contiguous countries, a certain percentage, number unknown, of CBP's apprehensions reflects the multiple attempts one Mexican child might make in a year to enter the U.S. It is therefore unknown the exact number of individual Mexican children who have been apprehended in any given year.

<sup>28</sup> See, e.g., *Forced Displacement and Protection Needs produced by new forms of Violence and Criminality in Central America (Forced Displacement and Protection Needs), Living in a World of Violence: An Introduction to the Gang Phenomenon*, Jul. 2011, PPLA/2011/07, available at <http://www.refworld.org/docid/4e3260a32.html>.

<sup>29</sup> *Forced Displacement and Protection Needs*, UNHCR 2012, prepared by CIDEHUM (International Centre for the Human Rights of Migrants) at the request of UNHCR, available at <http://www.rcusa.org/uploads/pdfs/Violence%20in%20CA%20Final%20July2012.pdf>. Some of the key findings are discussed more fully *infra* under the section Protection-Related Reasons for Leaving, in the subsection Organized Armed Criminal Groups. See, e.g., UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (Refworld Note on Organized Gangs)* (31 Mar. 2010), available at <http://www.refworld.org/docid/4bb21fa02.html>. In particular, ¶ 47 of the *Guidance Note* states: "It is important to consider, especially in the context of Central America, that powerful gangs . . . may directly control society and *de facto* exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials."

<sup>30</sup> Although this study was conducted and prepared by UNHCR Washington, several other key UNHCR offices played an important advisory or consultative role in the process: Branch Office Mexico, Regional Office Panama and Branch Office Costa Rica. Notably, in 2013, UNHCR began a series of research projects throughout the region to examine the causes for the increasing numbers of displaced people in parts of Central America and Mexico. For one such project, UNHCR is working with the Central American Integration System, States and civil society to analyze new displacement trends in the region. This project includes information gathered on displacement due to the activities of organized armed criminal actors and other situations of violence, identifying profiles of at-risk individuals and developing strategies to strengthen protection mechanisms, in particular for displaced children and other vulnerable persons with special protection needs.

<sup>31</sup> For purposes of protection screening procedures and access to the full asylum process, only a potential relationship between the harm and an international protection need is required. It is then in the course of a full assessment of the claim that a determination is made as to whether in any individual case the child does in fact have a need for international protection.

<sup>32</sup> Concerns identified during this study that fall outside the international refugee protection framework may well have negative consequences for the children interviewed. However, such concerns are not covered by this report.

<sup>33</sup> In addition to the harms in the home country that led to their decision to leave, the children presented a significant number of protection-related concerns that occurred during their journeys northward; the responses to and findings from these questions will be presented in a separate report to be issued later in 2014.

<sup>34</sup> More precisely, given that this study reflects the standard margin of error of plus or minus 5%, between 53% and 63% of children in this same age range from these four countries arriving to the U.S. would also have a potential international protection need.

This assertion is based on a 95% confidence and a maximum margin of error of 5% associated with the size of the random sample used in the study. The calculations associated with the maximum margin of error were conducted by German J. Pliego Hernandez, Associate Professor, Department of Computer & Information Sciences, Professor of Statistics, St. Thomas University.

<sup>35</sup> Two of the children were 18 years old at the time of interviewing but were 17 at the time of arrival in the United States.

<sup>36</sup> These four countries were chosen because they represent the four primary countries of origin of children apprehended in the U.S. since the surge began in Oct. 2011. The age range selected represents the ages of most of the children who have been arriving since the surge began. Other reasons younger children were excluded are their greater vulnerability and to avoid unnecessarily re-traumatizing them through the discussion of potentially hurtful subject matter, consistent with the principle to do no harm to children in the course of any activity involving them, as well as the increased likelihood these children would be less able to articulate their answers to many of the questions.

The original plan was to interview 100 children from each of the four countries, but for a variety of reasons, including achieving the intended breakdown by gender and type of federal custody placement of the child, this exact breakdown was not possible; nevertheless, the final numbers are very close to this goal.

The gender distribution for each country except Mexico mirrors that of the children in the custody of the Office of Refugee Resettlement in the first half of FY 2013. The majority of the Mexican children interviewed were in the custody of CBP rather than the custody of ORR, and at the time this study was conducted, CBP had not provided a gender breakdown of these children. Importantly, because the Mexican children available to be interviewed depended on CBP's daily apprehensions, UNHCR was not able to control the gender distribution of the Mexican children, and as a result only four of the 102 (4%) Mexican children interviewed were girls. Subsequent receipt and review of unofficial CBP statistics for apprehensions of unaccompanied children showed that 11% of Mexican unaccompanied children apprehended in FY 2013 were girls.

<sup>37</sup> A few of the children interviewed had entered the U.S. before the onset of the surge but had been apprehended in the interior and referred to ORR after October 2011. Children in this situation constitute a certain percentage of the surge numbers; thus they were kept in the interview sample.

<sup>38</sup> *Child Protection Framework* at 16 and 21.

<sup>39</sup> ORR employs a range of placement options for these children, among them group houses, foster care and secure facilities, depending on the profile and needs of the child. The number of children interviewed at each of the different settings was proportionate to the overall number of children found in each type of placement in 2013.

<sup>40</sup> Although these children did not undergo a formal random selection process, because they were screened only for three of the four variables applied to all the children – age, nationality and date of arrival but not sex, again due to the limited number – they were, in effect, selected randomly.

<sup>41</sup> The Mexican children interviewed in CBP custody were present for less than five days. To the extent feasible, UNHCR took additional measures when interviewing them to reduce the children's level of stress, to enable open communication.

<sup>42</sup> The interviews typically lasted 60-90 minutes, depending on the complexity of the child's situation and the time needed for the child's retelling of the journey to the U.S.

<sup>43</sup> In a few cases, a child's response raised concerns about potential trafficking issues, but the design, focus and parameters of this study did not allow for a meaningful exploration or examination of this issue, and as a result, the extent of the risk of trafficking or actual trafficking of these children is not known.

<sup>44</sup> The literature review with a bibliography is available at [www.unhcrwashington.org/children](http://www.unhcrwashington.org/children). It is important to note that most of the studies conducted between 2004 and early 2013, the time frame UNHCR used to cull existing studies in its review, were not focused primarily – if at all – on the reasons why children were leaving, and to the extent these issues were explored, the pool of children interviewed was very small and thus may not be statistically significant or, alternatively, the children interviewed may not have been randomly selected, thus diminishing the statistical value of the study. For example, one study interviewed 151 displaced children for its report, but the children interviewed were not subject to random selection, making the ability to extrapolate meaningfully from this pool limited. See *Forced From Home: The Lost Boys and Girls of Central America* (Women's Refugee Commission, Oct. 2012) (*Forced From Home*), available at <http://womensrefugeecommission.org/forced-from-home-press-kit> and discussed in this section. The one exception to this limitation is a report prepared by Catholic Relief Services, *Child Migration: The Detention and Repatriation of Unaccompanied Central American Children from Mexico* (2010), which administered a questionnaire in person to 790 displaced children. However, this report also has limitations; specifically, that the questionnaire asked the children to provide only the primary reason for leaving and did not allow for multiple reasons and, importantly, as discussed throughout this report, with only a single opportunity to discuss their reasons for leaving, many children may not provide the full reason or even the true reason behind the decision to migrate. These and other reports are discussed more fully in the UNHCR literature review.

<sup>45</sup> The two reports published after the surge that do not address the climb in numbers of these displaced children or those children who arrived to the U.S. from the region are *Niñez Detenido: Los Derechos de los Niños, Niñas y Adolescentes Migrantes en la Frontera México-Guatemala: Diagnóstico y propuestas para pasar del control migratorio a la protección integral de la niñez*, Universidad Nacional de Lanús (Argentina) Centro de Derechos Humanos y Centro de Derechos Humanos Fray Matías de Córdova (Mexico) (*Children Detained: The Rights of Migrant Children and Adolescents at the Mexico-Guatemala Border: Analysis and Proposals to bring essential protection of children into migration control*) (2012) (*Lanús Report*) (National University of Lanús Center for Human Rights and the Center for Human Rights, Fray Matías de Córdova), available at <http://biblioteca>.

ieec.unam.mx/index.php?option=com\_content&task=view&id=19117&Itemid=111, which focuses on children from Guatemala who were being detained for deportation by Mexican authorities in southern Mexico, with a very brief discussion of the reasons why children left Guatemala; and Casa Alianza, *Análisis de la situación de Derechos de la Infancia Migrante No Acompañada en el marco de los procedimientos de deportación y retorno a Honduras (Analysis of the situation of the Rights of Unaccompanied Migrant Children in the context of procedures for the deportation and return to Honduras)* (2012), available at <http://www.casa-alianza.org.hn/index.php?limitstart=5>, which examines the situation of the treatment and return of Honduran children in Mexico. Both of these reports are available only in Spanish, but the *Lanús Report* includes an English translation of the executive summary and recommendations.

<sup>46</sup> *The Time Is Now: Understanding and Addressing the Protection of Immigrant Children Who Come Alone to the United States (The Time Is Now)* (KIND, Feb. 2013), available at <http://www.supportkind.org/en/about-us/resources>. KIND (Kids in Need of Defense) is a nongovernmental organization dedicated to providing pro bono representation to unaccompanied and separated children who enter the U.S. alone and have been referred into the immigration system. The source of information for this report is the database KIND maintains of children for whom the organization has sought to find pro bono representation.

<sup>47</sup> *Forced From Home* is distinguishable from UNHCR's report for several key reasons: a significantly smaller pool of 151 children was interviewed for this report and the children came from Guatemala, El Salvador and Honduras but not Mexico; the children were met with in small "focus groups" and interviewed collectively; the questions asked about their reasons for leaving their home countries were fewer in number and were not as deep in scope; the report was published in Oct. 2012; and a significant portion of this report addresses the U.S. Government response to the influx, with a focus on detention and the temporary shelters that were established – and have since been closed down – in the early stages of the surge.

<sup>48</sup> A third report, *Mission to Central America: The Flight of Unaccompanied Children to the United States (Flight of Unaccompanied Children)* (U.S. Conference of Catholic Bishops, Nov. 2013), available at <http://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf>, was published after the completion of the literature review. This report is another important contribution, and its findings are also consistent with those presented here.

<sup>49</sup> This fundamental principle of child protection guides UNHCR's work and is embodied in international human rights and humanitarian law. See, e.g., UNHCR *Child Protection Framework*; UNHCR *Guidelines on Child Asylum Claims*; *Convention on the Rights of the Child*, 2 Sep. 1990, 1577 U.N.T.S. 3 (1990), available at <http://www.refworld.org/docid/3ae6b38f0.html> Committee on the Rights of the Child General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, available at <http://www.refworld.org/docid/42dd174b4.html>. In particular, the *Convention on the Rights of the Child*, which provides a comprehensive framework for the responsibilities of its State signatories to all children within their jurisdiction, including asylum-seeking and refugee children, sets out a number of principles for the protection of children that apply to displaced children. Article 22 provides that: "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

<sup>50</sup> See generally UNHCR *Guidelines on Child Asylum Claims*; 1998 *Guidelines for Children's Asylum Claims*, U.S. Department of Justice, issued by legacy Immigration and Naturalization Service, now U.S. Citizenship and Immigration Services (USCIS) (*USCIS Child Guidelines*) (10 Dec. 1998), available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> (see link at page bottom); *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, U.S. Department of Justice, Executive Office for Immigration Review (*EOIR Child Guidelines*) (22 May 2007) available at <http://www.justice.gov/eoir/efoia/ocj/oppm07/07-01.pdf>. For a fuller discussion of these issues by USCIS, see *Asylum Officer Basic Training Course Lesson Guidelines for Children's Asylum Claims* (Rev. Date 1 Sep. 2009), available at <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (see link at page bottom).

<sup>51</sup> Although three of the five were posed as "yes or no" questions, if a child opted to simply answer yes to one of those, the interviewer followed with open-ended questions to provide the opportunity for the child to elaborate. In fact, very few children answered with a simple yes or no, and of those who did, no child did not offer further details when asked open-ended follow-up questions.

<sup>52</sup> Interestingly, the children from Mexico were the least likely to have one or both parents in the U.S., accounting for only 10 out of the total 146 of these children.

<sup>53</sup> For a discussion of these issues, see *Forced Displacement and Protection Needs*.

<sup>54</sup> UNHCR, *The International Protection of Unaccompanied or Separated Children Along the Southern Border of Mexico (Children Along the Southern Border of Mexico)* (2006-2008), note 2, available at [www.unhcr.org/4cbeb6a96.pdf](http://www.unhcr.org/4cbeb6a96.pdf). The 2006 study of the situation of displaced children along Mexico's southern border was followed by a second study in 2007 assessing the situation of those children who had been returned to their countries of origin. The purpose was to determine whether the conditions upon their return ensured

respect for the rights and basic needs of these children. The results of both studies are published in *Children Along the Southern Border of Mexico*.

<sup>55</sup> The majority of the conflicts children discussed were between the Mara Salvatrucha (MS-13) and the 18th Street Gang (M-18), two of the most prominent and powerful gangs operating in the region.

<sup>56</sup> Although gang-related issues were more prevalent in the responses of children from urban areas, at 56%, the remaining 44% also indicated a significant number of children from rural communities raising gang-related violence.

<sup>57</sup> There are many possible explanations for this, among them that children may have viewed their migration decision as very separate from their maltreatment, even if the maltreatment had caused them to seek a safer life elsewhere; they may have felt ashamed or afraid to talk about the abuse and thus only disclosed it after several probing questions or after developing more rapport with the interviewer; or the maltreatment may not have seemed out of the ordinary if it was all the child had known.

<sup>58</sup> As discussed earlier, due to the very limited number of Mexican children in ORR custody, only four of the 102 children interviewed from Mexico were girls. Interestingly, all four of the girls, all of whom reported violence in the home to UNHCR, had been referred to ORR custody, indicating that they had been effectively screened for potential protection needs. The incidence of family abuse of girls in Mexico may be higher than the numbers reflect because two of the four girls interviewed – 50% – reported such abuse.

<sup>59</sup> The one boy who revealed an experience of sexual abuse stated that he had been touched inappropriately by a gang member. A troubling but interesting note is that staff members at two different ORR facilities stated that they were seeing an increase in male residents reporting incidents of sexual abuse, occurring particularly during their journey to the U.S.

<sup>60</sup> See, e.g., Debra Allnock, *Research Briefing: Children and Young People Disclosing Sexual Abuse: An Introduction to the Research (Disclosing Sexual Abuse)*, National Society for the Prevention of Cruelty to Children (Apr. 2010), at 6, 9, available at [http://www.nspcc.org.uk/inform/research/briefings/children\\_disclosing\\_sexual\\_abuse\\_wda75965.html](http://www.nspcc.org.uk/inform/research/briefings/children_disclosing_sexual_abuse_wda75965.html), which found that 46% to 69% of adults who were sexually abused as children never disclosed this abuse during childhood, and those children who did choose to disclose were less likely to tell a professional (less than 10% of children who disclosed in the studies cited) than to tell a friend or their mother. Other studies have described adolescent boys as "least likely to report their sexual victimization." Mary Paine and David Hansen, "Factors Influencing Children to Self-Disclose Sexual Abuse," *Clinical Psychology Review*, 22 at 274 (2002), available at <http://digitalcommons.unl.edu/psychfacpub/59/>. *Disclosing Sexual Abuse* states that "[g]ender differences have also been identified as impacting on the disclosure of sexual abuse. Although there are similarities between boys and girls in how they feel about it (e.g. fear, shame, guilt) . . . boys fear being stigmatised as a homosexual and/or victim, whereas girls are more likely to fear that they will not be believed." *Disclosing Sexual Abuse* at 9. It is important to note that none of the studies cited in *Disclosing Sexual Abuse* examined children from or were conducted by any of the countries under discussion in this report.

<sup>61</sup> Altogether, 57 indigenous children were interviewed. In addition to the 48 from Guatemala, there were six from Mexico and three from Honduras. These children were not selected based on their indigenous backgrounds but rather simply came up as part of the random selection process.

<sup>62</sup> As discussed below, UNHCR identified an additional 27 Mexican children who had been recruited into the human smuggling industry.

<sup>63</sup> Very few Mexican children – far fewer than children from the other three countries studied here – are referred to ORR for further assessment of these needs. One Mexican child even commented on this lack of parity between Mexican children and the other children. The vast majority of Mexican unaccompanied and separated children are returned directly to Mexico after minimal processing; very few are referred to ORR custody for further exploration of potential protection needs.

<sup>64</sup> In FY 2012, this area had the second highest rate of apprehensions of all U.S. Border Patrol sectors. United States Border Patrol, Total Illegal Alien Apprehensions by Fiscal Year, [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy12\\_stats/nationwide\\_appr\\_2000\\_2012.ctt/nationwide\\_appr\\_2000\\_2012.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/nationwide_appr_2000_2012.ctt/nationwide_appr_2000_2012.pdf).

<sup>65</sup> Human smuggling refers to the act of assisting individuals in unlawfully crossing the border between two countries or otherwise attempting to assist others in unlawfully entering a country, in particular from Mexico into the U.S. Trafficking in persons or "human trafficking" refers to using coercion, fraud, kidnapping or other deceptive, coercive or violent means to ensnare someone into exploitation. See UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 Nov. 2000, Article 3(a), available at <http://www.refworld.org/docid/4720706c0.html>.

<sup>66</sup> For purposes of protection screening procedures and access to the full asylum process, a potential relationship between the harm and an international protection need is all that is required. It is then in the course of a full assessment of the claim that a determination is made as to whether in any individual case the child does in fact have a need for international protection.

<sup>67</sup> 1951 Convention Article 1.A(2), as amended by 1967 Protocol Article I(2), states in relevant part that a "refugee" shall mean any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality or last habitual residence [referring to individuals who are stateless] and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country." The singular

purpose of the 1967 Protocol was to universalize the refugee definition by removing from it all temporal and geographical references to World War II contained in the original 1951 Convention definition.

<sup>68</sup> This principle is found in Article 33 of the 1951 Convention, which Article 1(1) of the 1967 Protocol incorporates by reference, as well as all the other substantive provisions of the 1951 Convention.

<sup>69</sup> UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, UN Doc. HCR/IP/4/Eng/ REV.1 (1979, reissued Dec. 2011) (reissued as *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, (*Handbook*), ¶ 65 available at <http://www.refworld.org/docid/4f33c8d92.html>). The *Handbook* was the first comprehensive guidance on interpreting the refugee definition and related aspects of the 1951 Convention and 1967 Protocol and has subsequently been complemented by a number of UNHCR *Guidelines on International Protection*. To date, 10 *Guidelines on International Protection* have been issued, addressing a range of topics, among them the meaning of membership in a particular social group, gender-related persecution, application of the exclusion clauses and child asylum claims. The first eight of these *Guidelines* are contained in the 2011 edition of the *Handbook and Guidelines*. All the *Guidelines* can be found at [http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=UNHCR&type=THE\\_MGUIDE&skip=0&querysi=Guidelines+on+International+Protection&se archin=title&sort=date](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=UNHCR&type=THE_MGUIDE&skip=0&querysi=Guidelines+on+International+Protection&se archin=title&sort=date). The *Handbook* and the *Guidelines on International Protection* have been prepared at the request of Member States of the UNHCR Executive Committee to provide guidance to governments in applying the terms of the 1951 Convention and 1967 Protocol. In addition to the *Handbook and Guidelines*, UNHCR issues a variety of other interpretative guidance. This can be found on the UNHCR website, [www.unhcr.org](http://www.unhcr.org), and on RefWorld, [www.refworld.org](http://www.refworld.org), the UNHCR research website.

<sup>70</sup> For purposes of meeting the refugee definition, it may be that a child – or any other asylum-seeker – is targeted by a non-State actor because of a protected ground, or it may be that, regardless of the reasons the non-State actor has, the State is unwilling or unable to provide protection from such non-State actor because of one of the five protected grounds.

<sup>71</sup> *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (2 Dec. 1949), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 Dec. 1984), available at <http://www.un.org/documents/ga/res/39/a39r046.htm>; *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (1999), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX\\_PUB:12100:0::NO:12100:P12100\\_IL0\\_CODE:C182](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:12100:0::NO:12100:P12100_IL0_CODE:C182). Among the other instruments according protection to individuals who are unable to receive it in their countries of origin are the *Convention on the Rights of the Child* (20 Nov. 1989), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; *Inter-American Convention on International Traffic in Minors* (18 Mar. 1994), available at [http://www.oas.org/dil/treaties\\_B-57\\_Inter-American\\_Convention\\_on\\_International\\_Traffic\\_in\\_Minors.htm](http://www.oas.org/dil/treaties_B-57_Inter-American_Convention_on_International_Traffic_in_Minors.htm); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (18 Dec. 1990), available at <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

<sup>72</sup> See, e.g., UNHCR *Framework for Child Protection* at 22-23. “Girls and boys have access to age and gender-sensitive protection procedures. . . . Procedures and decisions relating to children are informed by their age, maturity, gender, language, social and ethnic background and take into account the individual experience of the child.” See, e.g., *Guidelines on Child Asylum Claims*, ¶¶ 1, 2.

<sup>73</sup> *Guidelines on Child Asylum Claims*, ¶ 15 (citation omitted).

<sup>74</sup> *Id.*, ¶ 16.

<sup>75</sup> *Forced Displacement and Protection Needs Study*, at 5-6. Importantly, the study further states that “[w]hile the number of [refugees and asylum seekers mainly from Guatemala, El Salvador and Honduras] has risen in recent years, it represents only a portion of the population that has been displaced and may be in need of international protection. This [situation] could intensify because of problems of security and violence produced by the activities of OC.” *Id.* at 5. In addition to this study, in 2008 UNHCR published *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations* (2008), Beatriz Manz, commissioned by UNHCR, available at <http://www.refworld.org/pdfid/48ad1eb72.pdf>. Of particular note is the discussion of the increasing gang-related violence in the region and the “evidence that some gangs are part of transnational networks, using modern forms of communication to participate in organized criminal activities such as trafficking in drugs and humans.” *Id.* at 5.

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 6.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.* at 8. The study goes on to state: “[P]eople who leave the country because they lack protection from organized crime, once deported or expelled become even more vulnerable to OC activity, and can therefore again suffer the same violent situations that caused them to leave the country in the first place.” *Id.* at 7.

<sup>80</sup> *Id.* at 8. Here the study elaborates by offering several key examples of this failure to understand the scope of organized crime as it relates to international protection, stating: “In some claims for recognition of refugee status, the authorities of the receiving States do not consider OC as an agent of persecution but as an agent of common crime . . . [i]n other cases in which organized crime is considered as an agent of persecution, it is seen as

national or local common crime, failing to recognize or obscuring its character as Transnational Organized Crime. . . . In general, in some States there are difficulties in establishing the causal link between the well-founded fear of being persecuted by OC activity and one of the grounds of the refugee definition enshrined in the 1951 Convention (i.e. race, religion, nationality, membership of a particular social group or political opinion) . . . . The same happens with regard to the understanding of whether national protection exists or not and why this is not available or is not effective.”

The study also recognizes “some positive precedents do exist in terms of regulation of complementary protection and humanitarian visas . . . these new normative dispositions (Mexico and Costa Rica) should not be used as a substitute or to the detriment of the recognition of the international protection needs of those who qualify validly as refugees, including in cases of victims of organized crime.” *Id.*

<sup>81</sup> Not all the children who gave human smuggling as a reason expressed overt violence, but the exploitation and harm to which these children are subject to clearly constitute violations of their fundamental rights.

<sup>82</sup> *UNHCR Handbook* is the first comprehensive guidance on interpreting the refugee definition and related aspects of the 1951 Convention and 1967 Protocol and has subsequently been complemented by a number of UNHCR *Guidelines on International Protection*. The *Handbook* was prepared at the request of Member States of the UNHCR Executive Committee to provide guidance to governments in applying the terms of the 1951 Convention and 1967 Protocol.

<sup>83</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 24 (31 Mar. 2010), available at <http://www.refworld.org/docid/4bb21fa02.html>.

<sup>84</sup> UNHCR *Guidelines on Child Asylum Claims*, ¶ 21. This principle applies equally in the context of forced recruitment by a State, which was not an issue of key concern among the children interviewed in this study and so is not discussed here. See UNHCR *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 Dec. 2013, HCR/GIP/13/10, available at <http://www.refworld.org/docid/529ee33b4.html>.

<sup>85</sup> “[I]t is important to take into account the circumstances under which the applicant joined the gang. An individual who has been forcibly recruited into a gang would primarily be considered a victim of gang practices rather than a person associated with crime. This applies in particular to young people who may have less capacity or means to resist gang pressures. Children who lack the requisite maturity and mental capacity would normally not be considered to have voluntarily joined a gang. However, even if gang association occurred on a voluntary basis, former gang members, including those who have engaged in, or have been convicted of, criminal activity, may constitute a particular social group under certain circumstances provided they have denounced their affiliation with the gang and credibly deserted from it.” UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (Guidance Note on Organized Gangs)* (31 Mar. 2010), ¶ 44, available at <http://www.refworld.org/docid/4bb21fa02.html>.

<sup>86</sup> *Guidelines on Child Asylum Claims*, ¶ 32. See, e.g., UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 (7 May 2002) (discussing, among other issues, the context and circumstances under which domestic violence may serve as the basis for refugee protection), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

<sup>87</sup> See, e.g., *Guidelines on Child Asylum Claims*, ¶ 35: “A violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized.”

<sup>88</sup> *Guidelines on Child Asylum Claims*, ¶ 14 (citations omitted).

<sup>89</sup> UNHCR *Handbook*, ¶¶ 53, 55; *Guidelines on Child Asylum Claims*, ¶ 36.

<sup>90</sup> Another group of children raised the issue of exploitative labor in the context of harms they faced or were subjected to during their journey north. In this context, trafficking becomes a central concern. The design and implementation of this study focused on the reasons children gave for leaving their home countries and did not include questions specific to the elements of human trafficking. As a result, the way in which the questions were presented to the children and the point in time at which children were interviewed did not lend themselves to identification of trafficking victims. A second limitation of the study in detecting trafficking-related issues is that the children interviewed all had their journeys to the United States interrupted by their apprehension, so while there may have been children destined to be caught up in human trafficking, they were not yet aware of this. These factors support the view that further research on trafficking-related issues concerning the displaced children from the countries studied for this report is needed.

<sup>91</sup> International Labour Organization *Convention 182* (1999), Article 3, ¶¶ (c) and (d), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>. All five countries discussed in this report have ratified this Convention.

<sup>92</sup> Many of the children who disclosed that they were involved in smuggling confided point-blank that one reason why they were recruited for this is because the adults know that the children will more than likely be sent back to Mexico directly and will not be prosecuted under U.S. criminal law. Certainly, prosecuting children for crimes committed at the behest and under the orders of adults would be an inappropriate and ineffective response; at the same time, this reflects one key dimension of the level of deliberate exploitation by adults of these children.

<sup>93</sup> *Guidelines on Child Asylum Claims*, ¶¶ 29-30.

# DEMOGRAPHICS

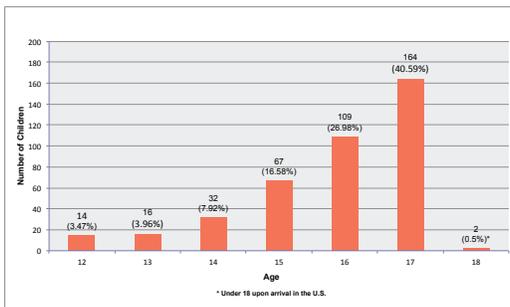
## How Many Children?

- **404 children total**  
 El Salvador: 104  
 Guatemala: 100  
 Honduras: 98  
 México: 102
- **Between the ages of 12 and 17 upon arrival in the U.S.**

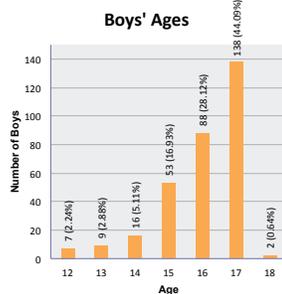
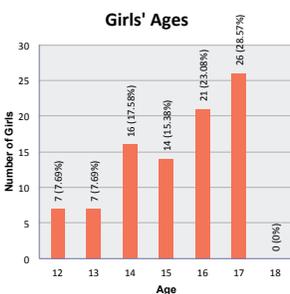
## Gender

Nationality	Number of Children Interviewed	Number of Boys and Girls Interviewed	
		Boys	Girls
El Salvador	104	67	37
Guatemala	100	79	21
Honduras	98	69	29
México	102	98	4
<b>TOTAL</b>	<b>404</b>	<b>313</b>	<b>91</b>

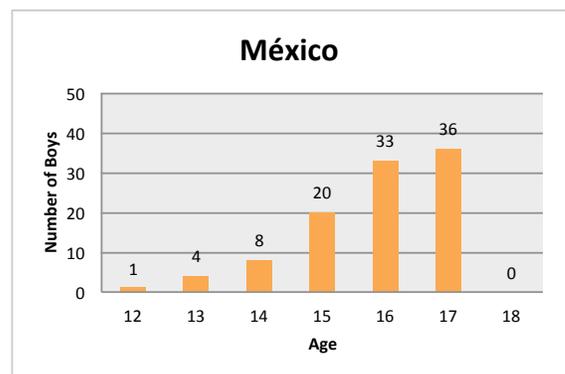
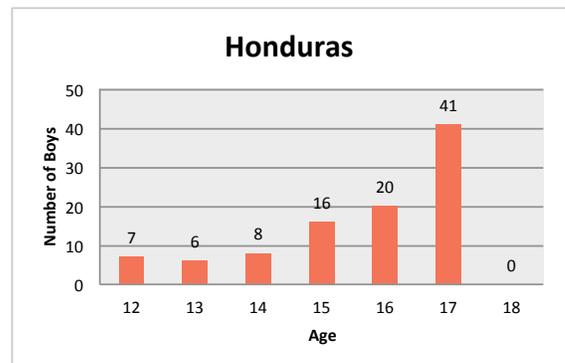
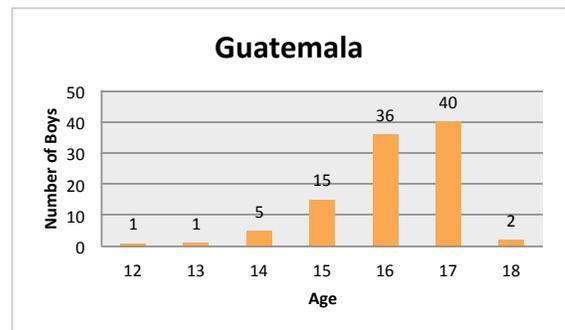
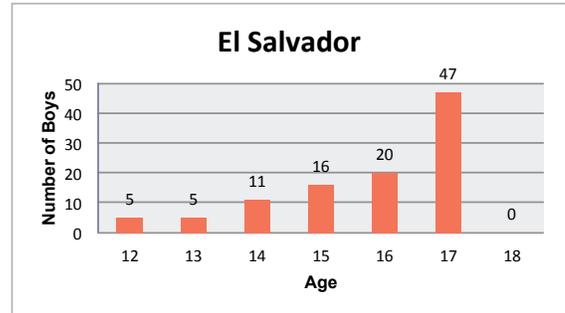
## Age



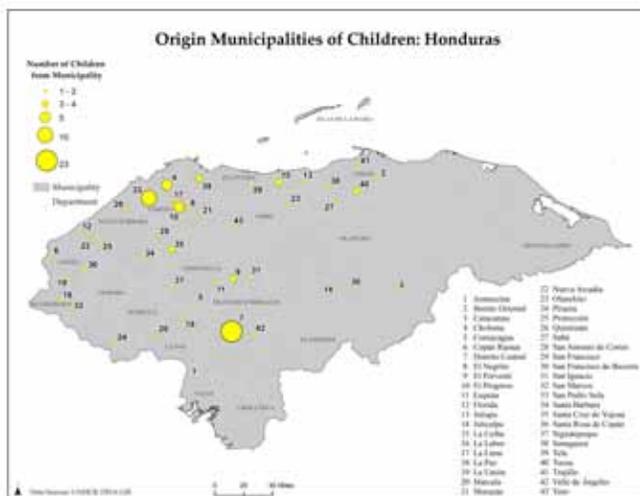
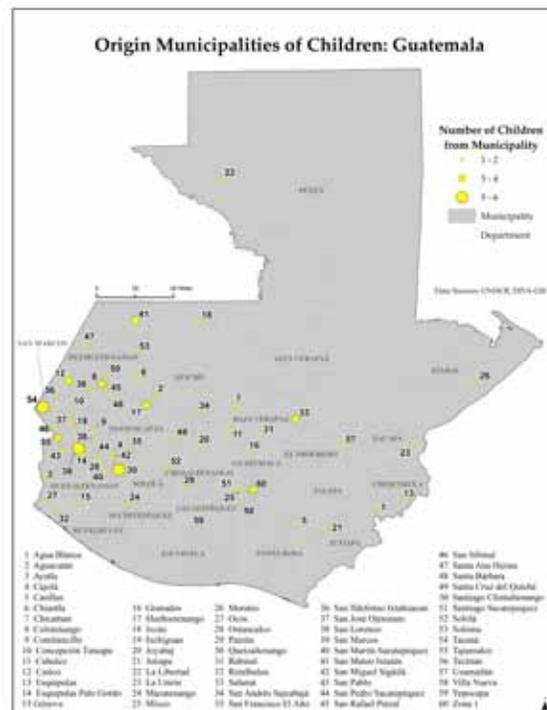
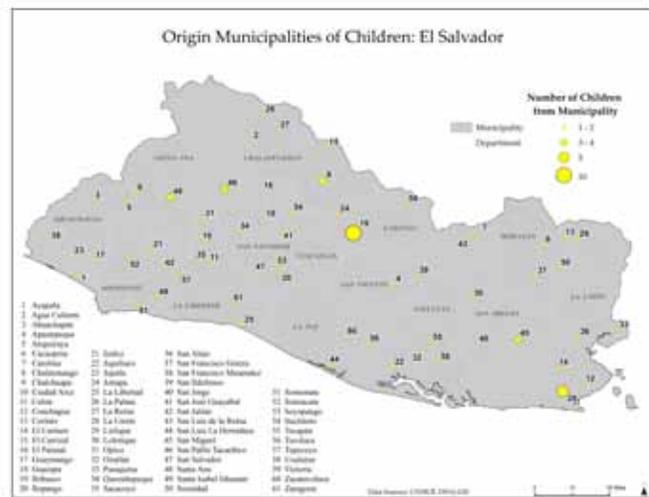
## Girls' and Boys' Ages



## Age by Country

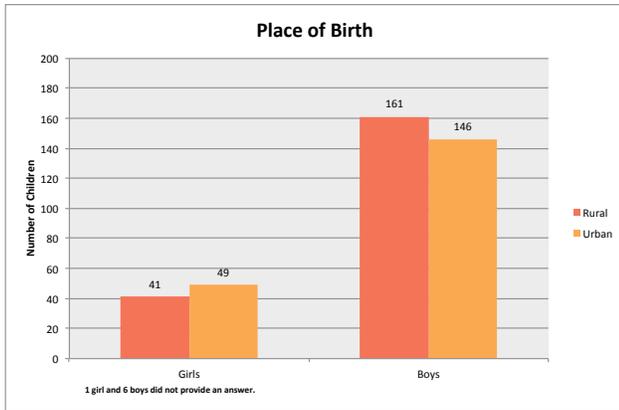


# Origin Municipalities of Children

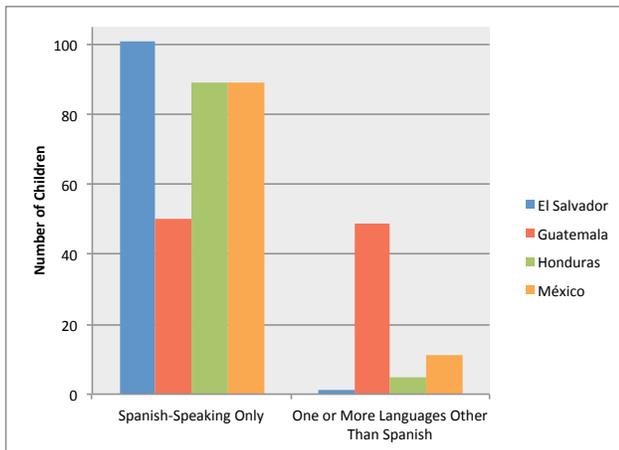


# DEMOGRAPHICS

## Urban vs. Rural by Gender



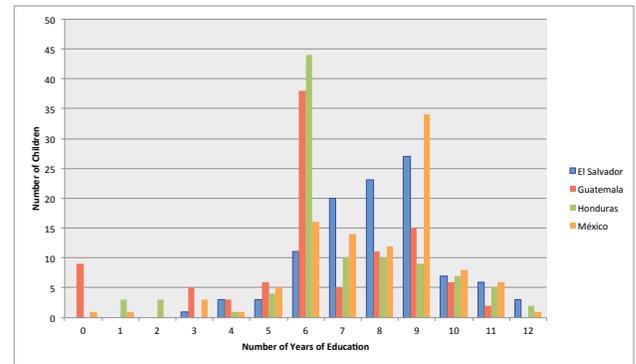
## Languages



## Children's Educational and Employment Profile

Nationality	Study	Work	Household Duties
El Salvador	98%	50%	27%
Guatemala	93%	68%	64%
Honduras	100%	65%	32%
México	100%	88%	23%

## Education



## Children's Employment

	Top 10 Areas of Work	Number of Children Some children reported having worked in more than one area
1	Construction	210
2	Agriculture: paid	187
3	Agriculture: unpaid	99
4	Carpentry	86
5	Child did not work	70
6	Domestic work: unpaid	58
7	Recruited into smuggling industry	39
8	Animal husbandry	36
9	Helped/apprenticed in a family business	29
9	Carried firewood: unpaid	29
10	Street vendor	28
10	Retail / worked in a store	28

## Family Structure

Nationality	Average Household Size	Percentage Raised by Both Parents	Average Number of Siblings	First-borns/Oldest child	Percentage with a Non-sibling Child in the Home
El Salvador	5.8	30%	4.28	33%	47%
Guatemala	7.2	45%	4.21	24%	41%
Honduras	6.5	29%	4.20	23%	45%
México	6.3	33%	4.35	24%	32%
TOTAL	6.5	34%	4.26	26%	41%

## Children with Children

Nationality	Number of Children Who Have Children	Number of Expecting Fathers	Number of Expecting Mothers	Total Number of Pregnant or Parenting Children
El Salvador	5 (2 F / 3 M)	1	2	8 (4 F / 4 M)
Guatemala	3 (1 F / 2 M)	1	1	5 (2 F / 3 M)
Honduras	3 (1 F / 2 M)	4	6	13 (7 F / 6 M)
México	6 (0 F / 6 M)	2	0	8 (0 F / 8 M)
TOTAL	17 (4 F / 13 M)	8	9	34 (11 F / 20 M)

## Children With and Without Parents in the U.S.

Nationality	Percentage of Children with Both Parents in the US	Percentage of Children with One Parent in the US	Percentage of Children With No Parent in the U.S.
El Salvador	16%	33%	51%
Guatemala	7%	20%	73%
Honduras	5%	42%	53%
México	3%	19%	78%
TOTAL	8%	28%	64%

**GUIDELINES ON INTERNATIONAL PROTECTION:  
Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or  
1967 Protocol relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

## Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

### I. INTRODUCTION

1. These Guidelines offer substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner. They highlight the specific rights and protection needs of children in asylum procedures. Although the definition of a refugee contained in Article 1(A)2 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereafter “1951 Convention” and “1967 Protocol”) applies to all individuals regardless of their age, it has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked altogether.<sup>1</sup>

2. The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as part of a family unit rather than as individuals with their own rights and interests. This is explained partly by the subordinate roles, positions and status children still hold in many societies worldwide. The accounts of children are more likely to be examined individually when the children are unaccompanied than when they are accompanied by their families. Even so, their unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account. Children may not be able to articulate their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so.

3. Global awareness about violence, abuse and discrimination experienced by children is growing,<sup>2</sup> as is reflected in the development of international and regional human rights standards. While these developments have yet to be fully incorporated into refugee status determination processes, many national asylum authorities are increasingly acknowledging that children may have refugee claims in their own right. In *Conclusion on Children at Risk* (2007), UNHCR’s Executive Committee underlines the need for children to be recognized as “active subjects of rights” consistent with international law. The Executive Committee also recognized that children may experience child-specific forms and manifestations of persecution.<sup>3</sup>

4. Adopting a child-sensitive interpretation of the 1951 Convention does not mean, of course, that child asylum-seekers are automatically entitled to refugee status. The

<sup>1</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997 (hereafter “UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*”), <http://www.unhcr.org/refworld/docid/3ae6b3360.html>, in particular Part 8.

<sup>2</sup> See, for instance, UN General Assembly, Rights of the Child: Note by the Secretary-General, A/61/299, 29 Aug. 2006 (hereafter “UN study on violence against children”) <http://www.unhcr.org/refworld/docid/453780fe0.html>; UN Commission on the Status of Women, The elimination of all forms of discrimination and violence against the girl child, E/CN.6/2007/2, 12 Dec. 2006, <http://www.unhcr.org/refworld/docid/46c5b30c0.html>; UN General Assembly, Impact of armed conflict on children: Note by the Secretary-General (the “Machel Study”), A/51/306, 26 Aug. 1996, <http://www.unhcr.org/refworld/docid/3b00f2d30.html>, and the strategic review marking the 10 year anniversary of the Machel Study, UN General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/62/228, 13 Aug. 2007, <http://www.unhcr.org/refworld/docid/47316f602.html>.

<sup>3</sup> ExCom, *Conclusion on Children at Risk*, 5 Oct. 2007, No. 107 (LVIII) - 2007, (hereafter “ExCom, *Conclusion No. 107*”), <http://www.unhcr.org/refworld/docid/471897232.html>, para. (b)(x)(viii).

child applicant must establish that s/he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. As with gender, age is relevant to the entire refugee definition.<sup>4</sup> As noted by the UN Committee on the Rights of the Child, the refugee definition:

*... must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.*<sup>5</sup>

Alongside age, factors such as rights specific to children, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status.<sup>6</sup>

5. A child-sensitive application of the refugee definition would be consistent with the 1989 Convention on the Rights of the Child (hereafter "the CRC").<sup>7</sup> The Committee on the Rights of the Child has identified the following four Articles of the CRC as general principles for its implementation:<sup>8</sup> *Article 2*: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind;<sup>9</sup> *Article 3 (1)*: the best interests of the child as a primary consideration in all actions concerning children;<sup>10</sup> *Article 6*: the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child;<sup>11</sup> and *Article 12*: the child's right to express his/her views freely regarding "all matters affecting the child", and that those views be given due weight.<sup>12</sup> These principles inform both the substantive and the procedural

<sup>4</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002 (hereafter "UNHCR, *Guidelines on Gender-Related Persecution*"), <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, paras. 2, 4.

<sup>5</sup> UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, Sep. 2005 (hereafter "CRC, *General Comment No. 6*"), <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para. 74.

<sup>6</sup> UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum, op cit.*, page 10.

<sup>7</sup> With a near universal ratification, the CRC is the most widely ratified human rights treaty, available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>. The rights contained therein apply to all children within the jurisdiction of the State. For a detailed analysis of the provisions of the CRC, see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, fully revised third edition, Sep. 2007 (hereafter "UNICEF, *Implementation Handbook*"). It can be ordered at [http://www.unicef.org/publications/index\\_43110.html](http://www.unicef.org/publications/index_43110.html).

<sup>8</sup> CRC, *General Comment No. 5 (2003): General Measures of Implementation for the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)*, CRC/GC/2003/5, 3 Oct. 2003 (hereafter "CRC, *General Comment No. 5*"), <http://www.unhcr.org/refworld/docid/4538834f1.html>, para. 12.

<sup>9</sup> CRC, *General Comment No. 6*, para. 18.

<sup>10</sup> *Ibid.*, paras. 19–22. See also ExCom *Conclusion No. 107*, para. (b)(5), and, on how to conduct "best interests" assessments and determinations, UNHCR, *Guidelines on Determining the Best Interests of the Child*, Geneva, May 2008, <http://www.unhcr.org/refworld/docid/48480c342.html>.

<sup>11</sup> CRC, *General Comment No. 6*, paras. 23–24.

<sup>12</sup> *Ibid.*, para. 25. See also CRC, *General Comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 20 July 2009 (hereafter "CRC, *General Comment No. 12*"), <http://www.unhcr.org/refworld/docid/4ae562c52.html>.

aspects of the determination of a child's application for refugee status.

## II. DEFINITIONAL ISSUES

6. These guidelines cover all child asylum-seekers, including accompanied, unaccompanied and separated children, who may have individual claims to refugee status. Each child has the right to make an independent refugee claim, regardless of whether s/he is accompanied or unaccompanied. "Separated children" are children separated from both their parents or from their previous legal or customary primary caregivers but not necessarily from other relatives. In contrast, "unaccompanied children" are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.<sup>13</sup>

7. For the purposes of these Guidelines, "children" are defined as all persons below the age of 18 years.<sup>14</sup> Every person under 18 years who is the principal asylum applicant is entitled to child-sensitive procedural safeguards. Lowering the age of childhood or applying restrictive age assessment approaches in order to treat children as adults in asylum procedures may result in violations of their rights under international human rights law. Being young and vulnerable may make a person especially susceptible to persecution. Thus, there may be exceptional cases for which these guidelines are relevant even if the applicant is 18 years of age or slightly older. This may be particularly the case where persecution has hindered the applicant's development and his/her psychological maturity remains comparable to that of a child.<sup>15</sup>

8. Even at a young age, a child may still be considered the principal asylum applicant.<sup>16</sup> The parent, caregiver or other person representing the child will have to assume a greater role in making sure that all relevant aspects of the child's claim are presented.<sup>17</sup> However, the right of children to express their views in all matters

<sup>13</sup> CRC, *General Comment No. 6*, paras. 7–8. See also, UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit.*, p. 5, paras. 3.1-3.2. See also, UNHCR, UNICEF et al, *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, Geneva, 2004 (hereafter "*Inter-Agency Guiding Principles*"), <http://www.unhcr.org/refworld/docid/4113abc14.html>, p. 13.

<sup>14</sup> CRC, Art. 1 provides that "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." In addition, the EU Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC, <http://www.unhcr.org/refworld/docid/4157e75e4.html>, provides that "unaccompanied minors" means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States", Art. 2 (i).

<sup>15</sup> The United Kingdom Immigration Appeals Tribunal (now the Asylum and Immigration Tribunal) has held that "[t]o adopt a rigidity however in this respect is in our view to fail to recognize that in many areas of the world even today exact ages and dates of birth are imprecise. It is better to err on the side of generosity"; *Sarjoy Jakitay v. Secretary of State for the Home Department*, Appeal No. 12658 (unreported), U.K. IAT, 15 Nov. 1995. See also, *Decision VA0-02635*, VA0-02635, Canada, Immigration and Refugee Board (hereafter "IRB"), 22 March 2001, <http://www.unhcr.org/refworld/docid/4b18dec82.html>.

<sup>16</sup> See, for instance, *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, Australia, High Court, 13 April 2000, <http://www.unhcr.org/refworld/docid/3ae6b6df4.html>. In this case, which concerned a 3 ½ year-old boy, it was found that "under Australian law, the child was entitled to have his own rights determined as that law provides. He is not for all purposes subsumed to the identity and legal rights of his parents", para. 78.

<sup>17</sup> See also UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994, <http://www.unhcr.org/refworld/docid/3ae6b3470.html>, pp. 97–103.

affecting them, including to be heard in all judicial and administrative proceedings, also needs to be taken into account.<sup>18</sup> A child claimant, where accompanied by parents, members of an extended family or of the community who by law or custom are responsible for the child, is entitled to appropriate direction and guidance from them in the exercise of his/her rights, in a manner consistent with the evolving capacities of the child.<sup>19</sup> Where the child is the principal asylum-seeker, his/her age and, by implication, level of maturity, psychological development, and ability to articulate certain views or opinions will be an important factor in a decision maker's assessment.

9. Where the parents or the caregiver seek asylum based on a fear of persecution for their child, the child normally will be the principal applicant even when accompanied by his/her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his/her child's refugee status.<sup>20</sup> In situations where both the parent(s) and the child have their own claims to refugee status, it is preferable that each claim be assessed separately. The introduction of many of the procedural and evidentiary measures enumerated below in Part IV will enhance the visibility of children who perhaps ought to be the principal applicants within their families. Where the child's experiences, nevertheless, are considered part of the parent's claim rather than independently, it is important to consider the claim also from the child's point of view.<sup>21</sup>

### III. SUBSTANTIVE ANALYSIS

#### a) Well-founded fear of persecution

10. The term "persecution", though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable situations as assessed with regard to the age, opinions, feelings and psychological make-up of the applicant.<sup>22</sup> Discrimination may amount to persecution in certain situations where the treatment feared or suffered leads to consequences of a substantially prejudicial nature for the child concerned.<sup>23</sup> The principle of the best interests of the child requires that the harm be assessed from the child's perspective. This may include an analysis as to how the child's rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a

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<sup>18</sup> CRC, Art. 12(2); CRC, *General Comment No. 12*, paras. 32, 67, 123.

<sup>19</sup> CRC, Art. 5.

<sup>20</sup> UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009 (hereafter "UNHCR, *Guidance Note on FGM*"), <http://www.unhcr.org/refworld/docid/4a0c28492.html>, para. 11. See also UNHCR, ExCom Conclusion on the Protection of the Refugee's Family, No. 88 (L), 1999, <http://www.unhcr.org/refworld/docid/3ae68c4340.html>, para. (b)(iii).

<sup>21</sup> See, for instance, *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, U.K. House of Lords, 22 Oct. 2008, <http://www.unhcr.org/refworld/docid/490058699.html>; *Refugee Appeal Nos. 76250 & 76251*, Nos. 76250 & 76251, New Zealand, Refugee Status Appeals Authority (hereafter "RSAA"), 1 Dec. 2008, <http://www.unhcr.org/refworld/docid/494f64952.html>.

<sup>22</sup> See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited, Geneva, Jan. 1992 (hereafter "UNHCR, *Handbook*") <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, paras. 51–52; UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, 7 Apr. 2006 (hereafter "UNHCR, *Guidelines on Victims of Trafficking*"), <http://www.unhcr.org/refworld/docid/443679fa4.html>, para. 14.

<sup>23</sup> UNHCR, *Handbook*, paras. 54–55.

child.<sup>24</sup>

11. Both objective and subjective factors are relevant to establish whether or not a child applicant has a well-founded fear of persecution.<sup>25</sup> An accurate assessment requires both an up-to-date analysis and knowledge of child-specific circumstances in the country of origin, including of existing child protection services. Dismissing a child's claim based on the assumption that perpetrators would not take a child's views seriously or consider them a real threat could be erroneous. It may be the case that a child is unable to express fear when this would be expected or, conversely, exaggerates the fear. In such circumstances, decision makers must make an objective assessment of the risk that the child would face, regardless of that child's fear.<sup>26</sup> This would require consideration of evidence from a wide array of sources, including child-specific country of origin information. When the parent or caregiver of a child has a well-founded fear of persecution for their child, it may be assumed that the child has such a fear, even if s/he does not express or feel that fear.<sup>27</sup>

12. Alongside age, other identity-based, economic and social characteristics of the child, such as family background, class, caste, health, education and income level, may increase the risk of harm, influence the type of persecutory conduct inflicted on the child and exacerbate the effect of the harm on the child. For example, children who are homeless, abandoned or otherwise without parental care may be at increased risk of sexual abuse and exploitation or of being recruited or used by an armed force/group or criminal gang. Street children, in particular, may be rounded up and detained in degrading conditions or be subjected to other forms of violence, including murder for the purpose of "social cleansing".<sup>28</sup> Children with disabilities may be denied specialist or routine medical treatment or be ostracized by their family or community. Children in what may be viewed as unconventional family situations including, for instance, those born out of wedlock, in violation of coercive family policies,<sup>29</sup> or through rape, may face abuse and severe discrimination. Pregnant girls may be rejected by their families and

<sup>24</sup> See, for instance, United States Bureau of Citizenship and Immigration Services, *Guidelines For Children's Asylum Claims*, 10 Dec. 1998 (hereafter the "U.S. Guidelines for Children's Asylum Claims"), <http://www.unhcr.org/refworld/docid/3f8ec0574.html>, noting that "the harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution." See also, *Chen Shi Hai, op. cit.*, where the Court found that "what may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child", para. 79.

<sup>25</sup> UNHCR, *Handbook*, paras. 40–43.

<sup>26</sup> See UNHCR, *Handbook*, paras. 217–219. See also *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629; F.C.J. 1049, Canada, Federal Court, 24 Oct. 1991, <http://www.unhcr.org/refworld/docid/403e24e84.html>. The Court concluded that "I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, s/he was incapable of experiencing fear the reasons for which clearly exist in objective terms.", at 5.

<sup>27</sup> See, for instance, *Canada (Minister of Citizenship and Immigration) v. Patel*, 2008 FC 747, [2009] 2 F.C.R. 196, Canada, Federal Court, 17 June 2008, <http://www.unhcr.org/refworld/docid/4a6438952.html>, at 32–33.

<sup>28</sup> "Social cleansing" refers to the process of removing an undesirable group from an area and may involve murder, disappearances, violence and other ill-treatment. See, UNICEF, *Implementation Handbook*, pp. 89, 91, 287. See also *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (hereafter "IACtHR"), Judgment of 19 Nov. 1999, <http://www.unhcr.org/refworld/docid/4b17bc442.html>, paras. 190–191. The Court found that there was a prevailing pattern of violence against street children in Guatemala. Relying on the CRC to interpret Art. 19 of the 1969 American Convention on Human Rights, "Pact of San Jose", Costa Rica (hereafter "ACHR"), <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, the Court noted that the State had violated their physical, mental, and moral integrity as well as their right to life and also failed to take any measures to prevent them from living in misery, thereby denying them of the minimum conditions for a dignified life.

<sup>29</sup> See further, UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies*, Aug. 2005, <http://www.unhcr.org/refworld/docid/4301a9184.html>.

subject to harassment, violence, forced prostitution or other demeaning work.<sup>30</sup>

### **Child-specific rights**

13. A contemporary and child-sensitive understanding of persecution encompasses many types of human rights violations, including violations of child-specific rights. In determining the persecutory character of an act inflicted against a child, it is essential to analyse the standards of the CRC and other relevant international human rights instruments applicable to children.<sup>31</sup> Children are entitled to a range of child-specific rights set forth in the CRC which recognize their young age and dependency and are fundamental to their protection, development and survival. These rights include, but are not limited to, the following: the right not to be separated from parents (Article 9); protection from all forms of physical and mental violence, abuse, neglect, and exploitation (Article 19); protection from traditional practices prejudicial to the health of children (Article 24); a standard of living adequate for the child's development (Article 27); the right not to be detained or imprisoned unless as a measure of last resort (Article 37); and protection from under-age recruitment (Article 38). The CRC also recognizes the right of refugee children and children seeking refugee status to appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the CRC and in other international human rights or humanitarian instruments (Article 22).

14. Children's socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child's claim as that of civil and political rights. It is important not to automatically attribute greater significance to certain violations than to others but to assess the overall impact of the harm on the individual child. The violation of one right often may expose the child to other abuses; for example, a denial of the right to education or an adequate standard of living may lead to a heightened risk of other forms of harm, including violence and abuse.<sup>32</sup> Moreover, there may be political, racial, gender or religious aims or intentions against a particular group of children or their parents underlying discriminatory measures in the access and enjoyment of ESC rights. As noted by the UN Committee on Economic, Social and Cultural Rights:

*The lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance, children who may live in abject poverty and not lead healthy lives are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.*<sup>33</sup>

### **Child-related manifestations of persecution**

15. While children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that might not reach the threshold of

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<sup>30</sup> UNHCR, *Guidelines on Gender-Related Persecution*, *op cit.*, para. 18.

<sup>31</sup> In the context of Africa, the African Charter on the Rights and Welfare of the Child should also be considered (hereafter "African Charter"), <http://www.unhcr.org/refworld/docid/3ae6b38c18.html>.

<sup>32</sup> CRC, *General Comment No. 5*, *op cit.*, paras. 6–7. See further below at v. Violations of economic, social and cultural rights.

<sup>33</sup> UN Committee on Economic, Social and Cultural Rights (hereafter "CESCR"), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, E/1992/23, 10 May 1999, <http://www.unhcr.org/refworld/docid/4538838c0.html>, para. 4.

persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.<sup>34</sup> Particularly in claims where the harm suffered or feared is more severe than mere harassment but less severe than a threat to life or freedom, the individual circumstances of the child, including his/her age, may be important factors in deciding whether the harm amounts to persecution. To assess accurately the severity of the acts and their impact on a child, it is necessary to examine the details of each case and to adapt the threshold for persecution to that particular child.

16. In the case of a child applicant, psychological harm may be a particularly relevant factor to consider. Children are more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances. Memories of traumatic events may linger in a child and put him/her at heightened risk of future harm.

17. Children are also more sensitive to acts that target close relatives. Harm inflicted against members of the child's family can support a well-founded fear in the child. For example, a child who has witnessed violence against, or experienced the disappearance or killing of a parent or other person on whom the child depends, may have a well-founded fear of persecution even if the act was not targeted directly against him/her.<sup>35</sup> Under certain circumstances, for example, the forced separation of a child from his/her parents, due to discriminatory custody laws or the detention of the child's parent(s) could amount to persecution.<sup>36</sup>

### **Child-specific forms of persecution**

18. Children may also be subjected to specific forms of persecution that are influenced by their age, lack of maturity or vulnerability. The fact that the refugee claimant is a child may be a central factor in the harm inflicted or feared. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed. UNHCR's Executive Committee has recognized that child-specific forms of persecution may include under-age recruitment, child trafficking and female genital mutilation (hereafter "FGM").<sup>37</sup> Other examples include, but are not limited to, family and domestic violence, forced or underage marriage,<sup>38</sup> bonded or hazardous child labour, forced labour,<sup>39</sup> forced prostitution and

<sup>34</sup> See further Save the Children and UNICEF, *The evolving capacities of the child*, 2005, <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>.

<sup>35</sup> See, for instance, *Cicek v. Turkey*, Application No. 67124/01, European Court of Human Rights (hereafter "ECtHR"), 18 Jan. 2005, <http://www.unhcr.org/refworld/docid/42d3e7ea4.html>, paras. 173–174; *Bazorkina v. Russia*, Application No. 69481/01, ECtHR, 27 July 2006, <http://www.unhcr.org/refworld/docid/44cdf4ef4.html>, paras. 140–141.

<sup>36</sup> See *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *op. cit.*, *Refugee Appeal Nos. 76226 and 76227*, Nos. 76226 and 76227, New Zealand, RSAA, 12 Jan. 2009, <http://www.unhcr.org/refworld/docid/49a6ac0e2.html>, paras. 112–113.

<sup>37</sup> ExCom, *Conclusion No. 107*, para. (g)(viii).

<sup>38</sup> CRC, Art. 24(3); International Covenant on Civil and Political Rights (hereafter "ICCPR"), <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, Art. 23; International Covenant on Economic, Social and Cultural Rights, <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>, Art. 10; Convention on the Elimination of All Forms of Discrimination Against Women, <http://www.unhcr.org/refworld/docid/3ae6b3970.html>, Art. 16.

<sup>39</sup> CRC, Arts. 32–36; International Labour Organization, *Worst Forms of Child Labour Convention*, C182 (hereafter "ILO Convention on the Worst Forms of Child Labour"), <http://www.unhcr.org/refworld/docid/3ddb6e0c4.html>; *Minimum Age Convention*, C138, (hereafter "ILO Minimum Age Convention"), <http://www.unhcr.org/refworld/docid/421216a34.html>, Arts. 2 (3), 2(4).

child pornography.<sup>40</sup> Such forms of persecution also encompass violations of survival and development rights as well as severe discrimination of children born outside strict family planning rules<sup>41</sup> and of stateless children as a result of loss of nationality and attendant rights. Some of the most common forms of child-specific persecution arising in the context of asylum claims are outlined in greater detail below.

#### i. Under-age recruitment

19. There is a growing consensus regarding the ban on the recruitment and use of children below 18 years in armed conflict.<sup>42</sup> International humanitarian law prohibits the recruitment and participation in the hostilities of children under the age of 15 years whether in international<sup>43</sup> or non-international armed conflict.<sup>44</sup> Article 38 of the CRC reiterates State Parties' obligations under international humanitarian law. The Rome Statute of the International Criminal Court classifies as war crimes the enlistment and use of children under the age of 15 years into the armed forces at a time of armed conflict.<sup>45</sup> The Special Court for Sierra Leone has concluded that the recruitment of children under the age of 15 years into the armed forces constitutes a crime under general international law.<sup>46</sup>

20. The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict provides that States parties shall take all feasible measures to ensure that members of their armed forces under the age of 18 years do not take part in hostilities, and ensure that persons under the age of 18 years are not compulsorily recruited into their armed forces.<sup>47</sup> The Optional Protocol contains an absolute prohibition against the recruitment or use, under any circumstances, of children who are less than 18 years old by armed groups that are distinct from the armed forces of a State.<sup>48</sup> It also amends

<sup>40</sup> CRC, Art. 34; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, <http://www.unhcr.org/refworld/docid/3ae6b38bc.html>.

<sup>41</sup> See, for instance, *Xue Yun Zhang v. Gonzales*, No. 01-71623, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 26 May 2005, <http://www.unhcr.org/refworld/docid/4b17c7082.html>; *Chen Shi Hai*, *op. cit.*

<sup>42</sup> See UNICEF, *The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, Feb. 2007 (hereafter "The Paris Principles"). While not binding, they reflect a strong trend for a complete ban on under-age recruitment. See also UN Security Council resolution 1612 (2005) (on children in armed conflict), 26 July 2005, S/RES/1612, <http://www.unhcr.org/refworld/docid/43f308d6c.html>, para. 1; 1539 on the protection of children affected by armed conflict, S/RES/1539, 22 Apr. 2004, <http://www.unhcr.org/refworld/docid/411236fd4.html>.

<sup>43</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>, Art. 77(2).

<sup>44</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), <http://www.unhcr.org/refworld/docid/3ae6b37f40.html>, Art. 4(3).

<sup>45</sup> UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998 (hereafter "ICC Statute"), <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>, Art. 8 (2) (b) [xxvii] and (e)[vii].

<sup>46</sup> See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 52–53; UN Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, <http://www.unhcr.org/refworld/docid/3ae6afb4.html>, para. 17, which recognized the customary character of the prohibition of child recruitment.

<sup>47</sup> The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, <http://www.unhcr.org/refworld/docid/47fdb180.html>, Arts. 1–2. There are currently 127 States Parties to the Optional Protocol. See also the African Charter, which establishes 18 years as the minimum age for all compulsory recruitment, Arts. 2 and 22.2, and the ILO Convention on the Worst Forms of Child Labour, which includes the forced recruitment of children under the age of 18, Arts. 2 and 3(a) in its definition of worst forms of child labor.

<sup>48</sup> Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art. 4.

Article 38 of the CRC by raising the minimum age of voluntary recruitment.<sup>49</sup> States also commit to use all feasible measures to prohibit and criminalize under-age recruitment and use of child soldiers by non-State armed groups.<sup>50</sup> The Committee on the Rights of the Child emphasizes that

*... under-age recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on “reasons of race, religion, nationality, membership of a particular social group or political opinion” (article 1A (2), 1951 Refugee Convention).*<sup>51</sup>

21. In UNHCR’s view, forced recruitment and recruitment for direct participation in hostilities of a child below the age of 18 years into the armed forces of the State would amount to persecution. The same would apply in situations where a child is at risk of forced re-recruitment or would be punished for having evaded forced recruitment or deserted the State’s armed forces. Similarly, the recruitment by a non-State armed group of any child below the age of 18 years would be considered persecution.

22. Voluntary recruitment of children above the age of 16 years by States is permissible under the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.<sup>52</sup> However, the recruiting State authorities have to put in place safeguards to ensure that the recruitment is voluntary, that it is undertaken with the informed consent of the parents and that the children who are so recruited are requested to produce satisfactory proof of age prior to their recruitment. In such cases, it is important to assess whether the recruitment was genuinely voluntary, bearing in mind that children are particularly susceptible to abduction, manipulation and force and may be less likely to resist recruitment. They may enlist under duress, in self-defence, to avoid harm to their families, to seek protection against unwanted marriages or sexual abuse within their homes, or to access basic means of survival, such as food and shelter. The families of children may also encourage them to participate in armed conflict, despite the risks and dangers.

23. In addition, children may have a well-founded fear of persecution arising from the treatment they are subjected to, and/or conduct they are required to engage in, by the armed forces or armed group. Boys and girls associated with armed forces or armed groups may be required to serve as cooks, porters, messengers, spies as well as to take direct part in the hostilities. Girls, in particular, may be forced into sexual relations with members of the military.<sup>53</sup> It is also important to bear in mind that children who have been released from the armed forces or group and return to their countries and communities of origin may be in danger of harassment, re-recruitment or retribution, including imprisonment or extra-judicial execution.

<sup>49</sup> *Ibid.*, Art. 3.

<sup>50</sup> *Ibid.*, Art. 4.

<sup>51</sup> CRC, *General Comment, No. 6*, para. 59. See also para. 58.

<sup>52</sup> Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art. 3. States Parties are required to raise in years the minimum age for the voluntary recruitment from the age set out in Art. 38, para. 3 of the CRC, hence, from 15 to 16 years.

<sup>53</sup> The Paris Principles define children associated with an armed force or group as follows: “A child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.” Art. 2.1.

## ii. Child trafficking and labour

24. As recognized by several jurisdictions, trafficked children or children who fear being trafficked may have valid claims to refugee status.<sup>54</sup> UNHCR's Guidelines on Victims of Trafficking and Persons at Risk of Being Trafficked are equally applicable to an asylum claim submitted by a child. The particular impact of a trafficking experience on a child and the violations of child-specific rights that may be entailed also need to be taken into account.<sup>55</sup>

25. The trafficking of children occurs for a variety of reasons but all with the same overarching aim to gain profit through the exploitation of human beings.<sup>56</sup> In this context, it is important to bear in mind that any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used. Whether the child consented to the act or not is, therefore, irrelevant.<sup>57</sup>

26. The trafficking of a child is a serious violation of a range of fundamental rights and, therefore, constitutes persecution. These rights include the right to life, survival and development, the right to protection from all forms of violence, including sexual exploitation and abuse, and the right to protection from child labour and abduction, sale and trafficking, as specifically provided for by Article 35 of the CRC.<sup>58</sup>

27. The impact of reprisals by members of the trafficking network, social exclusion, ostracism and/or discrimination<sup>59</sup> against a child victim of trafficking who is returned to his/her home country needs to be assessed in a child-sensitive manner. For example, a girl who has been trafficked for sexual exploitation may end up being rejected by her family and become a social outcast in her community if returned. A boy, who has been sent away by his parents in the hope and expectation that he will study, work abroad and send remittances back to his family likewise may become excluded from his family if they learn that he has been trafficked into forced labour. Such child victims of trafficking may have very limited possibilities of accessing and enjoying their human rights, including survival rights, if returned to their homes.

28. In asylum cases involving child victims of trafficking, decision makers will need to pay particular attention to indications of possible complicity of the child's parents, other family members or caregivers in arranging the trafficking or consenting to it. In such cases, the State's ability and willingness to protect the child must be assessed

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<sup>54</sup> See, for instance, *Ogbeide v. Secretary of State for the Home Department*, No. HX/08391/2002, U.K. IAT, 10 May 2002 (unreported); *Li and Others v. Minister of Citizenship and Immigration*, IMM-932-00, Canada, Federal Court, 11 Dec. 2000, <http://www.unhcr.org/refworld/docid/4b18d3682.html>.

<sup>55</sup> See UNHCR, *Guidelines on Victims of Trafficking*. See also UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, Oct. 2006, [http://www.unicef.org/ceecis/0610-Unicef\\_Victims\\_Guidelines\\_en.pdf](http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf), which make reference to refugee status for children who have been trafficked.

<sup>56</sup> These reasons include, but are not limited to, bonded child labour, debt repayment, sexual exploitation, recruitment by armed forces and groups, and irregular adoption. Girls, in particular, may be trafficked for the purpose of sexual exploitation or arranged marriage while boys may be particularly at risk of being trafficked for various forms of forced labour.

<sup>57</sup> For a definition of the scope of "trafficking", see the following international and regional instruments: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 15 Nov. 2000, <http://www.unhcr.org/refworld/docid/4720706c0.html>, in particular Art. 3; Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 3 May 2005 <http://www.unhcr.org/refworld/docid/43fded544.html>.

<sup>58</sup> For a detailed analysis of the human rights framework relating to the trafficking of children, see UNICEF, *Implementation Handbook*, *op cit.*, in particular pp. 531–542.

<sup>59</sup> UNHCR, *Guidelines on Victims of Trafficking*, *op cit.*, paras. 17–18.

carefully. Children at risk of being (re-)trafficked or of serious reprisals should be considered as having a well-founded fear of persecution within the meaning of the refugee definition.

29. In addition to trafficking, other worst forms of labour, such as slavery, debt bondage and other forms of forced labour, as well as the use of children in prostitution, pornography and illicit activities (for example, the drug trade) are prohibited by international law.<sup>60</sup> Such practices represent serious human rights violations and, therefore, would be considered persecution, whether perpetrated independently or as part of a trafficking experience.

30. International law also proscribes labour likely to harm the health, safety or morals of a child, also known as “hazardous work”.<sup>61</sup> In determining whether labour is hazardous, the following working conditions need to be considered: work that exposes children to physical or mental violence; work that takes place underground, under water, at dangerous heights or in confined spaces; work that involves dangerous equipment or manual handling of heavy loads; long working hours and unhealthy environments.<sup>62</sup> Labour performed by a child under the minimum age designated for the particular kind of work and deemed likely to inhibit the child’s education and full development is also prohibited according to international standards.<sup>63</sup> Such forms of labour could amount to persecution, as assessed according to the particular child’s experience, his/her age and other circumstances. Persecution, for example, may arise where a young child is compelled to perform harmful labour that jeopardizes his/her physical and/or mental health and development.

### iii. Female genital mutilation

31. All forms of FGM<sup>64</sup> are considered harmful and violate a range of human rights,<sup>65</sup> as affirmed by international and national jurisprudence and legal doctrine. Many jurisdictions have recognized that FGM involves the infliction of grave harm amounting to persecution.<sup>66</sup> As the practice disproportionately affects the girl child,<sup>67</sup> it can be considered a child-specific form of persecution. For further information about FGM in the context of refugee status determination, see UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation.<sup>68</sup>

### iv. Domestic violence against children

<sup>60</sup> ILO Convention on the Worst Forms of Child Labour, Art. 3 (a–c).

<sup>61</sup> *Ibid.*, Art. 3(d).

<sup>62</sup> *Ibid.*, Art. 4 in conjunction with ILO Worst Forms of Child Labour Recommendation, 1999, R190, <http://www.unhcr.org/refworld/docid/3ddb6ef34.html>, at 3 and 4.

<sup>63</sup> ILO Minimum Age Convention, Art. 2.

<sup>64</sup> FGM comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. See further, OHCHR, UNAIDS et al., *Eliminating Female Genital Mutilation: An Interagency Statement*, Feb. 2008, <http://www.unhcr.org/refworld/docid/47c6aa6e2.html>.

<sup>65</sup> These include the right to life, to protection from torture, and cruel, inhuman or degrading treatment, to protection from physical and mental violence and the right to the highest attainable standard of health.

<sup>66</sup> See, for instance, *Mlle Diop Aminata*, 164078, Commission des Recours des Réfugiés (hereafter “CRR”), France, 17 July 1991, <http://www.unhcr.org/refworld/docid/3ae6b7294.html>; *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh*, Canada, IRB, 10 May 1994, <http://www.unhcr.org/refworld/docid/3ae6b70618.html>; *In re Fauziya Kasinga*, 3278, U.S. Board of Immigration Appeals (hereafter “BIA”), 13 June 1996, <http://www.unhcr.org/refworld/docid/47bb00782.html>.

<sup>67</sup> FGM is mostly carried out on girls up to 15 years of age, although older girls and women may also be subjected to the practice.

<sup>68</sup> UNHCR, *Guidance Note on FGM*, *op cit.*

32. All violence against children, including physical, psychological and sexual violence, while in the care of parents or others, is prohibited by the CRC.<sup>69</sup> Violence against children may be perpetrated in the private sphere by those who are related to them through blood, intimacy or law.<sup>70</sup> Although it frequently takes place in the name of discipline, it is important to bear in mind that parenting and caring for children, which often demand physical actions and interventions to protect the child, is quite distinct from the deliberate and punitive use of force to cause pain or humiliation.<sup>71</sup> Certain forms of violence, in particular against very young children, may cause permanent harm and even death, although perpetrators may not aim to cause such harm.<sup>72</sup> Violence in the home may have a particularly significant impact on children because they often have no alternative means of support.<sup>73</sup>

33. Some jurisdictions have recognized that certain acts of physical, sexual and mental forms of domestic violence may be considered persecution.<sup>74</sup> Examples of such acts include battering, sexual abuse in the household, incest, harmful traditional practices, crimes committed in the name of honour, early and forced marriages, rape and violence related to commercial sexual exploitation.<sup>75</sup> In some cases, mental violence may be as detrimental to the victim as physical harm and could amount to persecution. Such violence may include serious forms of humiliation, harassment, abuse, the effects of isolation and other practices that cause or may result in psychological harm.<sup>76</sup> Domestic violence may also come within the scope of torture and other cruel, inhuman and degrading treatment or punishment.<sup>77</sup> A minimum level of severity is required for it to constitute persecution. When assessing the level of severity of the harm, a number of factors such as the frequency, patterns, duration and impact on the particular child need to be taken into account. The child's age and dependency on the perpetrator as well as the long-term effects on the physical and psychological development and well-being of the child also need to be considered.

#### v. Violations of economic, social and cultural rights

34. The enjoyment of economic, social and cultural rights is central to the child's survival and development.<sup>78</sup> The UN Committee on the Rights of the Child has stated that

*... the right to survival and development can only be implemented in a holistic*

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<sup>69</sup> CRC, Arts. 19, 37.

<sup>70</sup> Declaration on the Elimination of Violence Against Women, <http://www.unhcr.org/refworld/docid/3b00f25d2c.html>, Art. 2(a).

<sup>71</sup> See CRC, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, CRC/C/GC/8, 2 Mar. 2007 (hereafter "CRC, *General Comment No. 8*"), <http://www.unhcr.org/refworld/docid/460bc7772.html>, paras. 13–14, 26.

<sup>72</sup> UN study on violence against children, *op. cit.*, para. 40.

<sup>73</sup> See further UNICEF, *Domestic Violence Against Women and Girls*, Innocenti Digest No. 6, 2000, <http://www.unicef-irc.org/publications/pdf/digest6e.pdf>.

<sup>74</sup> See UNHCR, *Handbook for the Protection of Women and Girls*, Feb. 2008, <http://www.unhcr.org/refworld/docid/47cfc2962.html>, pp. 142–144. See also, for instance, *Rosalba Aguirre-Cervantes a.k.a. Maria Esperanza Castillo v. Immigration and Naturalization Service*, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 21 Mar. 2001, <http://www.unhcr.org/refworld/docid/3f37adc24.html>.

<sup>75</sup> UN Commission on Human Rights, Human Rights Resolution 2005/41: Elimination of violence against women, E/CN.4/RES/2005/41, 19 Apr. 2005, <http://www.unhcr.org/refworld/docid/45377c59c.html>, para. 5.

<sup>76</sup> CRC, *General Comment No. 8, op. cit.*, para. 11. See also UN study on violence against children, *op. cit.*, para. 42; UNICEF, *Domestic Violence Against Women and Girls, op. cit.*, pp. 2–4.

<sup>77</sup> CRC, *General Comment No. 8, op. cit.*, para. 12; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/7/3, 15 Jan. 2008, <http://www.unhcr.org/refworld/docid/47c2c5452.html>, paras. 45–49.

<sup>78</sup> CRC, Art. 6.2.

*manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play.*<sup>79</sup>

While the CRC and the 1966 Covenant on Economic, Social and Cultural Rights contemplate the progressive realization of economic, social and cultural rights, these instruments impose various obligations on States Parties which are of immediate effect.<sup>80</sup> These obligations include avoiding taking retrogressive measures, satisfying minimum core elements of each right and ensuring non-discrimination in the enjoyment of these rights.<sup>81</sup>

35. A violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized. For instance, the denial of a street child's right to an adequate standard of living (including access to food, water and housing) could lead to an intolerable predicament which threatens the development and survival of that child. Similarly, a denial of medical treatment, particularly where the child concerned suffers from a life-threatening illness, may amount to persecution.<sup>82</sup> Persecution may also be established through an accumulation of a number of less serious violations.<sup>83</sup> This could, for instance, be the case where children with disabilities or stateless children lack access to birth registration and, as a result, are excluded from education, health care and other services.<sup>84</sup>

36. Measures of discrimination may amount to persecution when they lead to consequences of a substantially prejudicial nature for the child concerned.<sup>85</sup> Children who lack adult care and support, are orphaned, abandoned or rejected by their parents, and are escaping violence in their homes may be particularly affected by such forms of discrimination. While it is clear that not all discriminatory acts leading to the deprivation of economic, social and cultural rights necessarily equate to persecution, it is important to assess the consequences of such acts for each child concerned, now and in the future. For example, bearing in mind the fundamental importance of education and the significant impact a denial of this right may have for the future of a child, serious harm

<sup>79</sup> CRC, *General Comment No. 7: Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 Sep. 2006 (hereafter "CRC, General Comment No. 7") <http://www.unhcr.org/refworld/docid/460bc5a62.html>, para. 10.

<sup>80</sup> See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, 14 Dec. 1990, <http://www.unhcr.org/refworld/docid/4538838e10.html>, para. 1; CRC, *General Comment No. 5*, para. 6.

<sup>81</sup> See UN Commission on Human Rights, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 Jan. 1987, E/CN.4/1987/17 at B.16, 21–22, <http://www.unhcr.org/refworld/docid/48abd5790.html>; International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 Jan. 1997, <http://www.unhcr.org/refworld/docid/48abd5730.html>, at II.9 and 11.

<sup>82</sup> See, for instance, *RRT Case No. N94/04178*, N94/04178, Australia, Refugee Review Tribunal (hereafter "RRT"), 10 June 1994, <http://www.unhcr.org/refworld/docid/3ae6b6300.html>.

<sup>83</sup> UNHCR, *Handbook*, para. 53. See also *Canada (Citizenship and Immigration) v. Oh*, 2009 FC 506, Canada, Federal Court, 22 May 2009, <http://www.unhcr.org/refworld/docid/4a897a1c2.html>, at 10.

<sup>84</sup> See *Case of the Yean and Bosico Children v. The Dominican Republic*, IACtHR, 8 Sep. 2005, <http://www.unhcr.org/refworld/docid/44e497d94.html>. Two girls of Haitian origin were denied the right to nationality and education because, among other matters, they did not have a birth certificate; *Case of the "Juvenile Reeducation Institute" v. Paraguay*, IACtHR, 2 Sep. 2004, <http://www.unhcr.org/refworld/docid/4b17bab62.html>. The Court found that failure to provide severely marginalized groups with access to basic health-care services constitutes a violation of the right to life of the ACHR. See also, CRC, *General Comment No. 7*, para. 25; CRC, *General Comment No. 9 (2006): The Rights of children with disabilities*, CRC/C/GC/9, 27 Feb. 2007 (hereafter "CRC, General Comment No. 9"), <http://www.unhcr.org/refworld/docid/461b93f72.html>, paras. 35–36.

<sup>85</sup> UNHCR, *Handbook*, para. 54.

could arise if a child is denied access to education on a systematic basis.<sup>86</sup> Education for girls may not be tolerated by society,<sup>87</sup> or school attendance may become unbearable for the child due to harm experienced on racial or ethnic grounds.<sup>88</sup>

## b) Agents of persecution

37. In child asylum claims, the agent of persecution is frequently a non-State actor. This may include militarized groups, criminal gangs, parents and other caregivers, community and religious leaders. In such situations, the assessment of the well-foundedness of the fear has to include considerations as to whether or not the State is unable or unwilling to protect the victim.<sup>89</sup> Whether or not the State or its agents have taken sufficient action to protect the child will need to be assessed on a case-by-case basis.

38. The assessment will depend not only on the existence of a legal system that criminalizes and provides sanctions for the persecutory conduct. It also depends on whether or not the authorities ensure that such incidents are effectively investigated and that those responsible are identified and appropriately punished.<sup>90</sup> Hence, the enactment of legislation prohibiting or denouncing a particular persecutory practice against children, in itself, is not sufficient evidence to reject a child's claim to refugee status.<sup>91</sup>

39. The child's access to State protection also depends on the ability and willingness of the child's parents, other primary caregiver or guardian to exercise rights and obtain protection on behalf of the child. This may include filing a complaint with the police, administrative authorities or public service institutions. However, not all children will have an adult who can represent them as is the case, for example, where the child is unaccompanied or orphaned, or where a parent, other primary caregiver or guardian is the agent of persecution. It is important to remember that, due to their young age, children may not be able to approach law enforcement officials or articulate their fear or

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<sup>86</sup> See *RRT Case No. V95/03256*, [1995] RRTA 2263, Australia, RRT, 9 Oct. 1995, <http://www.unhcr.org/refworld/docid/4b17c13a2.html>, where the Tribunal found that "discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution." at 47.

<sup>87</sup> See *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada, IRB, 23 Sep. 1996, <http://www.unhcr.org/refworld/docid/4b18e21b2.html>, which concerned a 9 year-old girl from Afghanistan. The Court concluded that "Education is a basic human right and I direct the Board to find that she should be found to be a Convention refugee."

<sup>88</sup> Decisions in both Canada and Australia have accepted that bullying and harassment of school children may amount to persecution. See, for instance, *Decision VA1-02828, VA1-02826, VA1-02827 and VA1-02829, VA1-02828, VA1-02826, VA1-02827 and VA1-02829*, Canada, IRB, 27 Feb. 2003, <http://www.unhcr.org/refworld/docid/4b18e03d2.html>, para. 36; *RRT Case No. N03/46534*, [2003] RRTA 670, Australia, RRT, 17 July 2003, <http://www.unhcr.org/refworld/docid/4b17bfd62.html>.

<sup>89</sup> See CRC, Art. 3, which imposes a duty on States Parties to ensure the protection and care of children in respect of actions by both State and private actors; ACHR, Arts. 17 and 19; African Charter, Arts. 1(3), 81. See also UNHCR, *Handbook*, para. 65; UNHCR, *Guidelines on Gender-Related Persecution*, para. 19; *Advisory Opinion on Juridical Condition and Human Rights of the Child*, No. OC-17/02, IACtHR, 28 Aug. 2002, <http://www.unhcr.org/refworld/docid/4268c57c4.html>.

<sup>90</sup> See, for instance, *Velásquez Rodríguez Case*, Series C, No. 4, IACtHR, 29 July 1988, para. 174 <http://www.unhcr.org/refworld/docid/40279a9e4.html>; *M.C. v. Bulgaria*, Application No. 39272/98, ECtHR, 3 Dec. 2003, <http://www.unhcr.org/refworld/docid/47b19f492.html>. See also UN Committee on the Elimination of Discrimination Against Women, General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), A/47/38, 1992, <http://www.unhcr.org/refworld/docid/453882a422.html>, para. 9; UN Commission on Human Rights, The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk, E/CN.4/2006/61, 20 Jan. 2006, <http://www.unhcr.org/refworld/docid/45377afb0.html>.

<sup>91</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 11.

complaint in the same way as adults. Children may be more easily dismissed or not taken seriously by the officials concerned, and the officials themselves may lack the skills necessary to interview and listen to children.

### c) The 1951 Convention grounds

40. As with adult claims to refugee status, it is necessary to establish whether or not the child's well-founded fear of persecution is linked to one or more of the five grounds listed in Article 1A(2) of the 1951 Convention. It is sufficient that the Convention ground be a factor relevant to the persecution, but it is not necessary that it be the sole, or even dominant, cause.

#### ***Race and nationality or ethnicity***

41. Race and nationality or ethnicity is at the source of child asylum claims in many contexts. Policies that deny children of a particular race or ethnicity the right to a nationality or to be registered at birth,<sup>92</sup> or that deny children from particular ethnic groups their right to education or to health services would fall into this category. This Convention ground would apply similarly to policies that aim to remove children from their parents on the basis of particular racial, ethnic or indigenous backgrounds. Systematic targeting of girls belonging to ethnic minorities for rape, trafficking, or recruitment into armed forces or groups also may be analysed within this Convention ground.

#### ***Religion***

42. As with an adult, the religious beliefs of a child or refusal to hold such beliefs may put him/her at risk of persecution. For a Convention ground to be established, it is not necessary that the child be an active practitioner. It is sufficient that the child simply be perceived as holding a certain religious belief or belonging to a sect or religious group, for example, because of the religious beliefs of his/her parents.<sup>93</sup>

43. Children have limited, if any, influence over which religion they belong to or observe, and belonging to a religion can be virtually as innate as one's ethnicity or race. In some countries, religion assigns particular roles or behaviour to children. As a consequence, if a child does not fulfil his/her assigned role or refuses to abide by the religious code and is punished as a consequence, s/he may have a well-founded fear of persecution on the basis of religion.

44. The reasons for persecution related to a child's refusal to adhere to prescribed gender roles may also be analysed under this ground. Girls, in particular, may be affected by persecution on the basis of religion. Adolescent girls may be required to perform traditional slave duties or to provide sexual services. They also may be required to undergo FGM or to be punished for honour crimes in the name of religion.<sup>94</sup> In other contexts, children - both boys and girls - may be specifically targeted to join armed groups or the armed forces of a State in pursuit of religious or related ideologies.

<sup>92</sup> Universal Declaration of Human Rights, <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>, Art. 15; ICCPR, Arts 24(2) and (3); CRC, Art. 7.

<sup>93</sup> UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 Apr. 2004 (hereafter, "UNHCR, *Guidelines on Religion-Based Persecution*"), <http://www.unhcr.org/refworld/docid/4090f9794.html>.

<sup>94</sup> *Ibid.*, para. 24.

## **Political opinion**

45. The application of the Convention ground of “political opinion” is not limited to adult claims. A claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods. Whether or not a child is capable of holding a political opinion is a question of fact and is to be determined by assessing the child’s level of maturity and development, level of education, and his/her ability to articulate those views. It is important to acknowledge that children can be politically active and hold particular political opinions independently of adults and for which they may fear being persecuted. Many national liberation or protest movements are driven by student activists, including schoolchildren. For example, children may be involved in distributing pamphlets, participating in demonstrations, acting as couriers or engaging in subversive activities.

46. In addition, the views or opinions of adults, such as the parents, may be imputed to their children by the authorities or by non-State actors.<sup>95</sup> This may be the case even if a child is unable to articulate the political views or activities of the parent, including where the parent deliberately withholds such information from the child to protect him/her. In such circumstances, these cases should be analysed not only according to the political opinion ground but also in terms of the ground pertaining to membership of a particular social group (in this case, the “family”).

47. The grounds of (imputed) political opinion and religion may frequently overlap in child asylum claims. In certain societies, the role ascribed to women and girls may be attributable to the requirements of the State or official religion. The authorities or other agents of persecution may perceive the failure of a girl to conform to this role as a failure to practice or to hold certain religious beliefs. At the same time, failure to conform could be interpreted as holding an unacceptable political opinion that threatens fundamental power structures. This may be the case particularly in societies where there is little separation between religious and State institutions, laws and doctrines.<sup>96</sup>

## **Membership of a particular social group**

48. Children’s claims to refugee status most often have been analysed in the context of the Convention ground of “membership of a particular social group”, although any of the Convention grounds may be applicable. As stated in UNHCR’s Guidelines

*[a] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.*<sup>97</sup>

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<sup>95</sup> See *Matter of Timnit Daniel and Simret Daniel*, A70 483 789 & A70 483 774, U.S. BIA, 31 Jan. 2002 (unpublished, non-precedent setting decision). The Court found that the notion “that the respondents were too young to have an actual political opinion is irrelevant; it is enough that the officials believed that they supported the EPLF.”

<sup>96</sup> UNHCR, *Guidelines on Gender-Related Persecution*, op. cit. para. 26.

<sup>97</sup> UNHCR, *Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f23f4.html>, para. 11.

49. Although age, in strict terms, is neither innate nor permanent as it changes continuously, being a child is in effect an immutable characteristic at any given point in time. A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared.<sup>98</sup> The fact that the child eventually will grow older is irrelevant to the identification of a particular social group, as this is based on the facts as presented in the asylum claim. Being a child is directly relevant to one's identity, both in the eyes of society and from the perspective of the individual child. Many government policies are age-driven or age-related, such as the age for military conscription, the age for sexual consent, the age of marriage, or the age for starting and leaving school. Children also share many general characteristics, such as innocence, relative immaturity, impressionability and evolving capacities. In most societies, children are set apart from adults as they are understood to require special attention or care, and they are referred to by a range of descriptors used to identify or label them, such as "young", "infant", "child", "boy", "girl" or "adolescent". The identification of social groups also may be assisted by the fact that the children share a common socially-constructed experience, such as being abused, abandoned, impoverished or internally displaced.

50. A range of child groupings, thus, can be the basis of a claim to refugee status under the "membership of a particular social group" ground. Just as "women" have been recognized as a particular social group in several jurisdictions, "children" or a smaller subset of children may also constitute a particular social group.<sup>99</sup> Age and other characteristics may give rise to groups such as "abandoned children",<sup>100</sup> "children with disabilities", "orphans", or children born outside coercive family planning policies or of unauthorized marriages, also referred to as "black children".<sup>101</sup> The applicant's family may also constitute a relevant social group.<sup>102</sup>

51. The applicant's membership in a child-based social group does not necessarily cease to exist merely because his/her childhood ends. The consequences of having previously belonged to such a social group might not end even if the key factor of that

<sup>98</sup> See *Matter of S-E-G-, et al.*, 24 I&N Dec. 579 (BIA 2008), U.S. BIA, 30 July 2008, <http://www.unhcr.org/refworld/docid/4891da5b2.html>, which noted that "we acknowledge that the mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable." (p. 583); *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department*, [2008] U.K. AIT 00005, 15 Mar. 2007, <http://www.unhcr.org/refworld/docid/47a04ac32.html>, finding that the applicant, "although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment" at 6; *Decision V99-02929, V99-02929*, Canada, IRB, 21 Feb. 2000, <http://www.unhcr.org/refworld/docid/4b18e5592.html>, which found that "[t]he child's vulnerability arises as a result of his status as a minor. His vulnerability as a minor is an innate and unchangeable characteristic, notwithstanding the child will grow into an adult."

<sup>99</sup> In *In re Fauziya Kasinga, op. cit.*, it was held that "young women" may constitute a particular social group.

<sup>100</sup> In *V97-03500*, Canada, Convention Refugee Determination Division, 31 May 1999, it was accepted that abandoned children in Mexico can be a particular social group. (A summary is available at [http://www2.irb-cisr.gc.ca/en/decisions/reflex/index\\_e.htm?action=article.view&id=1749](http://www2.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=article.view&id=1749)). See also *RRT Case No. 0805331*, [2009] RRTA 347, Australia, RRT, 30 April 2009, <http://www.unhcr.org/refworld/docid/4a2681692.html>, where the Tribunal held that the applicant's (a two-year old child) particular social group was "children of persecuted dissidents".

<sup>101</sup> This has been affirmed in several decisions in Australia. See, for instance, *Chen Shi Hai, op. cit.* and more recently in *RRT Case No. 0901642*, [2009] RRTA 502, Australia, RRT, 3 June 2009, <http://www.unhcr.org/refworld/docid/4a76ddb2.html>.

<sup>102</sup> See *Aguirre-Cervantes, op. cit.*, where the Court found that "[f]amily membership is clearly an immutable characteristic, fundamental to one's identity", and noted that "[t]he undisputed evidence demonstrates that Mr. Aguirre's goal was to dominate and persecute members of his immediate family."

identity (that is, the applicant's young age) is no longer applicable. For instance, a past shared experience may be a characteristic that is unchangeable and historic and may support the identification of groups such as "former child soldiers"<sup>103</sup> or "trafficked children" for the purposes of a fear of future persecution.<sup>104</sup>

52. Some of the more prominent social groupings include the following:

- i. **Street children** may be considered a particular social group. Children living and/or working on the streets are among the most visible of all children, often identified by society as social outcasts. They share the common characteristics of their youth and having the street as their home and/or source of livelihood. Especially for children who have grown up in such situations, their way of life is fundamental to their identity and often difficult to change. Many of these children have embraced the term "street children" as it offers them a sense of identity and belonging while they may live and/or work on the streets for a range of reasons. They also may share past experiences such as domestic violence, sexual abuse, and exploitation or being orphaned or abandoned.<sup>105</sup>
- ii. **Children affected by HIV/AIDS**, including both those who are HIV-positive and those with an HIV-positive parent or other relative, may also be considered a particular social group. The fact of being HIV-positive exists independently of the persecution they may suffer as a consequence of their HIV status. Their status or that of their family may set them apart and, while manageable and/or treatable, their status is by and large unchangeable.<sup>106</sup>
- iii. Where children are singled out as a target group for **recruitment or use by an armed force or group**, they may form a particular social group due to the innate and unchangeable nature of their age as well as the fact that they are perceived as a group by the society in which they live. As with adults, a child who evades the draft, deserts or otherwise refuses to become associated with an armed force may be perceived as holding a political opinion in which case the link to the Convention ground of political opinion may also be established.<sup>107</sup>

**d) Internal "flight" or "relocation" alternative**

53. An assessment of the issue of internal flight alternative contains two parts: the relevance of such an inquiry, and the reasonableness of any proposed area of internal

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<sup>103</sup> In *Lukwago v. Ashcroft, Attorney General*, 02-1812, U.S. Court of Appeals for the 3<sup>rd</sup> Circuit, 14 May 2003, <http://www.unhcr.org/refworld/docid/47a7078c3.html>, the Court found that "membership in the group of former child soldiers who have escaped LRA captivity fits precisely within the BIA's own recognition that a shared past experience may be enough to link members of a 'particular social group'."

<sup>104</sup> UNHCR, *Guidelines on Victims of Trafficking*, para. 39. See also, *RRT Case No. N02/42226*, [2003] RRTA 615, Australia, RRT, 30 June 2003, <http://www.unhcr.org/refworld/docid/4b17c2b02.html>, which concerned a young woman from Uzbekistan. The identified group was "Uzbekistani women forced into prostitution abroad who are perceived to have transgressed social mores."

<sup>105</sup> See, for instance, *Matter of B-F-O-*, A78 677 043, U.S. BIA, 6 Nov. 2001 (unpublished, non-precedent decision). The Court found that the applicant, who was an abandoned street child, had a well-founded fear of persecution based on membership in a particular social group. See also, *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department, op. cit.* The Tribunal found that the applicant's fear of harm as an orphan and street child "would be as a result of his membership in a part of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group", at 7.

<sup>106</sup> See further, CRC, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, 17 Mar. 2003, <http://www.unhcr.org/refworld/docid/4538834e15.html>.

<sup>107</sup> UNHCR, *Handbook*, paras. 169–171; UNHCR, *Guidelines on Religion-Based Persecution*, paras. 25–26.

relocation.<sup>108</sup> The child's best interests inform both the relevance and reasonableness assessments.

54. As in the case of adults, internal relocation is only **relevant** where the applicant can access practically, safely and legally the place of relocation.<sup>109</sup> In particular with regard to gender-based persecution, such as domestic violence and FGM which are typically perpetrated by private actors, the lack of effective State protection in one part of the country may be an indication that the State may also not be able or willing to protect the child in any other part of the country.<sup>110</sup> If the child were to relocate, for example, from a rural to an urban area, the protection risks in the place of relocation would also need to be examined carefully, taking into account the age and coping capacity of the child.

55. In cases where an internal flight or relocation alternative is deemed relevant, a proposed site of internal relocation that may be **reasonable** in the case of an adult may not be reasonable in the case of a child. The "reasonableness test" is one that is applicant-specific and, thus, not related to a hypothetical "reasonable person". Age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation.<sup>111</sup>

56. Where children are unaccompanied and, therefore, not returning to the country of origin with family members or other adult support, special attention needs to be paid as to whether or not such relocation is reasonable. Internal flight or relocation alternatives, for instance, would not be appropriate in cases where unaccompanied children have no known relatives living in the country of origin and willing to support or care for them and it is proposed that they relocate to live on their own without adequate State care and assistance. What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation.<sup>112</sup> Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.<sup>113</sup>

57. If the only available relocation option is to place the child in institutional care, a proper assessment needs to be conducted of the care, health and educational facilities that would be provided and with regard to the long-term life prospects of adults who were institutionalized as children.<sup>114</sup> The treatment as well as social and cultural

<sup>108</sup> UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, <http://www.unhcr.org/refworld/docid/3f2791a44.html>.

<sup>109</sup> *Ibid*, para. 7.

<sup>110</sup> *Ibid*, para. 15.

<sup>111</sup> *Ibid*, para. 25. See further factors in the CRC, *General Comment No. 6*, para. 84, on Return to Country of Origin. Although drafted with a different context in mind, these factors are equally relevant to an assessment of an internal flight/relocation alternative.

<sup>112</sup> See, for instance, *Elmi v. Minister of Citizenship and Immigration*, Canada, Federal Court, No. IMM-580-98, 12 Mar. 1999, <http://www.unhcr.org/refworld/docid/4b17c5932.html>.

<sup>113</sup> CRC, Arts. 3, 6 and 37. See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, ECtHR, 12 Oct. 2006, <http://www.unhcr.org/refworld/docid/45d5cef72.html>, which concerned the return (not internal relocation) of an unaccompanied five-year old girl. The Court was "struck by the failure to provide adequate preparation, supervision and safeguards for her deportation", noting further that such "conditions was bound to cause her extreme anxiety and demonstrated such a total lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment [violation of article 3 of the European Convention on Human Rights]", paras. 66, 69.

<sup>114</sup> See CRC, *General Comment No. 6*, para. 85. See also *Inter-Agency Guiding Principles, op cit.*, which notes that institutional care needs to be considered a last resort, as "residential institutions can rarely offer the developmental care and support a child requires and often cannot even provide a reasonable

perceptions of orphans and other children in institutionalized care needs to be evaluated carefully as such children may be the subject of societal disapproval, prejudice or abuse, thus rendering the proposed site for relocation unreasonable in particular circumstances.

#### e) The application of exclusion clauses to children

58. The exclusion clauses contained in Article 1F of the 1951 Convention provide that certain acts are so grave that they render their perpetrators undeserving of international protection as refugees.<sup>115</sup> Since Article 1F is intended to protect the integrity of asylum, it needs to be applied “scrupulously”. As with any exception to human rights guarantees, a restrictive interpretation of the exclusion clauses is required in view of the serious possible consequences of exclusion for the individual.<sup>116</sup> The exclusion clauses are exhaustively enumerated in Article 1F, and no reservations are permitted.<sup>117</sup>

59. In view of the particular circumstances and vulnerabilities of children, the application of the exclusion clauses to children always needs to be exercised with great caution. In the case of young children, the exclusion clauses may not apply at all. Where children are alleged to have committed crimes while their own rights were being violated (for instance while being associated with armed forces or armed groups), it is important to bear in mind that they may be victims of offences against international law and not just perpetrators.<sup>118</sup>

60. Although the exclusion clauses of Article 1F do not distinguish between adults and children, Article 1F can be applied to a child only if s/he has reached the age of criminal responsibility as established by international and/or national law at the time of the commission of the excludable act.<sup>119</sup> Thus, a child below such minimum age cannot be considered responsible for an excludable act.<sup>120</sup> Article 40 of the CRC requires

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standard of protection”, p. 46.

<sup>115</sup> UNHCR’s interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F is set out in UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 Sep. 2003, (hereafter: “UNHCR, *Guidelines on Exclusion*”) <http://www.unhcr.org/refworld/docid/3f5857684.html>; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter “UNHCR, *Background Note on Exclusion*”), <http://www.unhcr.org/refworld/docid/3f5857d24.html>; UNHCR, *Statement on Article 1F of the 1951 Convention*, July 2009, (hereafter “UNHCR, *Statement on Article 1F*”), <http://www.unhcr.org/refworld/docid/4a5de2992.html>, and UNHCR, *Handbook*, paras. 140–163.

<sup>116</sup> UNHCR, *Guidelines on Exclusion*, para. 2; UNHCR *Background Note on Exclusion*, para. 4. UNHCR, *Handbook* para. 149. See also ExCom Conclusions No. 82 (XLVIII), *Safeguarding Asylum*, 17 Oct. 1997, <http://www.unhcr.org/refworld/docid/3ae68c958.html>, para. (v); No. 102 (LVI) 2005, *General Conclusion on International Protection*, 7 Oct. 2005, <http://www.unhcr.org/refworld/docid/43575ce3e.html>, para. (i); No. 103 (LVI), *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, 7 Oct. 2005, <http://www.unhcr.org/refworld/docid/43576e292.html>, para. (d).

<sup>117</sup> UNHCR, *Guidelines on Exclusion*, para. 3; UNHCR, *Background Note on Exclusion*, para. 7.

<sup>118</sup> The Paris Principles state: “Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles,” para. 3.6. It should also be noted that the prosecutor for the SCSL chose not to prosecute children between the ages of 15 and 18 years given that they themselves were victims of international crimes.

<sup>119</sup> UNHCR, *Guidelines on Exclusion*, para. 28.

<sup>120</sup> UNHCR, *Background Note on Exclusion*, para. 91. If the age of criminal responsibility is higher in the

States to establish a minimum age for criminal responsibility, but there is no universally recognized age limit.<sup>121</sup> In different jurisdictions, the minimum age ranges from 7 years to higher ages, such as 16 or 18 years, while the Statutes of the Special Court for Sierra Leone<sup>122</sup> and the International Criminal Court<sup>123</sup> set the cut-off age at 15 years and 18 years respectively.

61. In view of the disparities in establishing a minimum age for criminal responsibility by States and in different jurisdictions, the emotional, mental and intellectual maturity of any child over the relevant national age limit for criminal responsibility would need to be evaluated to determine whether s/he had the mental capacity to be held responsible for a crime within the scope of Article 1F. Such considerations are particularly important where the age limit is lower on the scale but is also relevant if there is no proof of age and it cannot be established that the child is at, or above, the age for criminal responsibility. The younger the child, the greater the presumption that the requisite mental capacity did not exist at the relevant time.

62. As with any exclusion analysis, a three-step analysis needs to be undertaken if there are indications that the child has been involved in conduct which may give rise to exclusion.<sup>124</sup> Such an analysis requires that: (i) the acts in question be assessed against the exclusion grounds, taking into account the nature of the acts as well as the context and all individual circumstances in which they occurred; (ii) it be established in each case that the child committed a crime which is covered by one of the sub-clauses of Article 1F, or that the child participated in the commission of such a crime in a manner which gives rise to criminal liability in accordance with internationally applicable standards; and (iii) it be determined, in cases where individual responsibility is established, whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed.<sup>125</sup>

63. It is important to undertake a thorough and individualized analysis of all circumstances in each case. In the case of a child, the exclusion analysis needs to take into account not only general exclusion principles but also the rules and principles that address the special status, rights and protection afforded to children under international and national law at all stages of the asylum procedure. In particular, those principles related to the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake need to be considered. A rigorous application of legal and procedural standards of exclusion is also critical.<sup>126</sup>

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country of origin than in the host country, this should be taken into account in the child's favour.

<sup>121</sup> The Committee on the Rights of the Child urged States not to lower the minimum age to 12 years and noted that a higher age, such as 14 or 16 years, "contributes to a juvenile justice system which [...] deals with children in conflict with the law without resorting to judicial proceedings"; see, CRC, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, CRC/C/GC/10, 25 Apr. 2007, <http://www.unhcr.org/refworld/docid/4670fca12.html>, para. 33. See also UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, 29 Nov. 1985, <http://www.unhcr.org/refworld/docid/3b00f2203c.html>, which provides that the "beginning of that age should not be fixed at a too low an age level bearing in mind the facts of emotional, mental and intellectual maturity", Art. 4.1.

<sup>122</sup> UN Security Council, Statute of the Special Court for Sierra Leone, 16 Jan. 2002, Art. 7.

<sup>123</sup> ICC Statute, Art. 26.

<sup>124</sup> For further information on exclusion concerning child soldiers, see UNHCR, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers*, 12 Sep. 2005 (hereafter "UNHCR, *Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers*"), <http://www.unhcr.org/refworld/docid/440eda694.html>.

<sup>125</sup> UNHCR, *Statement on Article 1F*, p. 7.

<sup>126</sup> For a detailed analysis on procedural issues regarding exclusion, see UNHCR, *Guidelines on Exclusion*, paras. 31–36 and UNHCR, *Background Note on Exclusion*, paras. 98–113.

64. Based on the above, the following considerations are of central importance in the application of the exclusion clauses to acts committed by children:

- i. When determining individual responsibility for excludable acts, the issue of whether or not a child has the necessary **mental state** (or *mens rea*), that is, whether or not the child acted with the requisite intent and knowledge to be held individually responsible for an excludable act, is a central factor in the exclusion analysis. This assessment needs to consider elements such as the child's emotional, mental and intellectual development. It is important to determine whether the child was sufficiently mature to understand the nature and consequences of his/her conduct and, thus, to commit, or participate in, the commission of the crime. Grounds for the absence of the *mens rea* include, for example, severe mental disabilities, involuntary intoxication, or immaturity.
- ii. If mental capacity is established, other grounds for **rejecting individual responsibility** need to be examined, notably whether the child acted under duress, coercion, or in defence of self or others. Such factors are of particular relevance when assessing claims made by former child soldiers. Additional factors to consider may include: the age at which the child became involved in the armed forces or group; the reasons for which s/he joined and left the armed forces or group; the length of time s/he was a member; the consequences of refusal to join the group; any forced use of drugs, alcohol or medication; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered.<sup>127</sup>
- iii. Finally, if individual responsibility is established, it needs to be determined whether or not the consequences of exclusion from refugee status are **proportional** to the seriousness of the act committed.<sup>128</sup> This generally involves a weighing of the gravity of the offence against the degree of persecution feared upon return. If the applicant is likely to face severe persecution, the crime in question needs to be very serious in order to exclude him/her from refugee status. Issues for consideration include any mitigating or aggravating factors relevant to the case. When assessing a child's claim, even if the circumstances do not give rise to a defence, factors such as the age, maturity and vulnerability of the child are important considerations. In the case of child soldiers, such factors include ill-treatment by military personnel and circumstances during service. The consequences and treatment that the child may face upon return (i.e. serious human rights violations as a consequence of having escaped the armed forces or group) also need to be considered.

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<sup>127</sup> Decisions in France have recognized that children who committed offences, which should in principle lead to the application of the exclusion clauses, may be exonerated if they were in particularly vulnerable situations. See, for instance, 459358, *M.V.; Exclusion*, CRR, 28 Apr. 2005, <http://www.unhcr.org/refworld/docid/43abf5cf4.html>; 448119, *M.C.*, CRR, 28 Jan. 2005, <http://www.unhcr.org/refworld/docid/4b17b5d92.html>. See also, *MH (Syria) v. Secretary of State for the Home Department; DS (Afghanistan) v. Secretary of State for the Home Department*, [2009] EWCA Civ 226, Court of Appeal (U.K.), 24 Mar. 2009, <http://www.unhcr.org/refworld/docid/49ca60ae2.html>, para. 3. For detailed guidance on grounds rejecting individual responsibility, see, UNHCR *Guidelines on Exclusion*, paras. 21–24. UNHCR, *Background Note on Exclusion*, paras. 91–93. UNHCR, *Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers*, *op cit.* pp. 10–12.

<sup>128</sup> For detailed guidance on proportionality see UNHCR, *Guidelines on Exclusion*, para. 24; UNHCR, *Background Note on Exclusion*, paras. 76–78.

#### IV. PROCEDURAL AND EVIDENTIARY ISSUES

65. Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.<sup>129</sup> The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure. They do not preclude the application of the detailed guidance provided, for example, in the Action for the Rights of Children Resources Pack,<sup>130</sup> the Inter-Agency Guiding Principles on Unaccompanied and Separated Children and in national guidelines.<sup>131</sup>

66. Claims made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, as they often will have special protection and assistance needs. Priority processing means reduced waiting periods at each stage of the asylum procedure, including as regards the issuance of a decision on the claim. However, before the start of the procedure, children require sufficient time in which to prepare for and reflect on rendering the account of their experiences. They will need time to build trusting relationships with their guardian and other professional staff and to feel safe and secure. Generally, where the claim of the child is directly related to the claims of accompanying family members or the child is applying for derivative status, it will not be necessary to prioritise the claim of the child unless other considerations suggest that priority processing is appropriate.<sup>132</sup>

67. There is no general rule prescribing in whose name a child's asylum claim ought to be made, especially where the child is particularly young or a claim is based on a parent's fear for their child's safety. This will depend on applicable national regulations. Sufficient flexibility is needed, nevertheless, to allow the name of the principal applicant to be amended during proceedings if, for instance, it emerges that the more appropriate principal applicant is the child rather than the child's parent. This flexibility ensures that administrative technicalities do not unnecessarily prolong the process.<sup>133</sup>

68. For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or

<sup>129</sup> The relevant applicable age for children to benefit from the additional procedural safeguards elaborated in this section is the date the child seeks asylum and not the date a decision is reached. This is to be distinguished from the substantive assessment of their refugee claim in which the prospective nature of the inquiry requires that their age at the time of the decision may also be relevant.

<sup>130</sup> Action for the rights of children, *ARC Resource Pack, a capacity building tool for child protection in and after emergencies*, produced by Save the Children, UNHCR, UNICEF, OHCHR, International Rescue Committee and Terre des Hommes, 7 Dec. 2009, <http://www.savethechildren.net/arc>.

<sup>131</sup> See, for instance, U.K. Asylum Instruction, *Processing an Asylum Application from a Child*, 2 Nov. 2009, <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary>; U.K. Border Agency Code of Practice for Keeping Children Safe from Harm, Dec. 2008, <http://www.unhcr.org/refworld/docid/4948f8662.html>; Finland, Directorate of Immigration, *Guidelines for Interviewing (Separated) Minors*, Mar. 2002, <http://www.unhcr.org/refworld/docid/430ae8d72.html>; U.S. *Guidelines For Children's Asylum Claims*, *op cit.*; Canada, IRB, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues*, 30 Sep. 1996, No. 3, <http://www.unhcr.org/refworld/docid/3ae6b31d3b.html>.

<sup>132</sup> UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 Nov. 2003, <http://www.unhcr.org/refworld/docid/42d66dd84.html>, pages 3.25, 4.21–4.23.

<sup>133</sup> This is especially relevant in relation to claims, such as FGM or forced marriage, where parents flee with their child in fear for his/her life although the child may not fully comprehend the reason for flight.

other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution.<sup>134</sup>

69. An independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied or separated children. Children who are the principal applicants in an asylum procedure are also entitled to a legal representative.<sup>135</sup> Such representatives should be properly trained and should support the child throughout the procedure.

70. The right of children to express their views and to participate in a meaningful way is also important in the context of asylum procedures.<sup>136</sup> A child's own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express these views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process. It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them.<sup>137</sup> This includes information about their right to privacy and confidentiality enabling them to express their views without coercion, constraint or fear of retribution.<sup>138</sup>

71. Appropriate communication methods need to be selected for the different stages of the procedure, including the asylum interview, and need to take into account the age, gender, cultural background and maturity of the child as well as the circumstances of the flight and mode of arrival.<sup>139</sup> Useful, non-verbal communication methods for children might include playing, drawing, writing, role-playing, story-telling and singing. Children with disabilities require "whatever mode of communication they need to facilitate expressing their views".<sup>140</sup>

72. Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty

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<sup>134</sup> Family tracing and reunification have been addressed in a number of ExCom Conclusions, including most recently in ExCom, *Conclusion No. 107*, para. (h)(iii). See also UNHCR, *Guidelines on Determining the Best Interests of the Child, op cit.*; CRC, *General Comment No. 6*, para. 81.

<sup>135</sup> "Guardian" here refers to an independent person with specialized skills who looks after the child's best interests and general well-being. Procedures for the appointment of a guardian must not be less favourable than the existing national administrative or judicial procedures used for appointing guardians for children who are nationals in the country. "Legal representative" refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters. See ExCom, *Conclusion No. 107*, para. (g)(viii). For further details, see CRC, *General Comment No. 6*, paras. 33–38, 69. See also UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum, op cit.*, p. 2 and paras. 4.2, 5.7, 8.3, 8.5.

<sup>136</sup> CRC, Art. 12. The CRC does not set any lower age limit on children's right to express their views freely as it is clear that children can and do form views from a very early age.

<sup>137</sup> CRC, *General Comment No. 6*, para. 25; CRC, *General Comment No. 12*, paras. 123–124.

<sup>138</sup> CRC, Arts. 13, 17.

<sup>139</sup> Separated Children in Europe Programme, *SCEP Statement of Good Practice*, Third edition, 2004, <http://www.unhcr.org/refworld/docid/415450694.html>, para. 12.1.3.

<sup>140</sup> CRC, *General Comment No. 9*, para. 32.

relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary training and skills to be able to evaluate accurately the reliability and significance of the child's account.<sup>141</sup> This may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre.

73. Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied.<sup>142</sup> If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt.<sup>143</sup> Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.<sup>144</sup>

74. Just as country of origin information may be gender-biased to the extent that it is more likely to reflect male as opposed to female experiences, the experiences of children may also be ignored. In addition, children may have only limited knowledge of conditions in the country of origin or may be unable to explain the reasons for their persecution. For these reasons, asylum authorities need to make special efforts to gather relevant country of origin information and other supporting evidence.

75. Age assessments are conducted in cases when a child's age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.<sup>145</sup> It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.<sup>146</sup> As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child.

76. In normal circumstances, DNA testing will only be done when authorized by law and with the consent of the individuals to be tested, and all individuals will be provided with a full explanation of the reasons for such testing. In some cases, however, children may not be able to consent due to their age, immaturity, inability to understand what this entails or for other reasons. In such situations, their appointed guardian (in the absence of a family member) will grant or deny consent on their behalf taking into account the views of the child. DNA tests should be used only where other means for verification have proven insufficient. They may prove particularly beneficial in the case of children who are suspected of having been trafficked by individuals claiming to be

<sup>141</sup> ExCom, *Conclusion No. 107*, para. (d).

<sup>142</sup> *Ibid*, para. (g)(viii), which recommends that States develop adapted evidentiary requirements.

<sup>143</sup> UNHCR, *Handbook*, paras. 196, 219.

<sup>144</sup> *Inter-Agency Guiding Principles*, *op. cit.*, p. 61.

<sup>145</sup> ExCom, *Conclusion No. 107*, para. (g)(ix).

<sup>146</sup> *Ibid*, para. (g)(ix); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, *op cit.*, paras. 5.11, 6.

parents, siblings or other relatives.<sup>147</sup>

77. Decisions need to be communicated to children in a language and in a manner they understand. Children need to be informed of the decision in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment. If the decision is negative, particular care will need to be taken in delivering the message to the child and explaining what next steps may be taken in order to avoid or reduce psychological stress or harm.

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<sup>147</sup> UNHCR, *Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, <http://www.unhcr.org/refworld/docid/48620c2d2.html>.



# **GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS**

**United Nations High Commissioner for Refugees (UNHCR)  
Division of International Protection  
Geneva  
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The Office of the United Nations High Commissioner for Refugees (UNHCR) issues Guidance Notes on thematic legal issues pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, and subsequent General Assembly resolutions in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. Guidance Notes seek to provide guidance in the particular thematic area concerned, by analysing international legal standards, jurisprudence and other relevant documents.

Guidance Notes are in the public domain and are available on Refworld, <http://www.refworld.org>. Any questions relating to specific aspects of this Note may be addressed to the General Legal Advice Unit of the Division of International Protection (DIP), UNHCR, Geneva, e-mail [HQPR02@UNHCR.ORG](mailto:HQPR02@UNHCR.ORG).

## I. INTRODUCTION

1. Gang violence is a feature of everyday life in some countries of the world. Entire communities may be dominated by gangs and gang culture. The violence affects men, women and children alike. Many victims are young people who are targeted by gangs for recruitment and to carry out crime. This Note provides guidance on the assessment of asylum claims caused by, or associated with, organized gangs. It presents a brief overview of these gangs and their activities as well as a typology of victims of gang-related violence.<sup>1</sup>
2. As organized gangs have become increasingly common in various parts of the world, asylum claims connected with their activities have multiplied in regions as far apart as Europe and Central America. During recent years, an increasing number of claims have been made especially in Canada, Mexico, and the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their countries of origin.<sup>2</sup> Most of the examples and jurisprudence relied on in this Note illustrating the risks and legal issues involved therefore refer to this particular region. The Note may also be of relevance for similar types of claims arising in other regions.
3. The main question addressed in this Note is whether victims of criminal gangs or activities associated with those groups may be considered in need of international protection under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and, if so, under what circumstances.

## II. OVERVIEW OF GANGS AND THEIR PRACTICES

4. Although there is no universally recognized definition of a “gang”, the term is commonly used to denote a group of two or more members which carries out criminal activities as its primary or secondary objective.<sup>3</sup> For the purpose of this Note, the term “gang” refers to the relatively durable, predominantly *street-based groups of young people* for whom crime and violence is integral to the group’s identity. The term is also used to refer to *organized criminal groups* of individuals for whom involvement in crime is for personal gain (financial or otherwise) and their primary “occupation.” The notion of “organized gangs” may also include *vigilante type groups* involved in criminal activities.<sup>4</sup> Members of gangs typically

<sup>1</sup> For further information about gangs, see the background research for this Note: UNHCR, *Living in a World of Violence: An Introduction to The Gang Phenomenon* (publication forthcoming).

<sup>2</sup> For further information, see Washington Office on Latin America, “*Central American Gang-Related Asylum: A Resource Guide*”, May 2008, [http://www.wola.org/media/Gangs/WOLA\\_Gang\\_Asylum\\_Guide.pdf](http://www.wola.org/media/Gangs/WOLA_Gang_Asylum_Guide.pdf) (hereafter “WOLA, *A Resource Guide*”); Capital Area Immigrants’ Rights, “*Seeking asylum from Gang-Based Violence in Central America: A Resource Manual*”, Aug. 2007.

<sup>3</sup> The U.S. Federal Bureau of Investigation, for instance, defines a gang as “a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence and any other criminal activity to sustain the enterprise.” See also Deborah L. Weisel, “*Contemporary Gangs: An Organizational Analysis*,” LFB Scholarly Publishing LLC, 2002, pp. 34–36.

<sup>4</sup> See “*State failure and extra-legal justice: vigilante groups, civil militias and the rule of law in West Africa*”: New Issues in Refugee Research, Research Paper No. 166, UNHCR Policy Development and Evaluation Service, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=48f351722&query=State%20failure%20and%20extra->

share common social, cultural and psychological characteristics. Their members may be from marginalized segments of society,<sup>5</sup> the same socio-economic class or within a certain age range.<sup>6</sup> Gangs may also be organized along ethnic, political or religious lines.<sup>7</sup>

5. Certain behavioural characteristics can be used to identify gangs. They may be defined by qualities of exclusivity, as only certain individuals are recognized and permitted access. In addition, as part of crafting their identity and defining themselves, gangs and their members engage in rivalries with other gangs. There are also expectations of loyalty and consequences for perceived violations of those expectations within gangs. Typically, membership in a gang has been displayed by common attire, adherence to a certain dress code, hairstyle, jewellery and/or body tattoos and other identifying marks on the body. More recently, however, many gangs have moved away from these traditional identifiers in order to remain more clandestine in their activities.
6. The individual organization and culture of gangs vary considerably, however. Members of a gang tend to share a common mentality which defines the way in which they perceive and respond to events. Central to this mentality is the notion of respect and responses to perceived acts of disrespect. Because respect and reputation play such an important role in gang culture, members and entire gangs go to great lengths to establish and defend both. Refusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response. Significantly, once an individual or family has been targeted for retaliation, the gravity of the threat does not diminish over time.
7. Some gangs, such as the Maras,<sup>8</sup> rely heavily on forced recruitment to expand and maintain their membership. They typically recruit young people who are poor, homeless and from marginalized segments of society or particular neighborhoods. Initiation rituals are characterized by violent and abhorrent acts, requiring recruits to endure physical and sexual violence as well as to commit serious crimes,

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[legal%20justice:%20vigilante%20groups,%20civil%20militias%20and%20the%20rule%20of%20law%20in%20West%20Africa](#).

<sup>5</sup> See, for instance, about the Yakuza in Japan, Kristof, N. D., "Japan's Invisible Minority: Better off Than in Past, but Still Outcasts", New York Times, 30 Nov. 1995.

<sup>6</sup> The Committee on Economic, Social and Cultural Rights, in its Concluding Observations on El Salvador, E/C.12/SLV/CO/2, 27 June 2007, <http://www.unhcr.org/refworld/docid/46b9d7532.html>, expressed concerns that the Maras are "composed mainly of socially and economically marginalized young men".

<sup>7</sup> For further information about different types of gangs, see, for instance, Immigration and Refugee Board of Canada, *Kenya: The Mungiki sect; leadership, membership and recruitment, organizational structure, activities and state protection available to its victims (2006–October 2007)*, 1 Nov. 2007, <http://www.unhcr.org/refworld/docid/4784def81e.html>; Immigration and Refugee Board of Canada, *Croatia: Treatment of Muslims and Muslims of mixed descent by skinheads, nationalist and racist groups; availability and accessibility of state protection for Muslims (1995-2004)*, 18 May 2004, <http://www.unhcr.org/refworld/docid/41501c160.html>; U.S. Bureau of Citizenship and Immigration Services, *Jamaica: Jamaican Posses*, 22 Sep. 1999, <http://www.unhcr.org/refworld/docid/3ae6a6a10.html>; Anderson, A., "The Red Mafia: A Legacy of Communism", *Economic Transition in Eastern Europe and Russia: Realities of Reform*", ed. Lazear, P. Edward, Stanford California, The Hoover Institution Press, 1995.

<sup>8</sup> The Mara Salvatrucha or MS-13 gang and the Mara 18 or M-18 gang, hereinafter collectively referred to as "the Maras", are the most notorious of the Central American gangs.

including murder.<sup>9</sup> Membership of a gang is usually seen as a life-long commitment. Thus, any desertion carries heavy consequences; gangs tend to punish defectors severely, including through intimidation, death threats and/or physical revenge (which sometimes extends to family members).<sup>10</sup>

8. As indicated above, a key function of gangs is criminal activity. Extortion, robbery, murder, prostitution, kidnapping, smuggling and trafficking in people, drugs and arms are common practices employed by gangs to raise funds and to maintain control over their respective territories. Some gangs, such as the Maras, have become increasingly violent with a sharper focus on criminal activities in order to increase their economic profit.<sup>11</sup>
9. Gang members may in some countries also unite in conflict against law enforcement agents.<sup>12</sup> Some States in Central America have, as a response, adopted the so-called “mano dura” (“strong hand”) approach to the gang phenomenon.<sup>13</sup> Responses have, *inter alia*, included “social cleansing” practices, such as extrajudicial killings, police violence, arbitrary or unlawful arrests and detention<sup>14</sup> as well as inhumane prison conditions.<sup>15</sup> Such measures appear to be directed against gang members and those suspected of being gang members, and they are often supported or condoned by the State. As noted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

The evidence shows that social cleansing is more than the actions of a few rogue officers. This does not mean that it has risen to the level of officially sanctioned policy, but the frequency and regularity of social cleansing does indicate that it presents an issue of institutional responsibility.<sup>16</sup>

<sup>9</sup> Report of the International Human Rights Clinic, *No place to hide: Gang, State and Clandestine Violence in El Salvador*, Human Rights Programme, Harvard Law School, Feb. 2007 (hereinafter “IHRC, *No place to hide*”), <http://www.law.harvard.edu/programmes/hrp/documents/NoPlacetoHide.pdf>, pp. 31–32.

<sup>10</sup> Desertion is perceived to undermine the internal discipline of the gang as well as to impact the gang’s ability to dominate its territory and carry out its activities, *ibid*, pp. 33–34.

<sup>11</sup> See, for instance, Writenet, *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations*, Aug. 2008 (hereinafter “Writenet, *Report on Central America*”), <http://www.unhcr.org/refworld/docid/48ad1eb72.html>; IHRC, *No place to hide*, above fn. 9; USAID, *Central America and Mexico Gang Assessment*, Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development, Apr. 2006, [http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/gangs\\_assessment.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf).

<sup>12</sup> WOLA, *A Resource Guide*, above fn. 2, p. 5.

<sup>13</sup> In the views of some observers, these “zero tolerance” responses have been ineffective in addressing gang-related crime and raise additional human rights concerns. See Writenet, *Report on Central America*, above fn. 11, pp. 25–26, 37; IHRC, *No place to hide*, above fn. 9 pp. 44–45.

<sup>14</sup> The Committee on the Rights of the Child expressed concerns in its Concluding observations on Honduras, CRC/C/HND/CO/3, 3 May 2007, <http://www.unhcr.org/refworld/docid/478c93e72.html>, that “many children are arrested and detained on the mere allegation that they may belong to a mara because of their appearance, e.g. due to the way of dressing or to the presence of a tattoo or a symbol”, and recommended that the State party “ensure that persons below 18 are not deprived of their liberty unlawfully or arbitrarily, in particular as a consequence of the application of anti-maras measures”.

<sup>15</sup> See, for instance, Writenet, *Report on Central America*, above fn. 11.

<sup>16</sup> Human Rights Council, *Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Guatemala (21-25 August 2006)*, 19 Feb. 2007, A/HRC/4/20/Add.2, <http://www.unhcr.org/refworld/docid/461f844d2.html>, para. 21.

### III. TYPOLOGY OF VICTIMS OF ORGANIZED GANGS

10. Gang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs. Individuals, local businesses, buses and taxis may be subjected to demands for “renta” and threats of violence if refusing to comply with these demands.<sup>17</sup>
11. Certain social groups may, however, be specifically targeted. This includes people who are marginalized in society and, consequently, more vulnerable to forced recruitment, violence and other forms of pressure from gangs. It is important to note that although gang-related violence mostly affects men and boys, women and girls may also be exposed to such violence. Lack of protection by the State, lack of opportunities and family care, poverty and a need for social belonging may push children and youth into joining gangs. The primary victims of youth gang-related violence are other young people, including those who are involved in gangs and those who are not.<sup>18</sup> Several distinct categories of applicants in gang-related asylum claims can be identified and are briefly outlined below.

#### a) Resistance to gang activity

12. Gangs may direct harm at individuals who in various ways have resisted gang activity or who oppose, or are perceived to oppose, the practices of gangs. Members of this group need to be understood in their specific country and societal contexts. In areas where criminal activity is widespread and law enforcement is incapable of protecting people from gang violence, a person expressing opposition to gangs will often stand out from the rest of the community. Such “gang-resisters” may be grouped broadly into the following categories:
  - a. individuals at risk of, or who refuse, recruitment, such as young men and adolescent boys of a certain social status;
  - b. individuals, such as young women and adolescent girls, who refuse sexual demands by gangs, including for prostitution and trafficking purposes,<sup>19</sup> or to become sexual property of gangs;
  - c. business owners and others unable or unwilling to meet extortion or other unlawful demands for money or services by gangs;<sup>20</sup>

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<sup>17</sup> “Renta” is money collected by gang members from local businesses, public transportation drivers, households, etc., as part of an organized extortion system. See IHRC, *No place to hide*, above fn. 9, p. 81.

<sup>18</sup> See Commission on Human Rights, Extrajudicial, summary or arbitrary executions: *Report submitted pursuant to Commission on Human Rights resolution 2002/36: Addendum - Mission to Honduras*, 14 June 2002, E/CN.4/2003/3/Add.2, <http://www.unhcr.org/refworld/docid/3dec85782.html>, which noted that the “killing of children by unknown perpetrators is routinely attributed to inter-gang wars between the maras. It is alarming that a section of the Honduran press often demonizes street children and blames the high level of violence in the country on child gangs ... [i]n the end, every child with a tattoo and street child is stigmatized as a criminal”, para. 29; WOLA, *Transnational Study on Youth Gangs*, Mar. 2007, [http://www.wola.org/media/Gangs/executive\\_summary\\_gangs\\_study.pdf](http://www.wola.org/media/Gangs/executive_summary_gangs_study.pdf), p. 9.

<sup>19</sup> For persons who have been trafficked by gangs, please refer to UNHCR, *Guidelines on International Protection No. 7: “The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked,”* 7 Apr. 2006, <http://www.unhcr.org/refworld/docid/443679fa4.html>.

- d. witnesses of crimes committed by gangs, or individuals who have reported such incidents to the authorities who subsequently become vulnerable to violence as a form of deterrence or retribution;<sup>21</sup>
- e. law enforcement agents may become targets because of their efforts to combat gangs;
- f. NGO workers, human rights activists, lawyers and participants in community- or church-based groups who oppose gangs, thus becoming the targets of intimidation tactics and violence by gangs;<sup>22</sup>
- g. other individuals who are, or are perceived to be, a threat to gangs or as not conforming with their practices, including ethnic and sexual minorities.

#### **b) Former and current gang members**

13. In certain circumstances, former and current gang members may be considered as victims of gang-related violence, in particular, as a result of forced recruitment, violent gang rituals and the enforcement of a gang's membership code. Victims due to their *former* gang membership typically involve gang members who have deserted the gangs or who were forcibly recruited and managed to escape.<sup>23</sup> Such applicants could fear retaliation and violence from their own and/or rival gangs and not always benefit from the protection of law enforcement agencies. Although seeking to disassociate themselves from the gangs, they may continue nevertheless to be perceived as members, for instance, because of remaining gang tattoos.
14. *Current* gang members could fear harm from another gang or private individuals. More frequently, however, their fear may relate to harm emanating from law enforcement agents. This category also includes individuals who have joined gangs outside their country of origin but may fear harm if returned.

#### **c) Victims and critics of State's anti-gang policies and activities**

15. Gang-related claims to asylum could also involve victims of State's unlawful or arbitrary measures to combat the gang phenomenon (for instance, the above-mentioned social cleansing practices). Such measures could be directed against current gang members but may also involve other individuals who are mistakenly perceived to belong to gangs, such as former gang members and young people whose age, appearance or social background resemble those of gang members. The "Mano Dura" and similar approaches have occasionally targeted groups that

<sup>20</sup> See, for instance, *Jose Francisco Marquez-Perez, Petitioner v. Mukasey*, No. 06-61153, U.S. Court of Appeals for the 5<sup>th</sup> Circuit, 29 Feb. 2008 (non-precedent decision), <http://www.unhcr.org/refworld/docid/4b6aca8d2.html>, where the proposed group involved "business owners in El Salvador who [were] targeted by gang members for money;" *X (Re), Immigration and Refugee Board of Canada (Refugee Division)*, No. T99-04988, 17 Nov. 1999, <http://www.unhcr.org/refworld/docid/4b6be1ad2.html>, which concerned a Polish businessman who had fled threats and extortion demands of former police officers.

<sup>21</sup> *Yoli v. Canada (Minister of Citizenship and Immigration)*, F.C.J. No. 182 2002 FCT 1329, Canada, Federal Court, 30 Dec. 2002, <http://www.unhcr.org/refworld/docid/4039fa464.html>.

<sup>22</sup> *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, U.K. Asylum and Immigration Tribunal, 24 Nov. 2000, <http://www.unhcr.org/refworld/docid/40487df64.html>.

<sup>23</sup> *Santos-Lemus v. Mukasey*, No. 07-70604, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 9 Aug. 2008, <http://www.unhcr.org/refworld/docid/4b6c22a82.html>.

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<sup>21</sup> *Yoli v. Canada (Minister of Citizenship and Immigration)*, F.C.J. No. 182 2002 FCT 1329, Canada, Federal Court, 30 Dec. 2002, <http://www.unhcr.org/refworld/docid/4039fa464.html>.

<sup>22</sup> *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, U.K. Asylum and Immigration Tribunal, 24 Nov. 2000, <http://www.unhcr.org/refworld/docid/40487df64.html>.

<sup>23</sup> *Santos-Lemus v. Mukasey*, No. 07-70604, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 9 Aug. 2008, <http://www.unhcr.org/refworld/docid/4b6c22a82.html>.

have no association with gangs but who may be considered “undesirable” in society,<sup>24</sup> e.g. drug addicts, street children,<sup>25</sup> sexual minorities<sup>26</sup> and sex workers.

16. Unlawful or arbitrary measures, including extra-judicial killings, have also sometimes been used against members of civil society who may be perceived as critics of the government’s approach towards the gangs. This includes, for example, human rights activists and former law enforcement officials who have acted as “whistle-blowers” and reported corrupt or otherwise unlawful behaviour of government officials in relation to gangs.<sup>27</sup>

#### d) Family members

17. Family members of the above categories may also be routinely targeted by gangs. Typically, families could be subjected to threats and violence as an act of retaliation or to exert pressure on other members of the family to succumb to recruitment attempts or extortion demands. Even though the applicant may not have personally opposed the gangs or does not share the views of his/her family members, the gang or in some cases agents of the State may attribute such resistance or views to the applicant. For example, a woman (or girl) could be exposed to harm due to being perceived by gangs as holding the same anti-gang views as her father, husband, son or brothers.

## IV. LEGAL ANALYSIS

18. The increasing number of asylum claims resulting from gang-related activities, especially in the context of Central America, has necessitated clarification regarding the interpretation of the refugee definition contained in the 1951 Convention. Eligibility for international protection for individuals fleeing gang-related violence will depend on a number of factors, including the risks faced by the applicant, the severity and nature of the violence/human rights abuses suffered or feared, the causal link with one of the grounds enumerated in the refugee definition of the 1951 Convention, his/her involvement with gang activities as well as the level of available State protection in the country concerned. Obviously, exclusion considerations will need to be considered carefully in many such claims.
19. Proper consideration of the age and gender aspects of a claim will be particularly important in applications made by children, youth and women; it is essential that

<sup>24</sup> Writenet, *Report on Central America*, above fn. 11.

<sup>25</sup> The Committee on the Rights of the Child in its Concluding Observations on Colombia, CRC/C/COL/CO/3, 8 June 2008, <http://www.unhcr.org/refworld/docid/45377ee30.html>, was particularly disturbed by threats posed by social cleansing and noted that the right to life of children who live and/or work on the streets may be particularly threatened and also expressed concerns over the vulnerability of street children to youth gangs, paras. 84–85.

<sup>26</sup> In *RRT Case N98/22948*, RRTA 1055, Australia, Refugee Review Tribunal, 20 Nov. 2000, <http://www.unhcr.org/refworld/docid/4b7a97fd2.html>, the Tribunal accepted that “urban death squads and vigilante groups target sections of society who they consider to be disposable” and upheld the claim for refugee status of a HIV positive gay Colombian man. The Tribunal found that the identification of poor gay men as “disposables” would put them at risk of “social clean up” operations which “target the urban poor, some gay men, transvestites, male and female prostitutes, street children, vagrants and petty criminals”.

<sup>27</sup> Writenet, *Report on Central America*, above fn. 11, p. 10.

their relevance not be overlooked or underestimated during the assessment of claims.<sup>28</sup>

#### a) Well-founded fear of persecution

20. When assessing the well-foundedness of the fear of persecution, it is important to take into account a number of factors pertaining to the personal profile of the applicant, including his/her background, experiences, activities, and family situation. Gang-related asylum claims frequently reveal that one or more members of the same family have been threatened, harmed, killed or forced to relocate.<sup>29</sup> Harm inflicted on other individuals in similar situations, particularly other family members, may support the well-foundedness of the fear of the applicant.
21. In general, gang-related harm involves different forms of physical and sexual violence such as homicide, assault, rape, robbery, theft, arson and associated threats.<sup>30</sup> Beatings, rape and other serious assaults will generally rise to the level of persecution as would other serious human rights violations, such as trafficking and kidnapping.<sup>31</sup> Threats of violence or death, even where the applicant has not yet suffered violence, may also amount to persecution where the threat is deemed credible in light of the particular context and background of the applicant.
22. Pressure to join a gang often takes place through a gradual escalation of threats and violence. Coercing someone into a criminal gang or preventing him/her from leaving it through the use of violence, threats or other forms of coercion is at variance with a number of human rights, including the rights to freedom of association and to liberty and security of the person.<sup>32</sup> Forcible recruitment

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<sup>28</sup> See, *Doe v. Holder, Attorney General: Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, 13 Nov. 2009, <http://www.unhcr.org/refworld/docid/4b03eb182.html>, pp. 17–19.

<sup>29</sup> See, for instance, *Matter of E-A-G-*, 24 I&N Dec. 591, U.S. Board of Immigration Appeals, 30 July 2008, <http://www.unhcr.org/refworld/docid/4ae9acc00.html>.

<sup>30</sup> See *Francis Gatimi, et al v. Eric H. Holder, Jr. Attorney General of the U.S.*, No. 08-3197, U.S. Court of Appeals for the 7<sup>th</sup> Circuit, 20 Aug. 2009, <http://www.unhcr.org/refworld/docid/4aba40332.html>. The Court examined whether violence by gangs can amount to persecution and found that “the immigration judge ruled that the acts committed by the Mungiki against Gatimi were not persecution but merely ‘mistreatment.’ That is absurd.” See also - *Sandra --*, U.S. Department of Justice, Executive Office for Immigration Review (hereafter “EOIR”), Baltimore, MD, 16 Dec. 2008, where the Court held that “being relentlessly stalked, threatened, and physically and sexually assaulted by members of a violent gang whom the Guatemalan government has heretofore been unable to control would qualify as ‘infliction of suffering’ and thus be considered past persecution,” p. 17.

<sup>31</sup> Such acts may violate the right to life and the right to liberty and security enshrined in the International Covenant on Civil and Political Rights, <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> (hereinafter “ICCPR”), respectively Arts. 6 and 9. In the case of children, such acts may also violate a range of rights set out in the Convention on the Rights of the Child, <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (hereinafter “CRC”), including the right to life and maximum survival and development (Art. 6), the right to protection from all forms of violence (Art. 19), and the right not to be subject to abduction, sale and trafficking (Art. 35).

<sup>32</sup> See, for instance, the CRC, Arts. 6, 19, 20, 32. See also, the Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, <http://www.unhcr.org/refworld/docid/4538834f0.html>, which noted that “Violence results from a complex interplay of individual, family, community and societal factors. Vulnerable adolescents such as those who are homeless or who are living in institutions, who belong to gangs or who have

attempts, including under death threat, by violent groups would normally amount to persecution.<sup>33</sup> It is also important to recall, in particular with respect to children who have been forced into or abducted by criminal gangs and are under the control of gangs, that all forms of slavery and practices similar to slavery are prohibited according to international human rights law.<sup>34</sup> Such practices, including the sale and trafficking of human beings,<sup>35</sup> as well as forced or compulsory labour,<sup>36</sup> would normally be considered as persecution.

23. Harm inflicted by State agents, such as police officers and prison guards, may include extrajudicial killings, torture, arbitrary arrest and detention.<sup>37</sup> Although a State has the

right, and responsibility to curb violence by enacting and enforcing criminal laws for the protection of society, that obligation does not extend to exercising that duty in such a way as to intentionally inflict severe pain or suffering on individuals under its custody and control.<sup>38</sup>

### b) Agents of persecution

24. In most gang-related claims, the persecution emanates from criminal gangs and other similar non-State groups. As stipulated by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, persecution may “emanate from sections of the population that do not respect the standards

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been recruited as child soldiers are especially exposed to both institutional and interpersonal violence”, para. 19.

<sup>33</sup> As an illustration as to how forced recruitment may constitute persecution see, for instance, *Dinora Del Carmen Molina v. INS*, 170 F.3d, 1247, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 26 Mar. 1999, <http://www.unhcr.org/refworld/docid/4152e0fb.html>, which concerned a guerrilla group in El Salvador.

<sup>34</sup> The Convention to Suppress the Slave Trade and Slavery, 25 Sep. 1926, <http://www.unhcr.org/refworld/docid/3ae6b36fb.html>, provided the first basic definition of slavery: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”, Art 1(1). See also, International Labour Organization, Worst Forms of Child Labour Convention, 17 June 1999, C182, <http://www.unhcr.org/refworld/docid/3ddb6e0c4.html>, Art. 3.

<sup>35</sup> See also, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 Nov. 2000, <http://www.unhcr.org/refworld/docid/4720706c0.html>, Art. 3.

<sup>36</sup> International Labour Organization, Forced Labour Convention, C29, 28 June 1930, C29, <http://www.unhcr.org/refworld/docid/3ddb621f2a.html>, defines forced or compulsory labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

<sup>37</sup> The Committee on the Rights of the Child has, in the context of administration of juvenile justice, expressed particular concern at the repressive measures taken in response to youth gangs. See, for example, its Concluding Observations on El Salvador, CRC/C/15/Add.232, 30 June 2004, <http://www.unhcr.org/refworld/docid/42d3c19c4.html>, paras. 67–68. Some State agents have been implicated in ordering, facilitating or acquiescing to extrajudicial killings of gang members, including while in prison; see, for instance, the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his Mission to Guatemala, above fn. 16, and the follow-up report, A/HRC/11/2/Add.7, 4 May 2009, <http://www.unhcr.org/refworld/docid/4a0932270.html>.

<sup>38</sup> See *Matter of M-R-*, EOIR Immigration Court, York PA, (unpublished), 24 May 2005, and reasoning in relation to deferral of removal under the Convention Against Torture. The applicant was a former gang member who feared that he would be imprisoned under Honduran anti-gang legislation due to his past membership in MS-13 and that he would be subjected to severe pain and suffering while imprisoned. The decision was over-turned, however, on appeal.

established by the laws of the country concerned”. The UNHCR Handbook further provides that “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.”<sup>39</sup>

25. After determining whether the harm feared can be considered persecution in the sense of the 1951 Convention, it is necessary to establish whether the State is *unwilling* or *unable* to provide protection to victims of gang-related violence. The authorities may be unwilling to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of protection. The State could prove unable to provide effective protection, especially when certain gangs, such as the Maras, yield considerable power and capacity to evade law enforcement or when the corruption is pervasive.
26. The State may in certain circumstances be considered the agent of persecution in gang-related claims. This may be the case, for instance, where individual State agents collaborate with gang members or direct gangs to engage in violence and other criminal activities while acting outside the scope of their official duties or as part of unlawful measures to combat gang-related violence.<sup>40</sup> A State’s responsibility is engaged where groups or individuals, even if formally separated from the government structures, act at the instigation, or with the consent of, the government.
27. An assessment of the availability of State protection will require detailed and reliable country of origin information, including information about existing programmes, to address the gang phenomenon and their effectiveness. As with all other elements of refugee status determination, it is important to analyse the individual circumstances of each case. A State is not expected to guarantee the highest possible standard of protection to all its citizens all the time, but protection needs to be real and effective.<sup>41</sup>
28. Factors that may be indicative of available State protection and may help adjudicators analyse claims include: efforts to reform and expand the criminal justice system; attempts to end the practice of social cleansing; and the establishment of witness protection programmes. Conversely, the following factors are indicative of a lack of effective State protection: lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on

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<sup>39</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 Jan. 1992, <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereinafter the “UNHCR, *Handbook*”), para. 65. See also the EU Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC, <http://www.unhcr.org/refworld/docid/4157e75e4.html>, which explicitly refers to non-State actors as agents of persecution (Art. 6 (c)).

<sup>40</sup> See, for instance, Writenet, *Report on Central America*, above fn. 11

<sup>41</sup> The existence of Mano Dura and other similar programmes launched to address gang-related crime need not necessarily be taken as evidence that effective State protection is available. Some observers have commented on the inability of these programmes to effectively deal with the gangs and related crime; see, for instance, the Writenet, *Report on Central America*, above fn. 11.

the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs; a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.<sup>42</sup>

### c) Link to a Convention ground

29. To meet the criteria of the refugee definition, an individual's well-founded fear of persecution must be related to one or more of the five Convention grounds. As noted in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status "it is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared."<sup>43</sup> It must be shown that the Convention ground is a contributing factor to the risk of being persecuted, although it does not need to be the sole, or even dominant, cause.<sup>44</sup> Where the risk of persecution derives from a non-State actor, the causal link may be satisfied:

(1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.<sup>45</sup>

30. In many gang-related cases, in particular those concerning young people who resist recruitment or other unlawful gang demands, an individual is targeted because s/he lives in a poor neighbourhood, and/or is without family or other social support networks. On that basis, individuals are at heightened risk of being targeted because of their marginalization, social status and vulnerability.

### d) Convention grounds

31. Jurisprudential developments suggest that gang-related asylum claims have most frequently been analysed within the 1951 Convention ground of "membership of a particular social group" and/or "political opinion". This in itself does not exclude

<sup>42</sup> See discussion on State protection in *RPD File No. TA7-04670, TA7-04671, TA7-04672, (Private Proceedings), Immigration and Refugee Board of Canada*, CanLII 49548, Canada, Immigration and Refugee Board, 31 Jan. 2008, <http://www.unhcr.org/refworld/docid/4b6bea7e2.html>, p. 3.

<sup>43</sup> UNHCR, *Handbook*, above fn. 39, para. 67.

<sup>44</sup> UNHCR, *Position on Claims for Refugee Status under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, 17 Mar. 2006, <http://www.unhcr.org/refworld/docid/44201a574.html>, para. 13.

<sup>45</sup> UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f23f4.html>, (hereinafter "UNHCR, *Guidelines on Membership of a Particular Social Group*"), para. 23.

the applicability of any of the other 1951 Convention grounds. It is also important to note that the grounds are not mutually exclusive and may overlap.<sup>46</sup>

**(i) Religion**

32. The 1951 Convention ground of religion may be relevant for the analysis of a claim where the applicant's religious beliefs are incompatible with gang life style.<sup>47</sup> It could, for example, be the case where the applicant refuses to join a gang because of his/her religious belief or conscience, or where a gang member who experiences religious conversion wants to exit the gang. An individual's religion or beliefs may also be a ground for persecution where intolerance and violence against people of other religions or beliefs in a particular society is promoted by gangs. In such contexts, it is important to consider whether the applicant's religious conviction has been or could be brought to the attention of gang members.<sup>48</sup>

**(ii) Race and nationality**

33. Some gangs are motivated by racist or nationalist ideologies and operate in environments where racial discrimination is common. Gangs may, for example, fuel xenophobia and carry out hate crimes against foreigners as well as ethnic and national minorities. In such contexts, individuals belonging to these minorities, including indigenous groups, may be targeted by gangs because of their race or nationality. In the absence of State protection, the 1951 Convention grounds of race and/or nationality may thus be applicable where the applicant is persecuted by a gang on account of his or her race, ethnicity or nationality.<sup>49</sup>

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<sup>46</sup> UNHCR, *Handbook*, above fn. 39, para. 67. See also, *Orozco-Polanzo (Re)*, No. A75-244-012, U.S. EOIR, Immigration Court, El Paso, Texas, 18 Dec. 1997, <http://www.unhcr.org/refworld/docid/4b6beec42.html>. The applicant was a young male from Guatemala who had refused recruitment attempts by two gangs as he did not believe in the values of the gangs. The Court found that "the grounds of political opinion and membership in a particular group are interchangeable".

<sup>47</sup> In *Romero-Rodriguez v. U.S. Attorney General*, 131 Fed.Appx.203, 2005 WL 1106550, U.S. Court of Appeals for the 11<sup>th</sup> Circuit, 10 May 2005, <http://www.unhcr.org/refworld/docid/4b7aa25b2.html>, the applicants claimed a fear of persecution for their refusal to join a criminal organization due to their religious and conscientious upbringing.

<sup>48</sup> See further UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 Apr. 2004, <http://www.unhcr.org/refworld/docid/4090f9794.html>, paras. 4, 14.

<sup>49</sup> UNHCR, *Handbook*, above fn. 39, paras. 68–70, 74–76. See also decision *V-95-00138*, Canada, Convention Refugee Determination Division, 16 Jan. 1997, which noted that racial discrimination was common in Colombia and that young, poor, black men were common targets of gangs, operating with the tacit approval of the government. It was determined that the applicant had suffered from discrimination amounting to persecution on account of his race and socio-economic group. However, he was found to have an internal flight alternative; *X (re)*, File No. TA7-13448, TA7-13528; TA7-13529, TA7-13530, Canada, Immigration and Refugee Board, 28 July 2008 (amended 16 Sep. 2008), <http://www.unhcr.org/refworld/docid/4b7bad512.html>, which concerned a Roma family fearing harm from skinhead gangs; *Refugee Appeal Nos. 76259, 76260 & 76261*, New Zealand, Refugee Status Appeals Authority, 16 Dec. 2008, <http://www.unhcr.org/refworld/docid/4a1a8c002.html>.

**(iii) “Membership of a Particular Social Group”**

34. UNHCR defines a particular social group as:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>50</sup>

This definition combines the two alternate approaches emerging in State practice, that is, the “protected characteristics” approach and the “social perception” approach into one definition. In UNHCR’s view, both approaches are legitimate. The group only needs to be identifiable through one of the approaches, not both.<sup>51</sup>

35. Although a social group cannot be “defined exclusively by the persecution that the members of the group suffer or by a common fear of being persecuted”, the fact that members of a group have been or are being persecuted may serve to illustrate the potential relationship between persecution and a particular social group.<sup>52</sup> However, in order to be recognized, it is not necessary for a group to be victim of a higher incidence of crime or human rights violations than the rest of the population. As with other types of claims, the size of the group is also not relevant.<sup>53</sup>

*Innate and immutable characteristics*

36. Individuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender and social status.<sup>54</sup> Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance. Indeed, recent studies have found that the recruitment practices of Central American gangs

<sup>50</sup> UNHCR, *Guidelines on Membership of a Particular Social Group*, above fn. 45, paras. 11–13.

<sup>51</sup> *Ibid*, para. 14. “Social visibility” and “particularity” have been introduced in U.S. jurisprudence as additional requirements for recognition of a particular social group in a number of decisions, including in relation to gangs. Recently, however, in *Francis Gatimi, et al., v. Eric H. Holder*, above fn. 30, the “social visibility” requirement was questioned. For further information about UNHCR’s position on the issue, see *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 Apr. 2009, <http://www.unhcr.org/refworld/docid/49ef25102.html>; *Doe v. Holder*, UNHCR, Amicus Curiae, above fn. 28.

<sup>52</sup> *A v Minister for Immigration & Ethnic Affairs*, Australia, High Court, 24 Feb. 1997, <http://www.unhcr.org/refworld/docid/3ae6b7180.html>. The Court found that “while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.”

<sup>53</sup> UNHCR, *Guidelines on Membership of a Particular Social Group*, above fn. 45, para. 18.

<sup>54</sup> See, for instance, *VM (FGM - Risks - Mungiki - Kikuyu/Gikuyu) Kenya v. Secretary of State for the Home Department*, UKAIT 00049, U.K. Asylum and Immigration Tribunal, 9 June 2008, <http://www.unhcr.org/refworld/docid/484d4a222.html>, which involved a female asylum-seeker fearing persecution in the form of enforced female genital mutilation from her partner, a member of the Mungiki organization; the recognized group was “women (girls) in Kenya”.

frequently target young people.<sup>55</sup> Thus, an age-based identification of a particular social group, combined with social status, could be relevant concerning applicants who have refused to join gangs. The immutable character of “age” or “youth” is in effect, unchangeable at any given point in time.<sup>56</sup>

37. Past actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable.<sup>57</sup> For instance, *In Matter of S-E-G* (2008), the United States Board of Immigration Appeals accepted that “youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.”<sup>58</sup> Past association with a gang may be a relevant immutable characteristic in the case of individuals who have been forcibly recruited.

*Characteristics fundamental to one’s conscience and exercise of human rights*

38. Resisting involvement in crime by, for instance, evading recruitment or otherwise opposing gang practices may be considered a characteristic that is fundamental to one’s conscience and the exercise of one’s human rights. At the core of gang resistance is the individual’s attempt to respect the rule of law<sup>59</sup> and, in the case of those who refuse to join the gangs, also the right to freedom of association, including the freedom to not associate.<sup>60</sup> Former gang members may also be considered as seeking to exercise their right to rehabilitation and reform.<sup>61</sup> The ethical belief at stake, namely the belief to be “law-abiding”, may be considered to be of such a fundamental nature that the person concerned ought not be required to renounce it, as this, in effect, would be tantamount to requiring him/her to give in to the demands of the gangs and become involved in crime.<sup>62</sup> United States

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<sup>55</sup> Youth within the age range of 8–18 years may be particularly vulnerable to recruitment. See, for instance, the USAID, *Central America and Mexico Gang Assessment Report*, above fn. 11, p. 15.

<sup>56</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 Dec. 2009, <http://www.unhcr.org/refworld/docid/4b2f4f6d.html>, para. 49. See also, *Matter of S-E-G*, *et al.*, 24 I&N Dec. 579, U.S. Board of Immigration Appeals, 30 July 2008, <http://www.unhcr.org/refworld/docid/4891da5b2.html>, in which the Court acknowledged that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable,” p. 583.

<sup>57</sup> UNHCR, *Guidelines on Membership of a Particular Social Group*, above fn. 45, para. 6.

<sup>58</sup> See *Matter of S-E-G*, above fn. 56.

<sup>59</sup> ICCPR, Art. 14.

<sup>60</sup> ICCPR, Art. 22; American Convention on Human Rights, <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, Art. 16.

<sup>61</sup> These fundamental principles underpin ICCPR, Arts. 10(3), 14. See further Human Rights Committee, *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 Apr. 1984, <http://www.unhcr.org/refworld/docid/453883f90.html>, para. 16; *CCPR, General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 Apr. 1992, <http://www.unhcr.org/refworld/docid/453883fb11.html>, paras. 10–13.

<sup>62</sup> *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*. UNHCR Intervening; Case for the Intervener, 25 Mar. 1999, <http://www.unhcr.org/refworld/docid/3eb11c2f4.html>; *Doe v. Holder*, UNHCR, Amicus Curiae, above fn. 28, p. 27.

courts, for instance, have recognized particular social groups such as “young people who refuse to join a gang because they oppose crime”.<sup>63</sup>

39. Some applicants claim a fear of persecution as a result of pursuing their occupation, for example, business owners and public transportation staff who have been pressured by gangs to pay “renta” and other extortionate demands.<sup>64</sup> Requiring an applicant to abandon his or her occupation in order to avoid persecution amounts to a violation of the right not to be arbitrarily deprived of the right to work.<sup>65</sup> A particular social group based on the applicant’s occupation may in certain circumstances therefore be recognized where disassociation from the profession is not possible or this would entail a renunciation of basic human rights. This could also include journalists who have investigated crimes committed by gangs or former law enforcement officers who have reported corrupt behaviour on the part of some Stage agents.<sup>66</sup>
40. An applicant who is a family member of a “gang resister” (or gang member) could also be persecuted for reasons of his/her family membership, for example, where the family has a known record of being opposed to a gang. In such cases, the applicant’s “family” may be regarded as a relevant particular social group.<sup>67</sup> Family members may also experience persecution because of their imputed membership in any of the above-mentioned groups.<sup>68</sup>

#### *The social perception approach*

41. The social perception approach may also be relevant for the identification of a relevant social group. In a cultural context where it is risky for people to oppose gangs, often in closely knitted neighbourhoods that are effectively controlled by gangs, gang resisters may be set apart in society. In addition to youth and gender, those targeted for gang recruitment and other gang-related practices may be perceived by society as a social group by reason of their origin, social background

<sup>63</sup> *Orozco-Polanco (Re)*, above fn. 46.

<sup>64</sup> See, for instance, *RRT Case No. 0906782*, RRTA 1063, Australia, Refugee Review Tribunal, 24 Nov. 2009, <http://www.unhcr.org/refworld/docid/4b5708f42.html>, where the recognized particular social group was “bus, public transport and truck drivers.”

<sup>65</sup> International Covenant on Economic, Social and Cultural Rights, <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>, Arts. 2(2), 6.

<sup>66</sup> *RPD File No. TA7-04670, TA7-04671, TA7-04672*, above fn. 42. The principal applicant was targeted by an organized crime gang as a result of articles he had written. The Board found that “the PC is a XXXXX and he should not be expected to abandon his vocation and go into hiding in another location in Mexico”.

<sup>67</sup> “Family” or “kinship ties” have been recognized by several jurisdictions as constituting a “particular social group” for the purpose of the refugee definition. See, for instance, *Matter of Acosta*, A-24159781, U.S. Board of Immigration Appeals, 1 Mar. 1985, <http://www.unhcr.org/refworld/docid/3ae6b6b910.html>; *Sanchez Trujillo v. INS*, 801 F.2d 1571, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 15 Oct. 1986, <http://www.unhcr.org/refworld/docid/4a3a3af50.html>. The Court noted that “perhaps 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,” para. 26.

<sup>68</sup> See, for instance, *Orejuela v. Gonzales*, 423 F.3d 666, U.S. Court of Appeals for the 7<sup>th</sup> Circuit, 8 Sep. 2005, <http://www.unhcr.org/refworld/docid/4b7a9a0a2.html>. The applicant was targeted by FARC (Revolutionary Armed Forces of Colombia) which had killed her husband. The Court granted the application based on the fact that the political opinion of her husband had been imputed to her. See further, *Del Carmen Molina v. INS*, above fn. 33.

or class.<sup>69</sup> Examples abound of young people from certain areas or backgrounds who are regularly targeted by gangs for recruitment, extortion or other purposes.<sup>70</sup>

42. Imputed gang membership may amount to being a member of a relevant social group in the case of youth or others who are erroneously perceived to be gang members but who, in fact, have no affiliation with a gang. For example, youth who happen to be present when gang members are arrested may be erroneously considered gang members. When gangs exercise de facto control over some neighbourhoods of certain cities, it is consequently plausible for a young person to be targeted by virtue of his/her tie to that neighbourhood. Youth may also be targeted if they are friends with gang members.

*Special considerations concerning applicants with past or current gang affiliation*

43. Claims concerning individuals with present or past voluntary affiliation with gangs require a careful assessment of whether the applicant is indeed a member of a particular social group. In UNHCR's view, voluntary membership in organized gangs normally does not constitute membership of a particular social group within the meaning of the 1951 Convention. Because of the criminal nature of such groups, it would be inconsistent with human rights and other underlying humanitarian principles of the 1951 Convention to consider such affiliation as a protected characteristic.<sup>71</sup>
44. In such cases, it is important to take into account the circumstances under which the applicant joined the gang. An individual who has been forcibly recruited into a gang would primarily be considered a victim of gang practices rather than a person associated with crime. This applies in particular to young people who may have less capacity or means to resist gang pressures. Children who lack the requisite maturity and mental capacity would normally not be considered to have voluntarily joined a gang.<sup>72</sup> However, even if gang association occurred on a

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<sup>69</sup> Social groups with low socio-economic status have been recognized by some jurisdictions. See, for example, *MA6-03043*, CanLII 47104, Canada, Immigration and Refugee Board, 29 Feb. 2009, <http://www.unhcr.org/refworld/docid/4b7aa3662.html>, which recognized that “poor Haitian women with HIV/AIDS” can constitute a particular social group; *MA0-06253*, CanLII 26873, Canada, Immigration and Refugee Board, 18 Jan. 2001, <http://www.unhcr.org/refworld/docid/4b7aa5692.html>, which found that “in a country where major landholders, with impunity and the use of violence, still oppose agrarian reforms designed to provide poor and disadvantaged peasants with a minimum of dignity and chance for survival, membership in such an agricultural cooperative is a sacred and essential right which no one should be compelled to waive”. See also, *RRT Case N98/22948*, above fn. 26.

<sup>70</sup> USAID, *Central America and Mexico Gang Assessment Report*, above fn. 11, p. 15. See further Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 2007 ed., pp. 85–86; Michelle Foster, *International Refugee Law and Socio-Economic Rights, Refuge from Deprivation*, 2007, pp. 303–313.

<sup>71</sup> In *Arteaga v. Mukasey*, 511 F.3d 940, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 27 Dec. 2007, <http://www.unhcr.org/refworld/docid/4b6be7662.html>, the Court noted that “to do as Arteaga requests would be to pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws. Accordingly, we hold that participation in such activity is not fundamental to gang members’ individual identities or consciences, and they are therefore ineligible for protection as members of a social group”, at 946. See also, *Chacon v. INS*, 341 F.3d 533, U.S. Court of Appeals for the 6<sup>th</sup> Circuit, 18 Aug. 2003, <http://www.unhcr.org/refworld/docid/4b6bf1ac2.html>.

<sup>72</sup> In *Canada (Minister of Citizenship and Immigration) v. X*, CanLII 47735, Canada, Immigration and Refugee Board, 31 May 2007, <http://www.unhcr.org/refworld/docid/4b7a9d2d2.html>, the Board

voluntary basis, former gang members, including those who have engaged in, or have been convicted of, criminal activity, may constitute a particular social group under certain circumstances provided they have denounced their affiliation with the gang and credibly deserted from it. In such cases, it is important to assess whether the applicant is fleeing persecution or prosecution/punishment for a common law offence.<sup>73</sup> It will also be necessary to consider whether any of the exclusion clauses apply (as further addressed below, at (g) Exclusion).

**(iv) Political opinion**

45. Gang-related refugee claims may also be analysed on the basis of the applicant's actual or imputed political opinion vis-à-vis gangs, and/or the State's policies towards gangs or other segments of society that target gangs (e.g. vigilante groups). In UNHCR's view, the notion of political opinion needs to be understood in a broad sense to encompass "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged".<sup>74</sup>
46. The 1951 Convention ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin.<sup>75</sup> In certain contexts, expressing objections to the activities of gangs or to the State's gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a "political opinion" within the meaning of the refugee definition.
47. It is important to consider, especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and *de facto* exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities. Such cases, thus, may under certain circumstances be properly analysed within the political opinion Convention ground.<sup>76</sup> Some jurisdictions have recognized that opposition to a criminal activity

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adopted the reasoning in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, A-207-04, 2005 CAF 85, Canada, Federal Court of Appeal, 4 Mar. 2005, <http://www.unhcr.org/refworld/docid/47e0e21b2.html>, i.e. that "in the case of a minor under the age of 12, for example, it would be highly unusual for there to be a finding of membership [in a criminal organization, in this case a gang]" and that "[T]here is a continuum that the closer the minor is to age 18, the greater the presumption of understanding of his actions."

<sup>73</sup> UNHCR, *Handbook*, above fn. 39, paras. 56–59.

<sup>74</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 32. This interpretation has also received support in academic commentary; see for instance, Goodwin-Gill and Mc Adam, *The Refugee in International Law*, above fn. 70, p. 87.

<sup>75</sup> *Refugee Appeal Nr. 76044*, New Zealand, Refugee Status Appeals Authority, 11 Sep. 2008, <http://www.unhcr.org/refworld/docid/48d8a5832.html>, para. 84.

<sup>76</sup> See, for instance, *Emilia Del Socorro Gutierrez Gomez v. The Secretary of State for the Home Department*, above fn. 22, which noted that "the risk of extortion threats from a criminal gang will not normally be on account of political opinion, but in some societies where criminal and political activities heavily overlap, the picture may be different", para. 40; *Vassilev v. Canada (Minister of Citizenship and Immigration)*, CanLII 5394 (F.C.), 131 F.T.R. 128, Canada, Federal Court, 4 July

or, conversely, advocacy in favour of the rule of law may be considered a political opinion.<sup>77</sup>

48. Although not every expression of dissent will amount to political opinion, it may be political where the dissent is rooted in a political conviction.<sup>78</sup> Where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion.<sup>79</sup>
49. In certain circumstances, an applicant who fears harm because of his/her opposition to a government's policy or to the authorities' investigation of gang-related crime may qualify as a refugee on account of his/her political opinion. Such action could be viewed as a criticism of the State's inability to ensure law and order or imply an accusation of corruption amongst State authorities.<sup>80</sup> The political opinion ground would be particularly relevant where gang activity is closely intertwined with some parts of the authorities and/or the applicant has acted as a "whistle-blower" against corruption or other unlawful measures by certain State agents.<sup>81</sup>
50. In some cases, the opinion of the applicant may be characterized as neutral rather than as opposition.<sup>82</sup> This may, for example, be the case where a person expressly declines to join a gang, telling the gang that s/he is satisfied as s/he is. In such situations, neutrality is not the absence of an opinion but rather a conscious and

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1997, <http://www.unhcr.org/refworld/docid/4b6bf8502.html>. The Court found that "in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion."

<sup>77</sup> The U.S. Immigration Court, for instance, has found that the applicant had the political opinion of "believing in following the rule of law and earning an honest living and of opposing gang lifestyle and its accompanying illegal activities". See *Matter of Orozco-Polanco*, above fn. 46.

<sup>78</sup> (*Attorney General*) v. *Ward*, 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993, <http://www.unhcr.org/refworld/docid/3ae6b673c.html>. The Court found that "Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction."

<sup>79</sup> *Klinko v. Canada (Minister of Citizenship and Immigration)*, 3 F.C. 327; [2000] F.C.J. No. 228, Canada, Federal Court, 22 Feb. 2000, <http://www.unhcr.org/refworld/docid/403f18574.html>.

<sup>80</sup> See, for instance, *TA2-15177*, CanLII 55276, Canada, Immigration and Refugee Board, 7 Mar. 2003, <http://www.unhcr.org/refworld/docid/4b7aa7032.html>, which involved a claimant from Peru whose knowledge of misappropriation of funds in the government resulted in threats against his family and the kidnapping of his sister. The claimant was found to have a well-founded fear of persecution by reason of imputed political opinion; *Demchuk v. Canada*, CanLII 8677 (F.C.), Canada, Immigration and Refugee Board, 9 Sep. 1999, <http://www.unhcr.org/refworld/docid/4b7aa8572.html>.

<sup>81</sup> *Grava v. INS*, 205 F.3d. 1177, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 7 Mar. 2000, <http://www.unhcr.org/refworld/docid/4152e0fa6.html>. The Court found that threats against a whistle-blower who reported corrupt behaviour of government officials might be on account of political opinion.

<sup>82</sup> See, for instance, *Sangha v. INS*, 103 F. 3d, 1482, 1487, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 1997, <http://www.unhcr.org/refworld/docid/4152e0fc15.html>. The Court noted that "in these cases, the victim was recruited by a political group. The victim refused, and the political group threatened death if he did not comply. We reasoned in those cases that the victim's refusal showed his political neutrality, which was the equivalent of a political opinion, and that the persecutor's threats were persecution on account of that political opinion."

deliberate choice of the applicant and may constitute a political opinion. This may be especially so in an “environment in which political neutrality is fraught with hazard.”<sup>83</sup> A political opinion can be expressed both affirmatively and negatively. No doubt, rejecting a recruitment attempt may convey anti-gang sentiments as clearly as an opinion expressed in a more traditional political manner by, for instance, vocalizing criticism of gangs in public meetings or campaigns.<sup>84</sup>

51. Political opinion can also be imputed to the applicant by the gang without the applicant taking any action or making a particular statement him/herself.<sup>85</sup> A refusal to give in to the demands of a gang is viewed by gangs as an act of betrayal, and gangs typically impute anti-gang sentiment to the victim whether or not s/he voices actual gang opposition. Family members who are related to those who oppose gang practices may be perceived to hold the same opinion.<sup>86</sup>

#### e) Internal flight alternative

52. The option of internal flight or relocation must be both relevant and reasonable. Relocation is normally not considered relevant where the feared persecution emanates from, or is condoned or tolerated by, State agents, as State agents are presumed to exercise authority in all parts of the country.<sup>87</sup> This, therefore, generally precludes relocation where State agents are complicit with the gang activities or in cases involving a fear of arbitrary and unlawful State measures.
53. Where the applicant fears persecution by a non-State agent, the first analysis includes an assessment of the ability of the gang (or other similar group) to pursue the applicant in the proposed alternative location and the protection that would be available there from State authorities.<sup>88</sup> It is important to distinguish the reach of gangs which operate in relatively small countries, from gangs active in larger countries. Given that many of the Central American gangs, such as the Maras, have country- or even region-wide reach and organization, there may generally be no realistic internal flight alternative in claims relating to these gangs.<sup>89</sup>

<sup>83</sup> *Calderon-Medina (Re)*, No. A 78-751-1981, U.S. EOIR Immigration Court, Newark, NJ, 1 May 2002, <http://www.unhcr.org/refworld/docid/4b6bfb332.html>.

<sup>84</sup> *Matter of D-V*, U.S. EOIR, Immigration Court, San Antonio, Texas, (unpublished), 9 Sep. 2004.

<sup>85</sup> An imputed political opinion is defined as a political opinion that is attributed to the asylum-seeker by his/her persecutors. See, *Vasquez v. INS*, 177 F.3.d 62, 65, U.S. Court of Appeals for the 1<sup>st</sup> Circuit, 24 May 1999, <http://www.unhcr.org/refworld/docid/4b6c02142.html>. The Court held that whether correctly or incorrectly attributed, an imputed political opinion “may constitute a reason for political persecution within the meaning of the Act.”

<sup>86</sup> *Althea Sonia Britton v. Secretary of State for the Home Department*, EWCA Civ 227, U.K. Court of Appeal, 7 Feb. 2003, <http://www.unhcr.org/refworld/docid/403e49454.html>. The appellant and her family became the targets of a gang for political reasons (her cousins left a political party in which they had been active members, and as result were suspected of betraying it).

<sup>87</sup> UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, <http://www.unhcr.org/refworld/docid/3f2791a44.html>, para. 13.

<sup>88</sup> *Ibid*, para. 15.

<sup>89</sup> As noted by WOLA, *A Resource Guide*, above fn. 2, p. 3, “Even if one were able to move to another city, the gang presence is pervasive and relocation would not provide safety from persecution by gangs. Abandoned children without family support are even less likely to be able to relocate.”

54. Experiences of individuals fleeing gang violence often reveal that the victim may have sought protection internally within his/her country or relocated in the region, in order to escape the gangs. Such attempts have often been unsuccessful as gangs can locate the individual in urban as well as in rural areas, appearing at the applicant's home and place of work as well as near the homes of family members. Young people, without adult support, are likely to face even more difficulties relocating without their family's assistance.

#### **f) Exclusion**

55. The clauses contained in Article 1F of the 1951 Convention provide for the exclusion from refugee status of individuals who, otherwise, would meet the refugee definition set out in Article 1A(2) of the 1951 Convention but who are deemed not deserving of international protection on account of the commission of certain serious and heinous acts. Since Article 1F is intended to protect the integrity of asylum, it needs to be applied scrupulously.<sup>90</sup>

56. In cases where there are indications that an individual has been associated or involved with criminal activities which may bring him/her within the scope of Article 1F of the 1951 Convention, adjudicators will need to undertake an exclusion assessment.<sup>91</sup> Bearing in mind UNHCR's Exclusion Guidelines, a number of issues which are particularly relevant to gang-related asylum claims are highlighted below.

##### **(i) Excludable acts in the context of asylum claims relating to gangs**

57. Given the context in which gangs operate, Article 1F(b) of the 1951 Convention will be most relevant. It provides for the exclusion from refugee status of persons who have committed "a serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee".<sup>92</sup>

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<sup>90</sup> Art. 1F stipulates that "the provisions of the 1951 Convention shall not apply to any person with respect to whom there are serious reasons for considering that he [or she] (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; c) has been guilty of acts contrary to the purposes and principles of the United Nations." UNHCR's interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F is set out in UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter: "UNHCR, *Guidelines on Exclusion*") <http://www.unhcr.org/refworld/docid/3f5857684.html>; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter "UNHCR, *Background Note on Exclusion*"), <http://www.unhcr.org/refworld/docid/3f5857d24.html>; UNHCR, *Statement on Article 1F of the 1951 Convention*, July 2009, (hereafter "UNHCR, *Statement on Article 1F*"), <http://www.unhcr.org/refworld/docid/4a5de2992.html>, and UNHCR, *Handbook*, above fn. 39, paras. 140–163.

<sup>91</sup> UNHCR's interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F stated above should be referred to by decision makers when examining asylum claims relating to gangs and other groups involved in criminal activities.

<sup>92</sup> UNHCR, *Background Note on Exclusion*, above fn. 90, para. 37.

58. Many of the crimes committed by gangs, such as extortion, robbery, murder, homicide, violent assaults, rape, prostitution, kidnapping and trafficking in people, drugs and arms, and other violent crimes would generally qualify as serious offences under Article 1F(b) of the Convention.

**(ii) Individual responsibility**

59. For exclusion to be justified, individual responsibility needs to be established in relation to a crime falling within the scope of Article 1F. Three issues need to be addressed in this context: (i) the involvement of the applicant in the excludable act; (ii) the applicant’s mental state (*mens rea*); and, (iii) possible grounds for rejecting individual responsibility.<sup>93</sup>

60. In other words it is important to determine, based on credible and reliable information, that the individual committed or participated in the commission of the material elements of the crime(s) in question with the requisite mental element (*mens rea*).<sup>94</sup> Depending on the circumstances, a person may incur individual responsibility: (i) by perpetrating excludable crimes him/herself; (ii) for crimes perpetrated by others, either by provoking others to commit such crimes (e.g. through planning, inciting, ordering); or (iii) by making a substantial contribution to the commission of the crimes such that others know that his/her acts facilitated the criminal conduct (e.g. by aiding, abetting, or participating in a joint criminal enterprise).<sup>95</sup> In relation to gang-related asylum claims, the latter is particularly relevant.

61. The fact that an individual was part of a gang does not in itself entail individual liability for excludable acts. However, for applicants who were associated with a gang that has reportedly been involved in “serious non-political crimes” it is necessary to conduct a thorough assessment of their activities, roles and responsibilities. In some cases, depending on the gang’s objectives, activities, methods and other circumstances, individual responsibility for excludable acts may be presumed if membership in a particularly violent group is voluntary.

## V. CONCLUSION

62. Clearly not all individuals who are affected in some way by the activities of organized gangs qualify for international protection. Victims of gang violence would, for instance, normally not be eligible for refugee status where the State is able or willing to provide effective protection. Gang members who flee legitimate prosecution for criminal activities would normally not meet the inclusion criteria of the 1951 Convention. In some situations, however, the very methods through which a State seeks to protect against gang violence may themselves be repressive. Additionally, those who have committed serious non-political crimes

<sup>93</sup> *Ibid*, paras. 50–63.

<sup>94</sup> As reflected in the Rome Statute of the International Criminal Court, 17 July 1998, <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>, Art. 30, the mental element generally required for individual responsibility is “intent” (with regard to conduct or consequences) and “knowledge” (with regard to circumstances or consequences).

<sup>95</sup> UNHCR, *Background Note on Exclusion*, above fn. 90, paras. 50–56.

would normally not be considered as victims of gangs but as ordinary criminals and be excluded from refugee protection under the 1951 Convention.

63. Gang violence may affect large segments of society, especially where the rule of law is weak. Evidently, however, certain individuals are particularly at risk of becoming victims of gangs. They may be targeted because of their age, occupation, socio-economic status and their refusal to comply with gangs. Many asylum claims originate from marginalized youth who have been caught up in the violence. Their family members are often also drawn into the equation when gangs threaten to retaliate or exercise pressure to compel compliance with their demands.
64. One of the complex legal questions that needs to be considered in gang-related asylum claims is the establishment of a link between the persecution feared and one or more of the grounds enumerated in the 1951 Convention. Jurisprudence in this regard is far from uniform. In some jurisdictions, it has been argued that to fear harm “at the hands of gangsters” is not for a Convention ground; the claimant is simply targeted because of his/her money or for reasons of retribution by an organized gang. A link to the 1951 Convention ground “membership of a particular social group” has sometimes been dismissed because the possible “group” is merely defined by the persecution feared.
65. As reflected in some of the recent jurisprudential developments referred to in this Note, the necessary causal link can, under certain circumstances, be established. UNHCR’s perspective is that the interpretation of the 1951 Convention grounds needs to be inclusive and flexible enough to encompass emerging groups and respond to new risks of persecution. Young people, in particular, who live in communities with a pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention. Additionally, people fleeing gang-related violence may have a well-founded fear of persecution on account of their political opinion, especially where criminal and political activities heavily overlap. In the absence of effective State protection, individuals may also fear persecution at the hands of gangs which pursue religious or ethnic ideologies through violent means.









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