



Representing Children from Central America: Leveraging International Law to Strengthen Gang Based Asylum Claims

February 2017

Discussion Points

- Discussion of UNHCR and international law guidance on child asylum claims;
- Child advocacy and best interests of the child determinations;
- Current issues and strategies for representing children from Central America in claims arising from gang violence;
- Case example.



UNHCR in the United States

UNHCR: Child Protection



UNHCR's work on child protection in the U.S.:

- Identify child protection challenges in accessing territory/asylum through **monitoring**
- Protect access to territory and asylum through **advocacy & confidential reporting**
- Identify root cause of child migration in the Mesoamerica region through **research**
- Increase public awareness of the refugee dimension of child migration in the region through **public reports**
- Promote child-sensitive adjudication through **training**
- Offer interpretive guidance on the refugee definition from a child sensitive approach through **strategic litigation**

Children on the Run



- **Purpose:** To learn directly from the children why they left their homes and to assess if any are in need of international protection;
- **Scope:** Based on over 400 interviews with unaccompanied children from NTCA and Mexico;
- **Findings:**
 - “No less than 58%” of the children interviewed raised potential international protection needs;
 - Two overarching patterns of harm: (1) **violence by organized criminal actors** (48% of those interviewed), and (2) **violence in the home** (21% of those interviewed).

International Refugee Law in the U.S. Context

International Treaties

- U.S. acceded to the **1967 Protocol** in 1968
 - The Protocol incorporates the substantive provisions of the **1951 Convention**

Domestic Legislation

- **Refugee Act of 1980**: Enacted by Congress to bring the U.S. into conformance with the 1967 Protocol

How to Use UNHCR Interpretive Guidance



Courts look to UNHCR guidance and reports for:

- **Interpretation** of the refugee definition
- Guidance on interpreting specific **legal questions**
- Evidence of **country conditions** in the asylum seekers country of origin

UNHCR Guidance Includes:

- UNHCR Handbook
- UNHCR Guidelines on International Protection
- UNHCR Eligibility Guidelines
- UNHCR reports

Guidelines on Child Asylum Claims: Procedure

- International law requires a child sensitive approach to the refugee definition, meaning:
 - Consideration of the child's age and vulnerability;
 - Assessment of the claim from the child's perspective;
 - Consideration of all evidence in the record.

Guidelines on Child Asylum Claims: Substance

- Recognition that children may:
 - (1) Have independent claims to refugee status, and/or;
 - (2) Experience child-specific forms of persecution.

Additional guidance and reports:

- Children on the Run;
- UNHCR Gang Guidance Note
- UNHCR Eligibility Guidelines for El Salvador and Honduras;
- UNHCR's amicus briefs in:
 - Flores v. Lynch (9th Circuit);
 - Mejilla-Romero v. Holder (1st Circuit).

More resources available at:

<http://www.unhcr.org/en-us/beyond-childrens-claims.html>

Child Advocacy & Best Interests of the Child

- Meet regularly with the child;
- Gather facts about child's case from all stakeholders;
- Identify child's wishes, wishes of parent(s), other close family members;
- Apply best interests principles to make recommendations on child's best interests:
 - Domestic child welfare law;
 - International law and guidance;
- Submit best interests recommendation (BIR) to decision-maker(s)
 - Placement, Transfer, Release → Custodial agency (ORR)
 - Permanency, Repatriation → Adjudicators (EOIR, USCIS)

Sources of Authority

- **Trafficking Victims Protection Reauthorization Act (2008)**
- **Domestic Child Welfare Law**
 - How do states determine what is in child's best interests when they are separated (temporarily or permanently) from parent?
- **International Law**
 - Convention on the Rights of the Child
 - Committee on the Rights of the Child
 - UNHCR Guidelines on Determining the Best Interests of the Child
 - U.S. Interagency Working Group: *Framework for Considering the Best Interests of Unaccompanied Children*

William Wilberforce Trafficking Victims Protection Act 2008 (TVPRA)

CHILD ADVOCATES.—The Secretary of Health and Human Services is authorized to appoint **independent** child advocates for child trafficking victims and other **vulnerable** unaccompanied alien children. A child advocate shall be provided access to materials necessary to effectively **advocate for the best interest of the child**. The child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. The child advocate shall be presumed to be acting in good faith and be immune from civil and criminal liability for lawful conduct of duties as described in this provision.

8 U.S.C. § 1235 (c)(6) (emphasis added).

Sources of Authority When Advocating for Best Interests

- Convention on the Rights of the Child
- Committee on the Rights of the Child
 - #6 Guidance on Unaccompanied Children (2005)
 - #14 Guidance on Application of Best Interests Principle (2013)
- UNHCR Guidelines on Best Interests Determinations (2008)
- Interagency Working Group on Unaccompanied Children: Framework for Considering Best Interests (2016)

Convention on the Rights of the Child

- In all actions concerning children...***the best interests of the child shall be a primary consideration.*** —Article 3
- [T]he ***views of the child*** [shall be] given due weight in accordance with the age and maturity of the child. — Article 12
- States Parties shall ensure that ***a child shall not be separated from his or her parents against their will....*** — Article 9
- State parties undertake to respect the right of the child to ***preserve his or her identity . . .***—Article 8

Committee on the Rights of the Child

Guidance #6 on Treatment of Unaccompanied Children (2005)

- Non-discrimination
- Best interests as primary consideration for short- and long-term solutions
- Right to life, survival, development
- Appointment of guardian/adviser and legal representative
- Access to asylum procedure; safeguards
- Family reunification and durable solutions

Guidance #14 on Best Interests as Primary Consideration (2013)

- Child's views
- Child's identity
- Preservation of family environment and maintaining relations
- Care, protection and safety of child
- Situation of vulnerability
- Child's right to health
- Child's right to education

UNHCR BID Guidelines (2008)

- Process for Identifying Best Interests of Child
- Process for evaluating competing rights
 - View of the child
 - Views of family members and others close to child
 - Safety as priority
 - Importance of family and close relationships
 - Nurturing developmental needs of child
- Strict Procedural Safeguards: adoptions, decisions on separation from parents against their will
- Decisions on repatriation and resettlement of unaccompanied children require safeguards to ensure respect for best interests principle

Interagency Working Group “Best Interests Framework”

Interagency Working Group

- All federal agencies (DOJ, DHS, HHS, State)
- Advocates from non-governmental organizations
- Subcommittee on Best Interests: met from 2012-2015

Framework for Considering the Best Interests of Unaccompanied Children

- **Recommends considering best interests in every decision**
- Sets forth **best interests factors**, which mirror international standards
- Recommends **changes in each agency’s policies**
- **Provides roadmap** for considering best interests factors in every decision along continuum of child’s case

<http://theyoungcenter.org/stories/released-framework-for-considering-the-best-interests-of-unaccompanied-children/>

Young Center Child Advocate Paradigm for Assessing Best Interests

CHILD'S WISHES

The Child Advocate should always advocate for the child's wishes unless there is a clear risk to the child's safety.

CHILD'S SAFETY

The Child Advocate should always advocate for the child's safety.

FAMILY INTEGRITY

Child's right to be with parents, siblings, children.

LIBERTY

Child's right to be free from detention.

DEVELOPMENT

Child's right to food, shelter, education and medical care.

Marlon's Case

Case Synopsis

Child Advocate's Role

- Consistent meetings over months
- Gathered vital information from ORR
- Authored best interests recommendation applying facts to best interests principles

Child Advocate Best Interests Recommendation

- Submitted to asylum office and immigration court

Young Center BID Panels

Particularly complex cases

- Child unable to express interests (infants/toddlers/children who lack capacity)
- Child's expressed wishes endanger life or safety
- Risk of permanent separation from parent against will

Panel of independent experts

Work for consensus on recommendations; report is attached to best interests recommendation submitted to decision-maker

Submitting Best Interests Recommendations

- Immigration Court
- Asylum Office
- Other agencies:
 - Office of Refugee Resettlement
 - DHS Enforcement & Removal Operations
 - Jurisdictions (state court proceedings)

Access to Young Center Child Advocates

Locations

Chicago, IL	Houston, TX
Harlingen, TX	Phoenix, AZ
New York/New Jersey	Los Angeles, CA
Washington, DC	San Antonio, TX

Referrals

- Primary focus: children in ORR custody; continue working on cases after release
- Can accept referrals for children released to sponsors
- Anyone may refer, including attorneys, immigration judges, asylum officers

Contact:

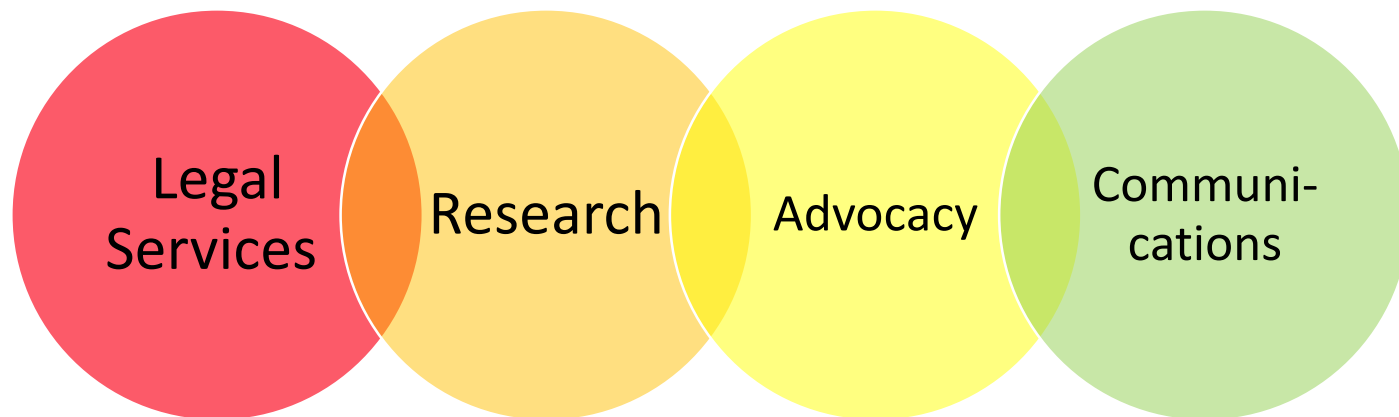
- Elizabeth Frankel, Associate Director
efrankel@theyoungcenter.org
- Sarah Diaz, National Case Director
sdiaz@theyoungcenter.org

www.theyoungcenter.org

Representing Children from Central America in Gang-Based Asylum Claims

KIND works to ensure that no child faces immigration court alone.

- 10 field offices: **Atlanta, Boston, Baltimore, DC, NJ, NY, Houston, Los Angeles, San Francisco Seattle**
- We serve unaccompanied children in removal proceedings through a mix of direct representation and pro bono partnerships.
- We advocate for changes in law, policy, & practices to improve protection of unaccompanied children in the US.



Principles in children's claims

Sources

- USCIS, Asylum Officers Basic Training Course (AOBTC), Guidelines for Children's Asylum Claims (2009), and other modules
- US DOJ, INS, Guidelines for Children's Asylum Claims (1998)
- UNHCR, Guidelines on International Protection: Child Asylum Claims (2009)

Main principles

- “Liberal benefit of the doubt” to child's testimony on feared persecution
- Harm to child may be relatively less than that of an adult and still qualify as persecution (quoted in *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006))
- Consider child's age and developmental stage
- Accommodations for children

Elements of asylum (8 USC § 1101(a)(42))

WELL-FOUNDED FEAR: SUBJECTIVE & OBJECTIVELY REASONABLE

WFF of (future)
persecution

or

(Past)
persecution

On account of any of 5 protected grounds

Race

Religion

National-
ity

Particular
social
group

Political
opinion

Gang as persecutor

“by a government, or persons a government is unwilling or unable to control...”

Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996)

- Role of persecutor(s) in gang, of gang in society
 - does gang supplant gov't functions?
 - UNHCR Gang Guidance Note
- Relationship of gang to government
 - influence, corruption, weak gov't institutions?
- Impunity for gang activity
 - absence of laws, or lack of enforcement?
 - low prosecution or conviction rates?

Was there past persecution?

Grievous bodily harm

Sexual servitude

Kidnapping

Harm to family members

Hernandez-Ortiz v Gonzales, 496 F.3d 1042 (9th Cir. 2007) (must consider harm to parents that occurred when applicant was a child)

Gives rise to presumption of well-founded fear, rebuttable if:

- fundamental change in circumstances OR
- internal relocation would be safe & reasonable – BUT “generally not reasonable to expect a child to internally relocate” BUT should examine circumstances

Is 'harassment' (*molestar*) persecution?

- “**actions must rise above the level of mere harassment** to constitute persecution.” *Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005)
- Frequent “harrassment” or “torment” of Russian Jewish child by schoolmates: religious/ethnic slurs, stealing toys, pulling down his pants, attack by German shepherd, broken arm.
 - *Held*: BIA should have considered **cumulative significance of events & applicant’s age at time of events**.

Kholyavskiy v. Mukasey, 540 F.3d 555, 571 (7th Cir. 2008)

Do threats (absent physical harm) constitute persecution?

- **Past persecution:** only if threats are so menacing as to cause significant actual suffering. *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000)
- But, specific, serious threat may establish a **well-founded fear of persecution**, *Barraza Rivera v. INS*, 913 F.2d 1443, 1453 (9th Cir. 1990)
- **WFF but no past persecution:** woman was threatened, harassed, but never touched. *Mgoian v. INS*, 184 F.3d 1029 (9th Cir. 1999)

Threats as Persecution or WFF?

- Serious nature of threat, power of maker of threat
- Resulting psychological harm
- Attempts to act on threat, or to inflict other harm
- Attacks, harassment or threats to family
- Threats carried out on others (who received similar threats, & what happened to them?)

AOBTC on Past Persecution & Well-Founded Fear.

UNHCR Guidelines on Child Asylum Claims.

See also *Cordero-Trejo v INS*, 40 F.3d 482 (1st Cir. 1994)

Other forms of harm

- Gang activity by family member or caretaker
- Exposure to violence or criminal activity
- Parental abandonment or death as a consequence of gang activity

...persecution OR a well-founded fear

8 CFR 208.13(b)(2). Alternative tests, but argue both past & WFF if facts available.

- 1. Subjective:** credibly articulates genuine fear of return, *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); must be primary motivation in seeking asylum, but need not be only motivation, UNHCR ¶39, AOBTC
- 2. Objective:** reasonable possibility of persecution; facts would lead reasonable person in similar circumstances to fear persecution, AOBTC. May show “pattern or practice of persecution of a group of persons similarly situated” to applicant, 8 CFR 208.13(b)(2).
Also, country conditions evidence.

Lapse of time between harm and departure

- Significant lapse of time may undercut WFF.
Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005) (2 yrs.)
- Q: Why did you leave the country when you did (and not at some other time)?
- Seek to explain a time gap: e.g., funds for departure, safety of family members, belief that situation would improve, persecutor temporarily not causing harm. (See AOBTC on WFF, 15)

Protected grounds: Political opinion

Gang as political entity or de facto authority: implicit or overt ideology, *de facto* authority over territory (e.g., controlling or monitoring movement, collecting protection money).

Political opinion on gang, or on persons opposing it. Child may hold political opinions even if difficult to articulate (see AOBTC and UNHCR Guidelines on Child Asylum Claims).

Opinion may be imputed: e.g., association with family members who expressed opinion.

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996); *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007); *Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010)

Protected grounds: Political opinion

Words or actions may be expressions of political opinion.

- Statements made to gang or to community
- Reporting gang violence to police because of **belief in the rule of law**
- Resisting gang overtures, or refusing extortion demands, out of deeply held **beliefs** that are e.g., pro-government, anti-corruption, anti-violence
- A girl may resist sexual overtures based on beliefs about women's rights or political opinion against gang
- Membership in community or church groups

Particular social group evolution

- Definition elaborated through BIA decisions, e.g.
 - Common immutable characteristic (*Acosta* 1985)
 - Particularity (*C-A-* 2006; *E-A-G- and S-E-G-*, 2008)
 - Social distinction (*MEVG, WGR* 2014)
- The Ninth Circuit held “particularity” and “social distinction” to be reasonable requirements for establishing existence of a PSG. *Reyes v. Lynch*, No. 14-70686 (9th Cir. 2016)
- Burden: (1) Identify cognizable PSG, (2) show applicant is a member. (Next step, show nexus.)

PSG held to be cognizable:

- **People testifying against gang members**, *Henriquez–Rivas v. Holder*, 707 F.3d 1081 (9th Cir., 2013); **potential witness** at criminal trial named in public list, see *Gashi v. Holder*, 702 F.3d 130 (2d Cir 2012)
- **Nuclear family**, see *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) (threats to mother of boy recruited by gang from age 12)

Proposed PSG that were rejected

- Salvadoran youths who have resisted gang recruitment (SEG, 24 I&N 579, 2008) – failed both tests
- Former members of the Mara 18 gang in El Salvador who have renounced their membership (WGR 9th Cir 2016) - failed both tests
- Deportees from the United States to El Salvador, (WGR 9th Cir 2016) - lacked particularity
- What about: girls who have been sexually assaulted by gang members? (circularity)

Nexus to a protected ground

- “one central reason for persecuting,” INA § 208(b)(1)
- No nexus, even a protected ground is established, if sole motivation is economic gain or personal vengeance, *Cuevas v. INS* 43 F.3d 1167 (7th Cir. 1995)
- Mixed motive: e.g., after arrest on suspicion of weapons, police beat victim & mentioned victim’s father’s political work, but never questioned about. *Singh v Gonzales*, 406 F.3d 191, 198 (3d. Cir. 2005)
- Not tangential, incidental. E.g., attacking near a church is not per se on acct of religion.

Case Example

Case study: Calvin

Calvin, age 16, is from Honduras. He entered the U.S. as an unaccompanied child at age 11. Growing up in Honduras, Calvin was targeted by gang members from a neighboring town. The gang members beat him, attempted to rape him, harassed him, and on one occasion left him tangled in a barbed wire fence. Calvin believes that all of these incidents were motivated by the gang members' wanting to recruit him into their gang.

At 13, Calvin was interviewed at the Asylum Office, which referred his case to the Immigration Court, which heard his case last year. The IJ found Calvin was credible and had a subjective fear of return to Honduras. However, the IJ found that Calvin had not established past persecution, and that the harm was not on account of an anti-gang political opinion nor other statutory grounds.

The case is now on appeal to the BIA.

Proving the Elements: Calvin must prove....

1. (a) Harm that constitutes **persecution** in past, OR
(b) Well-founded fear of **future** persecution
2. By actor (gang) govt is *unable/unwilling to control*;
3. One or more protected grounds:
 - **PSG**: cognizable; applicant is a member
 - **Political opinion** held by or imputed to applicant
 - Race, religion, nationality;
4. **Nexus** to protected ground(s)
5. No bar to application; merits favorable discretion.
6. Humanitarian asylum; Withholding; CAT.

Preparing the case:

How would you approach briefing this case?

- (1) Past persecution: why did AO and IJ conclude finding of persecution was not warranted?
- (2) Nexus: what protected grounds apply? what facts show nexus? are other grounds applicable?
- (3) Child-sensitive approach: what should AO/IJ have done differently?

Relevant UNHCR Guidance:

- **Guidelines on Child Asylum Claims;**
- **UNHCR Gang Guidance Note;**
- **Children on the Run;**
- **Eligibility Guidelines for Honduras.**

Questions?