

## UNHCR's Views on Children's Asylum Claims

### *Using international law to support claims of children seeking protection in the United States*

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The United Nations High Commissioner for Refugees (UNHCR) has long recognized the specific protection needs of children in asylum procedures.<sup>1</sup> Children might have independent claims to refugee status separate from those of their parents or other family members, in part due to the possibility that they may experience certain child-specific forms of persecution that could give rise to a distinct claim for protection. In addition, children have inherent vulnerabilities that mandate additional safeguards as they move through the asylum process. The purpose of this note is to summarize UNHCR's views on these topics as relevant to pursuing asylum in the United States.

Especially considering that children face unique protection risks, addressing their specific needs is a key priority for UNHCR. UNHCR has taken the view that the refugee definition, found in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and Article I of the 1967 Protocol Relating to the Status of Refugees,<sup>2</sup> should be read to encompass claims from children fleeing violence and other harms, including those considered child-specific, and it has developed guidance accordingly. UNHCR works to understand and respond to the forces behind and reception of increasing numbers of children—both accompanied and unaccompanied—arriving in the United States from Central America,<sup>3</sup> the Middle East,<sup>4</sup> South Asia,<sup>5</sup> Africa,<sup>6</sup> and other regions, and it has produced country-specific asylum eligibility guidelines that discuss their unique risk profiles.

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<sup>1</sup> The position of UNHCR concerning the asylum claims of children was first reflected in the UNHCR Handbook at paragraphs 213 to 219, which are devoted to the topic of “unaccompanied minors” and address some of the particular needs of children seeking refugee protection. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, ¶¶ 213-19, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) [hereinafter Handbook]. The Handbook, in calling for a more generous application of the standard of proof in the case of asylum-seeking children, reflects UNHCR's understanding that children may experience greater difficulties than adults in articulating the basis for their fear and may therefore require special assistance to ensure their interests are fully safeguarded. More recently, recognizing the ever-growing number of children seeking protection and the increasing need for more specific guidance relating to the assessment of their claims, UNHCR issued the *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*, U.N. Doc. HCR/GIP/09/08 (Sept. 22, 2009) [hereinafter Child Guidelines].

<sup>2</sup> U.N. General Assembly, Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137 (July 28, 1951) [hereinafter 1951 Convention]; U.N. General Assembly, Protocol relating to the Status of Refugees, GA Res. 2198 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2198 (Dec. 6, 1966) [hereinafter 1967 Protocol].

<sup>3</sup> See UNHCR, *El Salvador, Guatemala and Honduras Situation* (last accessed Aug. 4, 2022), <https://reporting.unhcr.org/ncasituation>; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014) [hereinafter *Children on the Run*].

<sup>4</sup> See, e.g., UNHCR, *International Protection Considerations with Regard to People Fleeing the Republic of Iraq*, U.N. Doc. HCR/PC/IRQ/2019/05\_Rev.2 (May 2019), <https://www.refworld.org/docid/5cc9b20c4.html> [hereinafter *Iraq International Protection Considerations*].

<sup>5</sup> See, e.g., Shabia Mantoo, *UNHCR Calls on States to Expedite Family Reunification Procedures for Afghan Refugees* (Oct. 15, 2021), <https://www.unhcr.org/news/briefing/2021/10/616935614/unhcr-calls-states-expedite-family-reunification-procedures-afghan-refugees.html>; Shabia Mantoo, *UNHCR Warns Afghanistan's Conflict Taking the Heaviest Toll on Displaced Women and Children* (Aug. 13, 2021), <https://www.unhcr.org/news/briefing/2021/8/611617c55/unhcr-warns-afghanistans-conflict-taking-heaviest-toll-displaced-women.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, U.N. Doc. HCR/EG/AFG/18/02 (Aug. 30, 2018), <https://www.refworld.org/docid/5b8900109.html> [hereinafter *Afghanistan Eligibility Guidelines*]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, U.N. Doc. HCR/EG/LKA/12/04 (Dec. 21, 2012), <https://www.refworld.org/docid/50d1a08e2.html>.

<sup>6</sup> See, e.g., UNHCR, *UNHCR Position on Returns to Mali – Update III* (Jan. 2022), <https://www.refworld.org/docid/61f3a52e4.html>; UNHCR, *UNHCR Position on Returns to Burkina Faso* (July 30, 2021), <https://www.refworld.org/docid/60f8209c4.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, U.N. Doc. HCR/EG/ERT/11/01\_Rev.1 (Apr. 20, 2011), <https://www.refworld.org/docid/4d4afe0ec2.html>.

More broadly, children’s rights are safeguarded in international law, and, under that framework, the best interests of the child must be a primary consideration in any action affecting children. The best interests principle, therefore, is at the core of a common mechanism for protecting children, the “Best Interests Procedure.”<sup>7</sup> “Best interests” generally refers to the well-being of a child, determined by a variety of individual circumstances (e.g., age, level of maturity, etc.), and the Best Interests Procedure describes the standards and processes for managing cases of children at risk. While States have the primary responsibility for upholding and applying the best interests principle and corresponding procedures, UNHCR has issued guidelines relevant to incorporating and implementing those in asylum adjudication,<sup>8</sup> as further discussed below in section VI. The resources detailed at the end of the document expand upon this discussion.

## I. Relevance of International Refugee Law in the United States

The 1951 Convention and its 1967 Protocol<sup>9</sup> are the key international instruments governing the protection of refugees. The United States is a signatory and party to the 1967 Protocol, and therefore is bound to comply with the obligations deriving from the Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention,<sup>10</sup> and it has incorporated the substantive provisions of the Protocol into U.S. domestic law.<sup>11</sup> U.S. law, based on the 1951 Convention and the 1967 Protocol, defines a refugee as someone who is outside his or her country of nationality and is “unable or unwilling to avail himself or herself of the protection of that country” because of persecution or a well-founded fear of future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>12</sup>

U.S. courts have an obligation to construe U.S. statutes in a manner consistent with international obligations whenever possible.<sup>13</sup> In their efforts to fulfill that duty, U.S. courts have relied on UNHCR

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<sup>7</sup> See UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021), <https://www.refworld.org/docid/5c18d7254.html> [hereinafter BIP Guidelines]. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” U.N. General Assembly, *Convention on the Rights of the Child*, G.A. Res. 44/25, art. 3, U.N.T.S. vol. 1577 (Nov. 20, 1989) [hereinafter CRC]; see also U.N. Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, U.N. Doc. CRC/C/GC/14, Art. 3, ¶ 1 (May 29, 2013). The United States has signed but not fully ratified the CRC. See U.N. Treaty Ratification Status, *Convention on the Rts. of the Child*, <<http://tinyurl.com/CRCStatus>>. As a signatory, the United States is bound not to “defeat” the CRC’s “object and purpose.” Vienna Convention on the Law of Treaties, Art. 18, 1155 U.N.T.S. 331, <<http://tinyurl.com/ViennaConvention>>. Moreover, the CRC is the world’s most ratified human rights treaty—ratified by all but one country—and its provisions are therefore considered customary international law. See, e.g., Inter-American Ct. of Hum. Rts., *Judicial Condition and Hum. Rts. of the Child*, Advisory Opinion OC-17/2002 (Aug. 28, 2002) (“The large number of ratifications shows a broad international consensus (opinio iuris comunis) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter.”).

<sup>8</sup> See generally BIP Guidelines.

<sup>9</sup> 1951 Convention; 1967 Protocol.

<sup>10</sup> The 1967 Protocol binds parties to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention with respect to “refugees” as defined in Article 1A(2) of the 1951 Convention. 1967 Protocol, art. 1, ¶¶ 1–2. The 1967 Protocol universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical and temporal limitations. *Id.* ¶¶ 2–3. The United States acceded to the 1967 Protocol in 1968, thereby binding itself to the international refugee protection regime and the definition of a refugee in the 1951 Convention. H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160; H.R. Rep. No. 96-608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

<sup>11</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

<sup>12</sup> 8 U.S.C. § 1101(a)(42).

<sup>13</sup> *Murray v. The Charming Betsy*, 6 U.S. 64, 80 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (noting “abundant evidence” that Congress intended to conform the refugee definition and U.S. asylum law “to the United Nation’s (sic) Protocol to which the United States has been bound since 1968.”).

guidance,<sup>14</sup> especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook),<sup>15</sup> in assessing refugee claims—including those involving children<sup>16</sup>— and have recognized that UNHCR’s analysis provides significant direction in understanding issues in refugee law.<sup>17</sup> The U.S. Supreme Court, for instance, has “consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention.”<sup>18</sup> Thus, UNHCR guidance can serve as a critical tool in evaluating and resolving the diverse, evolving interpretative questions concerning the refugee definition, as well as issues related to proper adjudicatory procedures, that continue to arise, including in the United States.

Accordingly, UNHCR offers the following guidance concerning claims by asylum-seeking children in the United States,<sup>19</sup> which may be relevant to advocating on behalf of children in need of protection in the United States. While international law can be used to support an individual’s claim to refugee status, UNHCR recognizes that an asylum seeker may need to affirmatively highlight relevant international legal standards to receive individualized consideration by U.S. courts and authorities in a particular case. Therefore, advocates and asylum seekers may wish to submit relevant materials, such as UNHCR’s *Guidelines on International Protection* or *Eligibility Guidelines*,<sup>20</sup> to be included in the record when applicable. These sources are cited throughout the document and compiled thematically in the last section.

## II. Child-Specific Forms of Persecution and Common Risk Profiles

### a. Harms Experienced by Children

In UNHCR’s opinion, the refugee definition must be interpreted in a child-sensitive manner, recognizing the child’s unique experiences and properly evaluating the child’s account of relevant events.<sup>21</sup> In particular, asylum claims of children may present questions regarding the interpretation of “persecution.”<sup>22</sup> The Handbook provides that a threat to life or freedom or other serious human rights violations on account of race, religion, nationality, political opinion, or membership in a particular social group constitutes persecution.<sup>23</sup> Children may be more susceptible to harm than adults and may

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<sup>14</sup> UNHCR began issuing *Guidelines on International Protection* in 2002 to complement the interpretive guidance in the Handbook. The *Guidelines on Child Asylum Claims* are part of this series and offer substantive and procedural guidance on carrying out refugee status determinations in a child-sensitive manner. Child Guidelines, ¶¶ 7, 22. U.S. courts have expressly relied on these interpretations as “provid[ing] significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

<sup>15</sup> The UNHCR Handbook was prepared at the request of the Member States of the Executive Committee of the High Commissioner’s Programme, including the United States, in order to provide guidance to governments in applying the terms of the Convention and Protocol. See Handbook, at 9.

<sup>16</sup> See, e.g., *Flores v. Garland*, 3 F.4th 615, 636 (4th Cir. 2021) (citing UNHCR’s Child Asylum Guidelines to explain children’s ability to access State protection); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1071 (9th Cir. 2017) (citing UNHCR’s Child Asylum Guidelines to underscore the challenges children may experience in reporting their abuse).

<sup>17</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, n.22 (1987) (“The Handbook provides significant guidance in construing the Protocol . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes.”).

<sup>18</sup> *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing Supreme Court cases where the Court turned to UNHCR guidance materials for assistance in interpreting U.S. obligations under the Refugee Convention); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (“In interpreting the Protocol . . . we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (finding the UNHCR Handbook to be “persuasive authority in interpreting the scope of refugee status under domestic asylum law”) (internal quotation marks omitted).

<sup>19</sup> The Child Guidelines define “children” as “all persons below the age of 18 years.” Child Guidelines, ¶¶ 7, 22.

<sup>20</sup> See, e.g., Child Guidelines; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016), <https://www.refworld.org/docid/56e706e94.html>.

<sup>21</sup> Child Guidelines, ¶¶ 1-2.

<sup>22</sup> The refugee definition in the 1951 Convention and the 1967 Protocol, while not being age-specific, has traditionally been interpreted in light of adult experiences, and persecution that is child-specific is often overlooked. Child Guidelines, ¶¶ 1-2.

<sup>23</sup> Handbook, ¶ 51.

experience certain types of harm differently.<sup>24</sup> In other words, harm that would not rise to the level of persecution if inflicted upon an adult may rise to the level of persecution if inflicted upon a child.<sup>25</sup> Therefore, persecution should be viewed from the child’s perspective, including by accounting for his or her age and maturity level.<sup>26</sup> Further, violations of child-specific rights, such as protection from all forms of physical and mental violence, abuse, neglect and exploitation, may constitute persecution.<sup>27</sup> The following non-exhaustive list further explores child-specific harms:

- **Sexual violence** against children may constitute persecution and might encompass rape, incest, forced prostitution, or child pornography, among other harms.<sup>28</sup> In addition, sex trafficking constitutes persecution as it is a serious violation of the fundamental 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 labor and abduction, sale and trafficking.”<sup>29</sup>
- **Psychological violence** may constitute persecution.<sup>30</sup> This might include serious forms of humiliation, intimidation, harassment, threats, abuse, the effects of isolation from family and friends, and other practices that cause or result in mental or emotional harm.<sup>31</sup>
- **Harmful traditional practices** may constitute persecution. Examples include female genital mutilation (FGM),<sup>32</sup> early or forced marriage, severe discrimination against children born outside strict family planning rules,<sup>33</sup> and denial of education to girls.<sup>34</sup>
- **Child labor**, which remains widespread in many places, may amount to persecution in cases involving slavery, debt bondage, child prostitution, and the use of children in other forms of forced labor and illicit activity.<sup>35</sup> Trafficking, which may occur for various reasons “but with

<sup>24</sup> Child Guidelines, ¶ 10; *see also Mecha v. INS*, 2000 U.S. App. LEXIS 22263, at \*4 (4th Cir. Aug. 30, 2000) (“The Board agreed with the IJ that the harm suffered by [the petitioner] rose to the level of persecution, especially in light of [the petitioner]’s very young age at the time she suffered the harm.”); *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (“[W]hen a young girl loses her father, mother and brother sees [sic] her family effectively destroyed she plainly suffers severe emotional and developmental injury.”) (citation omitted).

<sup>25</sup> Child Guidelines, ¶ 10; USCIS, RAI0 Directorate, *Training Module on Children’s Claims*, at 44-45, Dec. 20, 2019, [https://www.uscis.gov/sites/default/files/document/foia/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf) [hereinafter RAI0, Child Claims]; *see also, Mecha v. INS*, 2000 U.S. App. LEXIS 22263, at \*4 (4th Cir. Aug. 30, 2000) (“The Board agreed with the IJ that the harm suffered by [the petitioner] rose to the level of persecution, especially in light of [the petitioner]’s very young age at the time she suffered the harm.”); *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (“[W]hen a young girl loses her father, mother and brother sees [sic] her family effectively destroyed she plainly suffers severe emotional and developmental injury.”) (citation omitted).

<sup>26</sup> *See* Child Guidelines, ¶ 15 (“[T]o 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.”). U.S. courts and administrative bodies have similarly acknowledged the need to account for a child’s age at the time of the persecution. *See Portillo-Flores v. Garland*, 3 F.4th 615, 628 (4th Cir. 2021) (finding that age can be a “critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether [h]e holds a well-founded fear of persecution”) (*quoting Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004)).

<sup>27</sup> Child Guidelines, ¶ 13.

<sup>28</sup> Child Guidelines, ¶ 18.

<sup>29</sup> Child Guidelines, ¶ 26; CRC, art. 35.

<sup>30</sup> Child Guidelines, ¶ 33.

<sup>31</sup> Child Guidelines, ¶ 33 (citing U.N. Committee on the Rights of the Child, *General Comment No. 8 (2006) on the Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, ¶ 11, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2017)); *see also* U.N.G.A., Report of the Independent Expert for the United Nations Study on Violence Against Children (Paulo Sergio Pinheiro), ¶ 42, A/61/299 (Aug. 29, 2006); UNICEF, *Domestic Violence Against Women and Girls*, at 2-4, Innocenti Digest. No. 6 (2000).

<sup>32</sup> Female Genital Mutilation (FGM) is a form of gender-based violence that “inflicts severe harm, both mental and physical, and amounts to persecution.” UNHCR, *Guidance Note of Refugee Claims Relating to Female Genital Mutilation*, ¶ 7 (2009) [hereinafter FGM Guidance Note]. Girls under the age of 15 are at particular risk of being subjected to FGM. *Id.* ¶ 4.

<sup>33</sup> *See, e.g., Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1246-49 (9th Cir. 2005) (finding that hardships such as economic deprivation and limited educational opportunities due to the forced sterilization of the applicant’s father could amount to persecution).

<sup>34</sup> Child Guidelines, ¶¶ 18, 36.

<sup>35</sup> Child Guidelines, ¶ 29; Afghanistan Eligibility Guidelines, at 80-81.

the overarching aim to gain profit through the exploitation of human beings,” is a serious violation of a child’s fundamental rights.<sup>36</sup> More broadly, “hazardous work”—that is, “labor likely to harm the health, safety or morals of a child”—is prohibited under international law and may similarly constitute persecution.<sup>37</sup>

- **Under-age recruitment by armed forces or armed non-State actor groups** may constitute persecution.<sup>38</sup> While several international laws prohibit under-age recruitment,<sup>39</sup> children in various regions across the world remain at risk of or suffer from such practice.<sup>40</sup> Children also may experience persecution if they 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.”<sup>41</sup> Furthermore, children who have been released from armed forces or groups and return to their communities or countries of origin may be at risk of persecution in the form of “harassment, re-recruitment or retribution, including imprisonment or extra-judicial execution.”<sup>42</sup>
- **Violations of economic, social, or cultural rights** may amount to persecution “where minimum core elements of [the rights] are not realized.”<sup>43</sup> For example, denying street children their right to an adequate standard of living, which includes access to water, food, and housing, could threaten the child’s development and survival, and therefore, it may rise to the level of persecution.<sup>44</sup> Similarly, denying medical treatment to a child, especially one with a life-threatening illness, may constitute persecution.<sup>45</sup> Further, the forced separation of a child from his or her parents “due to discriminatory custody laws or the detention of the child’s parent(s) could amount to persecution.”<sup>46</sup>
- **Severe or cumulative instances of discrimination** may amount to persecution “where the treatment feared or suffered leads to consequences of a substantially prejudicial nature for the child concerned.”<sup>47</sup> Discrimination may affect in particular children who “lack adult care and support, are orphaned, abandoned or rejected by their parents, and are escaping violence in their homes.”<sup>48</sup> Examples of less-severe discrimination that together could constitute persecution include denying children with disabilities or stateless children access to birth registration, which may lead to exclusion from education, health care, and other services.<sup>49</sup> Similarly, considering that education is fundamentally important to a child’s future, significant harm may result from systemic denial of access to education.<sup>50</sup> This may be the case, for

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<sup>36</sup> Child Guidelines, ¶¶ 25, 26; CRC, art. 35. For more guidance on claims related to trafficking, see Child Guidelines, ¶¶ 24-29; 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*, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006).

<sup>37</sup> Child Guidelines, ¶ 30.

<sup>38</sup> Child Guidelines, ¶ 21. Children may also have a well-founded fear of persecution based on the treatment the State army or non-State armed group subjects them to. *Id.* ¶ 23.

<sup>39</sup> See, generally, Child Guidelines, ¶¶ 19-20. U.N.G.A., Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Arts. 1–2, 4, U.N. Doc. A/Res/54/263 (May 25, 2000).

<sup>40</sup> See Iraq International Protection Considerations, at 96-97; Afghanistan Eligibility Guidelines, at 85.

<sup>41</sup> Child Guidelines, ¶ 22.

<sup>42</sup> Child Guidelines, ¶ 23.

<sup>43</sup> Child Guidelines, ¶ 35.

<sup>44</sup> Child Guidelines, ¶ 35.

<sup>45</sup> Child Guidelines, ¶ 35.

<sup>46</sup> Child Guidelines, ¶ 17.

<sup>47</sup> Child Guidelines, ¶ 10 (citing Handbook, ¶¶ 51-52).

<sup>48</sup> Child Guidelines, ¶ 65.

<sup>49</sup> Child Guidelines, ¶ 35.

<sup>50</sup> Child Guidelines, ¶ 36.

instance, where societies do not tolerate education for girls or where school attendance becomes unbearable due to a child experiencing harm based on racial or ethnic grounds.<sup>51</sup>

When determining whether a child has a well-founded fear of persecution, both subjective and objective factors are relevant to consider, including the child’s economic, cultural, ethnic, or racial background,<sup>52</sup> child-specific risk profiles,<sup>53</sup> and child-specific circumstances in his or her country of origin.<sup>54</sup> Further, in addition to any episodes of past harm experienced personally by a child, “harm inflicted against members of the child’s family can support a well-founded fear in the child,” as children are more sensitive to acts targeted at close relatives.<sup>55</sup>

## **b. Common Risk Profiles of Children Fleeing to the United States**

UNHCR recognizes that children fleeing to the United States frequently share risk profiles which may make them more vulnerable and /or likely to face harm in their countries of origin. These risk profiles may very well be distinct from those of their parents or other family members. This non-exhaustive list lays out common risk profiles of child asylum seekers and harms that may be associated with them:

- **Girls:** Girls and young women frequently are susceptible to various types of gender-based violence, harmful traditional practices—including female genital mutilation (FGM),<sup>56</sup> early or forced marriage,<sup>57</sup> and denial of access to education—as well as other harms, like sex trafficking.<sup>58</sup> They may also share other immutable and innate characteristics, such as tribal membership, that when coupled with gender may elevate girls’ risk for certain harms.
- **Children living in areas under the control of or with significant presence of armed non-State actors:** A significant number of children flee areas with a high presence of armed non-State actors and/or organized crime.<sup>59</sup> Children in these situations are susceptible to various harms perpetrated by organized criminal groups, such as “forced recruitment; physical violence, including rape and severe beatings; threats of violence; and extortion.”<sup>60</sup> Children with certain shared characteristics—marginalized children, street children, and children lacking protection—are particularly vulnerable and often specifically targeted by armed non-State

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<sup>51</sup> Child Guidelines, ¶ 36; see also *RRT Case No. V95/03256, [1995] RRTA 2263*, at 47, Australia, RRT (Oct. 9, 1995), <http://www.unhcr.org/refworld/docid/4b17c13a2.html> (holding that “discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution”); Canada Immigration & Refugee Board, Decision VA1-02828, VA1-02826, VA1-02827 & VA1-02829, at 3, 8-9 (Feb. 27, 2003), <http://www.unhcr.org/refworld/docid/4b18e03d2.html> (finding that children’s harassment and bullying at school based on their ethnicity and nationality amounted to persecution because it affected their education, “which is essential to the development and well-being of a child”).

<sup>52</sup> Child Guidelines, ¶ 11; RAIO, Child Claims, at 50.

<sup>53</sup> Children with certain risk profiles—homeless, abandoned, or street children, children with disabilities, children in unconventional family situations, among others—may face an increased risk of harm. Child Guidelines, ¶ 12.

<sup>54</sup> Child Guidelines, ¶ 12.

<sup>55</sup> Child Guidelines, ¶ 17; see also *Rusak v. Holder*, 734 F.3d 894, 897 (9th Cir. 2013) (finding that the child was entitled to rely on parent’s past persecution to support her asylum claim); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (holding that “injuries to a family must be considered in an asylum case where the events that form the basis of the past persecution were perceived when the petitioner was a child”); *Flores v. Garland*, 3 F.4th 615, 628 (4th Cir. 2021) (en banc) (emphasizing the “particular relevance of age” in determining whether threats to family members constituted persecution). *But see Bolainez-Vargas v. Garland*, 861 Fed. Appx. 159, 162 (10th Cir. 2021) (affirming that the murders of a child’s parents did not amount to persecution where the child was “not individually targeted or physically harmed in the attack”).

<sup>56</sup> Child Guidelines, ¶ 31.

<sup>57</sup> Child Guidelines, ¶ 18.

<sup>58</sup> Child Guidelines, ¶ 36.

<sup>59</sup> In 2014, UNHCR conducted interviews with unaccompanied or separated children from Central America and Mexico who arrived in the U.S. during or after October 2011, finding that no less than 58 percent of the interviewed children raised potential international protection needs. *Children on the Run*, at 6.

<sup>60</sup> *Children on the Run*, at 44.

actors.<sup>61</sup> Additionally or alternatively, children who are perceived as members or supporters of certain armed non-State actors, perhaps simply by virtue of where they live, may face harms such as arbitrary arrest and detention, retaliatory violence, and discrimination at the hands of other non-State actors or the State.<sup>62</sup>

- **Street children:** Children living and/or working on the streets are often viewed as social outcasts and more susceptible to child-specific harms, such as under-age recruitment, trafficking, sexual abuse, and detention in degrading conditions.<sup>63</sup> Further, street children may share certain past experiences, such as sexual abuse, domestic violence, and exploitation or being abandoned or orphaned, that leave them at heightened risk of additional future harm.<sup>64</sup>
- **Children in unconventional family situations:** Children in unconventional family situations, such as those living in female-headed households in patriarchal societies, as well as those born out of wedlock, in violation of coercive family policies,<sup>65</sup> or as a result of rape are at an increased risk of harm.<sup>66</sup> They may be more susceptible to domestic violence, discrimination, and targeting by organized criminal groups.<sup>67</sup>
- **Children who are witnesses or informants:** Children who have witnessed crimes or served as informants are more susceptible to violence as a form of deterrence, retaliation, or retribution.<sup>68</sup> Moreover, children who have witnessed violence being committed against a parent or other caretaker may face lasting psychological trauma, which may make them particularly vulnerable and more likely to need protection.<sup>69</sup>

Consistent with international law, as discussed above, these risk profiles highlight the fact that children may have independent claims to asylum, which might arise from child-specific forms of persecution or from harm to a family member or close relative.

### III. Child Asylum Claims Based on Membership in a Particular Social Group

“Membership in a particular social group” is one of the five protected grounds, though it is not defined in the 1951 Convention. It has been increasingly invoked in asylum applications in recent years, especially in child asylum cases. At the same time, in the United States, this ground has been subject to increased litigation and has seen attempts to narrow its scope. The Handbook provides generally that a particular

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<sup>61</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 30 (Mar. 31, 2010), <https://www.refworld.org/docid/4bb21fa02.html> [hereinafter Gang Guidance Note]; USAID, Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development, *Central America and Mexico Gang Assessment*, at 17 (Apr. 2006) (finding that youth between 8 to 18 years old may be particularly vulnerable to gang recruitment); Washington Office on Latin America (WOLA), *Transnational Study on Youth Gangs*, at 2 (Mar. 30, 2007).

<sup>62</sup> Iraq International Protection Considerations, at 95-96.

<sup>63</sup> Child Guidelines, ¶ 12.

<sup>64</sup> Child Guidelines, ¶ 52.i.

<sup>65</sup> For more guidance on refugee claims based on coercive family policies, see UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Aug. 2005), <https://www.refworld.org/docid/4301a9184.html>.

<sup>66</sup> Child Guidelines, ¶ 12.

<sup>67</sup> Child Guidelines, ¶ 12, *Children on the Run*, at 45 (citing International Centre for the Human Rights of Migrants, *Forced Displacement and Protection Needs Produced by New Forms of Violence and Criminality in Central America*, at 6 (2012), <https://www.acnur.org/fileadmin/Documentos/BDL/2012/8956.pdf>).

<sup>68</sup> *Children on the Run*, at 97 (citing Gang Guidance Note, ¶ 12).

<sup>69</sup> Child Guidelines, ¶ 17; *Children on the Run*, at 43.

social group (PSG) is normally comprised of persons of similar background, habits, or social status,<sup>70</sup> and other UNHCR guidelines elaborate on the proper interpretation and substantive analysis of membership in a PSG.<sup>71</sup>

While a PSG cannot be “exclusively defined by the fact that it is targeted for persecution,” there is no “closed list” of groups that constitute a PSG.<sup>72</sup> Social groups should also be viewed in an evolutionary manner, “open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>73</sup> The following subsections offer an overview of relevant international legal standards on cognizable groups and nexus and detail how they apply in the specific context of child asylum claims presented in the United States.

#### a. Legal Cognizability of Particular Social Groups

International law recognizes alternative approaches to defining a “particular social group,” and child asylum claims may be established under either. Under these alternative approaches, an asylum seeker may demonstrate that his or her PSG is comprised of a group of persons that *either* shares a common characteristic (**the protected characteristics approach**) *or* is perceived as a distinct group by society (**the social perception approach**).<sup>74</sup> The common characteristic “will often be one which is innate [such as sex, age, color, family background, or social status], unchangeable, or which is otherwise fundamental to identity, conscience<sup>75</sup> or the exercise of one’s human rights.”<sup>76</sup> It might also be based on shared past experiences (such as refusing to join a gang or status as a former child soldier)<sup>77</sup> or shared values, attitudes, or behaviors (such as sexuality). Alternatively, many, if not all, societies perceive children as a distinct group, as they require special care and this fact is reflected by the use of various distinct labels to refer to children, such as “young,” “infant,” “child,” “boy,” “girl,” or “adolescent,” and laws, policies, and programs designed specifically to support and protect them.<sup>78</sup>

Claims based on membership in a PSG have come under increased scrutiny in U.S. courts and administrative bodies in recent years. While U.S. law initially followed the protected characteristics approach,<sup>79</sup> it has evolved to require essentially that *both* alternative approaches be satisfied, as a PSG must include members who share a common, immutable characteristic; be defined with particularity; and be socially distinct<sup>80</sup>—thus establishing a threshold for cognizable PSGs that far exceeds international

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<sup>70</sup> Handbook, ¶ 77.

<sup>71</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*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Social Group Guidelines].

<sup>72</sup> Social Group Guidelines, ¶ 2.

<sup>73</sup> Social Group Guidelines, ¶ 3.

<sup>74</sup> Social Group Guidelines, ¶ 11.

<sup>75</sup> Resisting recruitment by gangs, for instance, may be viewed as a characteristic fundamental to one’s conscience, dignity, and human rights, as an individual’s insistence on the rule of law is an internationally recognized human right. Gang Guidance Note, ¶ 38.

<sup>76</sup> Social Group Guidelines, ¶ 11; Gang Guidance Note, ¶ 36. Children who oppose gang practices or resist forced recruitment may share innate or immutable characteristics such as age, gender, impressionability, poverty, or lack of parental guidance and family ties. Gang Guidance Note, ¶ 36. Such innate characteristics may also be shared among trafficked children or those exploited for child labor. Iraq International Protection Considerations, at 98-99. Girls who fear female genital mutilation or those denied access to education may share innate characteristics such as sex, age, tribal membership or ethnicity, and location in rural areas. Afghanistan Eligibility Guidelines, at 83; FGM Guidance Note, at 23-24. Moreover, vulnerability as a minor is recognized as an immutable characteristic that is unchangeable at any given point in time, notwithstanding that a child will grow into an adult. See Child Guidelines, ¶¶ 49-50 (“A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared.”).

<sup>77</sup> Gang Guidance Note, ¶ 37.

<sup>78</sup> Child Guidelines, ¶ 49.

<sup>79</sup> *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (interpreting “particular social group” to mean a group of persons who share a common, immutable characteristic).

<sup>80</sup> *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 589 (BIA 2008).



standards. Notably, in 2018, *Matter of A-B-* restated these heightened requirements<sup>81</sup> and significantly affected asylum seekers, including children, many of whom fled domestic and gang violence.<sup>82</sup> UNHCR subsequently filed several amicus briefs addressing the U.S. interpretation of “particular social group,” underscoring how it is at variance with international legal standards and emphasizing that those fleeing such harms can qualify for protection.<sup>83</sup>

Although *Matter of A-B-* was vacated in 2021,<sup>84</sup> establishing legally cognizable PSGs in U.S. asylum adjudication remains challenging and out of step with international law in a number of ways. The size of a PSG, for instance, sometimes becomes an issue.<sup>85</sup> Under prevailing international standards, the size, cohesion, and diffusiveness of a proposed group are not at all relevant to determining whether a PSG exists within the meaning of Article 1A(2) of the 1951 Convention.<sup>86</sup> Nevertheless, while there are no explicit limitations on the size of a PSG under U.S. law and PSGs “may contain only a few individuals or a large number of people,”<sup>87</sup> the Board of Immigration Appeals (BIA) has cautioned that “major segments of the population will rarely constitute distinct social groups.”<sup>88</sup> The BIA’s warning, especially should it be used to deny recognition of an otherwise cognizable PSG, is contrary to international law.

Despite these challenges, and even though U.S. law remains at variance with international standards, U.S. federal courts and administrative adjudicators have found children to be members of various social groups. The below list (and corresponding footnotes) includes examples of child-specific PSGs that are viable according to U.S. law:

- Social groups based on family, kinship, or tribal membership or lack thereof<sup>89</sup>
- Social groups based on relationships and status within them<sup>90</sup>
- Social groups based on past experiences<sup>91</sup>
- Social groups based on opposition to forced marriage, involuntary servitude, or child labor<sup>92</sup>

<sup>81</sup> See *Matter of A-B- I*, 27 I&N Dec. 316, 317 (A.G. 2018) (“The applicant must demonstrate membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question.”).

<sup>82</sup> *Matter of A-B- I*, 27 I&N Dec. 316, 320 (A.G. 2018) (suggesting, in dicta, that “claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum”).

<sup>83</sup> See, e.g., UNHCR Amicus Brief, *Grace v. Barr*, No. 19-5013 (D.C. Cir. July 31, 2019), <https://www.refworld.org/docid/5d7a0e544.html>; UNHCR Amicus Brief, *Matter of O.L.B.D.*, No. 18-1816 (A206-252-605) (1st Cir. Mar. 11, 2019), <https://www.refworld.org/docid/5c8924454.html>; UNHCR Amicus Brief, *Marroquin-Perez v. Barr*, No. 18-73146 (BIA Feb. 28, 2020), <https://www.refworld.org/docid/5f647e574.html>.

<sup>84</sup> *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

<sup>85</sup> *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (“Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group.”).

<sup>86</sup> This means that an asylum seeker does not have to establish that all members of the group are at risk of being persecuted or that all members of the proposed group know or associate with each other for the PSG to be considered legally cognizable. Social Group Guidelines, ¶¶ 15, 17-18; UNHCR Amicus Brief, *Matter of O.L.B.D.* (citing Social Group Guidelines, ¶¶ 15, 18).

<sup>87</sup> *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (explaining that “the size and breadth of a group alone does not preclude a group from qualify as such a social group”).

<sup>88</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014) (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

<sup>89</sup> UNHCR recognizes that a child’s family may constitute a social group. Child Guidelines, ¶ 51; see also RAI0, Child Claims, at 57. Similarly, social groups such as “street children,” “orphans,” and “abandoned children” are viable. Child Guidelines, ¶¶ 50-52. While some U.S. courts have rejected social groups of street children, the BIA and immigration judges have recognized such groups as viable. See, e.g., *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (rejecting “Honduran street children” as a viable PSG); *Matter of B-F-O-*, No. 78-677-043, 24 IMMIG. RPT. B1-41, 43-44 (BIA Nov. 6, 2001) (recognizing “abandoned street children in Nicaragua” as a viable PSG). Guidance materials for asylum officers explicitly state that the holding in *Escobar* does not foreclose the possibility of a particular social group involving street children. RAI0, Child Claims, at 56.

<sup>90</sup> *Hui v. Holder*, 769 F.3d 984, 986-87 (recognizing “Chinese daughters viewed as property by virtue of their position within a domestic relationship” as a viable PSG but denying because the applicant’s age constituted a changed circumstance).

<sup>91</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (recognizing “former child soldiers who have escaped” as a viable PSG).

<sup>92</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 178-79 (3d Cir. 2003) (recognizing “former child soldiers who have escaped” as a viable PSG).

- Social groups based on disability or medical condition<sup>93</sup>

Further, the below list (and corresponding footnotes) includes examples of child-specific PSGs that are considered viable under international standards but have not necessarily seen as widespread or consistent recognition in the U.S. context:

- Social groups based on a combination of age, nationality, and/or gender<sup>94</sup>
- Social groups based on opposition to organized crime or recruitment into organized crime<sup>95</sup>

UNHCR notes that individuals may be eligible for asylum based upon multiple PSGs, as well as various protected grounds since the Convention grounds are not mutually exclusive (see Section IV, below).<sup>96</sup>

## b. Nexus

Under the 1951 Convention, nexus is established when the persecutor harms an individual for reasons of a Convention ground.<sup>97</sup> The protected ground only has to be a “relevant contributing factor, [and] it need not be . . . the sole, or dominant, cause” of the persecution.<sup>98</sup> Where a child has suffered domestic abuse, for example, “nexus would be satisfied if the persecutor harmed the applicant for reasons related to [his or] her relationship with the persecutor or status in the relationship, in addition to any other reasons or motives that may exist.”<sup>99</sup> Even if an asylum seeker is unable to show that the persecutor acted based on a protected ground, nexus may nonetheless be established if the State is unable or unwilling to protect the asylum seeker *based on* a Convention ground.<sup>100</sup> This could be the case, for instance, when a State is biased or discriminates against girls or children of a particular race or ethnicity, perhaps demonstrating

<sup>93</sup> UNHCR has recognized “children with disabilities” and “children affected by HIV/AIDS” (including those who are HIV-positive and those with an HIV-positive parent or other relative) as viable social groups. Child Guidelines, ¶¶ 50, 52. U.S. courts have similarly recognized such social groups. See *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188 (9th Cir. 2005) (recognizing “disabled children and their parents who provide care for them” as a viable PSG), *vacated and remanded on other grounds, Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006).

<sup>94</sup> UNHCR considers social groups based on age, nationality, and/or gender as viable and has recognized that “‘children’ or a smaller subset of children may [] constitute a particular social group.” Child Guidelines, ¶ 50. In the United States, however, such social groups are rarely recognized, as they are considered too broad and insufficiently cohesive and homogenous. See, e.g., *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (“Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group.”). Accordingly, U.S. law is at variance with international standards on this point. One exception where such social groups have been deemed viable is in the context of female genital mutilation. See *Mohammed v. Gonzales*, 400 F.3d 785, 796-97 (9th Cir. 2005) (recognizing “young girls in the Benadir clan” or “Somalian females” as viable PSGs); *In re Kasinga*, 21 I&N Dec. 357, 365 (INS 1996) (recognizing “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” as a viable PSG). *But see Cece v. Holder*, 733 F.3d 662, 677 (7th Cir. 2013) (recognizing “young, Albanian women who live alone” as a viable PSG).

<sup>95</sup> UNHCR recognizes that children who are “singled out as a target group for recruitment or use by an armed group” may constitute a social group “due to the shared 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.” Child Guidelines, ¶ 52. However, U.S. courts frequently reject social groups based on opposition to gang recruitment. See *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (holding that Salvadoran males between the age of 8 and 15 who have been recruited by a gang but refused to join do not form a PSG); *Mayorga-Vidal v. Holder*, 675 F.3d 9, 15 (1st Cir. 2012) (collecting cases rejecting social groups based on youth resistant to gang recruitment).

<sup>96</sup> Asylum seekers who resist gang recruitment or oppose gang practices, for example, may be seen as expressing a political opinion, or their resistance may be a manifestation of religious conviction. Thus, persecution in such settings might effectively be linked to political opinion or religion, actual or imputed. Gang Guidance Note, ¶¶ 32, 45-51.

<sup>97</sup> Social Group Guidelines, ¶ 21.

<sup>98</sup> Gender Guidelines, ¶ 20; Social Group Guidelines, ¶¶ 15, 18.

<sup>99</sup> UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”*, at 47 (July 15, 2020), <https://www.refworld.org/docid/60f846504.html> [hereinafter UNHCR Comments on Global Asylum Rule]; UNHCR Amicus Brief, *In the Matter of Thomas*, at 17 (BIA Jan. 25, 2007), <https://www.refworld.org/pdfid/45c34c244.pdf>.

<sup>100</sup> Social Group Guidelines, ¶ 22.

this stance when it declines to investigate violence they have suffered or prosecute the perpetrators of that harm.<sup>101</sup>

U.S. law governing nexus exceeds international standards. Under U.S. law, an asylum seeker must demonstrate that a protected ground “was or will be at least one central reason” for the applicant’s persecution.<sup>102</sup> However, U.S. courts have acknowledged that applicants—especially those victimized as young children—will rarely know the “exact motivation” of their persecutors.<sup>103</sup> As a result, a child’s failure to explicitly articulate a nexus to the harm he or she experienced does not preclude a finding of nexus.<sup>104</sup> UNHCR notes that, as a Convention ground need not be the sole or dominant cause for the persecution (rather, it only needs to be a relevant contributing factor), the existence of personal or interpersonal animus does not necessarily lead to a claim failing for lack of nexus, an issue that has come up in U.S. asylum adjudication.<sup>105</sup> Persecution could, for example, be perpetrated due to personal or interpersonal animus in combination with one or more Convention grounds, and this would satisfy the causal link under international standards so long as the Convention ground(s) were a relevant, contributing factor. Accordingly, personal or interpersonal animus should not automatically preclude a grant of refugee status.

#### IV. Child Asylum Claims Based on Other Convention Grounds

Any of the Convention grounds may be applicable to child asylum claims, and while a large number of child claims fall under the “particular social group” ground, those “may frequently overlap with a claim on other grounds,” such as political opinion, race, or religion.<sup>106</sup> For example, child asylum seekers who resist gang recruitment or oppose gang practices may be seen as expressing a political opinion, or their resistance may be a manifestation of a religious conviction.<sup>107</sup> Thus, persecution in such settings might effectively be linked to political opinion or religion, actual or imputed.

UNHCR’s *Child Guidelines* elaborate on how each of the Convention grounds may apply in child asylum claims.<sup>108</sup> Persecution may be on account of race and nationality or ethnicity in child claims, for example, where policies “deny children of a particular race or ethnicity the right to a nationality or to be registered at birth,” or the right to education or health services.<sup>109</sup> Indigenous children may be at heightened risk of these and other types of harm on account of their race or ethnicity, which may rise to the level of

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<sup>101</sup> UNHCR Amicus Brief, *In the Matter of Thomas*, at 17.

<sup>102</sup> INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). As with the definition of PSG, federal courts have interpreted the “one central reason” requirement in various ways, and some administrations have attempted to heighten the requirement for proving nexus. While the Third Circuit held that “one central reason” must be “an essential or principal reason for the persecution,” for example, *Gonzalez-Posadas v. U.S. Att’y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015), the Ninth Circuit has held that the persecutor may be motivated by more than one central reason, and an applicant does not have to prove which reason was dominant. *Singh v. Holder*, 764 F.3d 1153, 1162 (9th Cir. 2014). In addition, in *Matter of A-B-II*, then-Acting Attorney General Rosen attempted to heighten the nexus requirement, by requiring that asylum seekers show that the protected status was the “but-for” cause and “neither incidental nor tangential to another reason for the harm.” *Matter of A-B-II*, 28 I&N Dec. 199, 210-11 (A.G. 2021), *vacated by Matter of A-B-III*, 28 I&N Dec. 307 (A.G. 2021).

<sup>103</sup> *Ordonez-Quino v. Holder*, 760 F.3d 80, 90 (1st Cir. 2014).

<sup>104</sup> RAO, *Child Claims*, at 53.

<sup>105</sup> See, e.g., *Matter of Pierre*, 15 I&N Dec. 461, 462-63 (BIA 1975) (finding no nexus because “[t]he motivation behind [the persecutor’s] alleged actions appears to be strictly personal”); *Marquez v. INS*, 105 F.3d 374, 380 (7th Cir. 1997) (“A personal dispute, no matter how nasty, cannot support [a noncitizen’s] claim of asylum.”); Final Rule, *Procedures for Asylum and Withholding of Removal; Credible and Reasonable Fear Review*, 85 Fed. Reg. 80,274, 80,281 (Dec. 11, 2020) (providing that “[i]nterpersonal animus or retribution” is a circumstance that “would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant’s inability to demonstrate persecution on account of a protected ground”) (currently enjoined by *Pangea Legal Services v. DHS* (3:20-cv-09253) and *Immigration Equality v. DHS* (3:20-cv-09258), Order Re Preliminary Injunction (N.D. Cal. Jan. 8, 2021)).

<sup>106</sup> Handbook, ¶ 77.

<sup>107</sup> Gang Guidance Note, ¶¶ 32, 45-51.

<sup>108</sup> *Child Guidelines*, ¶¶ 40-52.

<sup>109</sup> *Child Guidelines*, ¶ 41.

persecution.<sup>110</sup> This Convention ground would also apply where policies remove children from their parents “on the basis of particular racial, ethnic or indigenous backgrounds” or where girls belonging to ethnic minorities are systematically targeted for rape, trafficking, or recruitment into armed forces or groups.<sup>111</sup>

Religious beliefs or a refusal to hold such beliefs may form the basis of a child asylum claim.<sup>112</sup> It is not necessary for children to be actively practicing their religion to have a claim based on religion, as, for instance, a persecutory actor may also perceive a child as having certain religious beliefs because of his or her parents’ religion.<sup>113</sup> Children may also not have influence over which religion they belong to, causing a child’s religion to at times be as innate as race or ethnicity.<sup>114</sup> Some religions assign children particular roles or demand certain behaviors which, if not fulfilled, may lead to punishment, potentially giving rise to harm or a well-founded fear of persecution.<sup>115</sup> Similarly, harmful traditional practices may have a religious component that requires girls to undergo female genital mutilation (FGM), or girls might be punished for honor crimes in the name of religion.<sup>116</sup> U.S. courts and administrative bodies have recognized child asylum claims based on these types of religious beliefs and practices.<sup>117</sup>

Children may also hold political opinions, independently of adults, for which they may fear being persecuted.<sup>118</sup> As with religious beliefs, State authorities and non-State actors may impute political opinions of a child’s parents to the child, or they may impute a political opinion based on children’s actions or affiliations.<sup>119</sup> U.S. courts and administrative bodies have recognized child asylum claims based on political opinion.<sup>120</sup>

## V. Agents of Persecution and a State’s Ability and Willingness to Protect

International legal standards do not require the persecutor to be a State actor. In UNHCR’s view, “the source of feared harm is of little, if any, relevance to the finding of whether persecution has occurred, or is likely to occur.”<sup>121</sup> The Handbook, while acknowledging that persecution is “normally related to action

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<sup>110</sup> Guatemala Eligibility Guidelines, at 6-7, 47; Children on the Run, at 34 (pointing out that indigenous children “composed 55% of all the Guatemalan children who discussed deprivation and social exclusion.”); see also *Ordonez-Quino v. Holder*, 760 F.3d 80, 88-90 (1st Cir. 2014) (finding that the Guatemalan army bombing of the Mayan Quiche population, including children, women, and the elderly, constituted persecution against Mayan Quiche child on account of his race and ethnicity).

<sup>111</sup> Child Guidelines, ¶ 41; Guatemala Eligibility Guidelines, at 47.

<sup>112</sup> Child Guidelines, ¶ 42.

<sup>113</sup> Child Guidelines, ¶ 42

<sup>114</sup> Child Guidelines, ¶ 43.

<sup>115</sup> Child Guidelines, ¶ 43.

<sup>116</sup> Child Guidelines, ¶ 44.

<sup>117</sup> See *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000) (granting asylum to young woman based on her liberal religious beliefs); see also *Gao v. Ashcroft*, 299 F.3d 266, 267 (3d Cir. 2002) (recognizing teenage girl’s well-founded fear of persecution based on her involvement in the religious Falun Gong movement, dismissing IJ’s adverse credibility finding, and remanding for further proceedings); *Pascual-Juan v. Barr*, 817 Fed. Appx. 449, 449-50 (9th Cir. 2020) (unpublished opinion) (recognizing that 13-year-old girl may have suffered past persecution on account of her religion where she and her father were beaten and her mother was sexually harassed for their Evangelical religious beliefs).

<sup>118</sup> Child Guidelines, ¶ 45. “Many national liberation or protest movements are driven by student activists, including schoolchildren,” for example, and children may participate in political activities such as “distributing pamphlets, participating in demonstrations, acting as couriers, or engaging in subversive activities.” *Id.*

<sup>119</sup> Child Guidelines, ¶ 46.

<sup>120</sup> See *Li Wu Lin v. INS*, 238 F.3d 239, 248 (3d Cir. 2001) (granting asylum based on political opinion to 15-year-old youth activist who participated in pro-democracy protests in China); see also *Daci v. Gonzales*, 186 Fed. Appx. 136, 137 (2d Cir. 2006) (recognizing child’s well-founded fear based on his political activities and remanding for further proceedings); *Balliu v. Gonzales*, 467 F.3d 609 (7th Cir. 2006) (evaluating claim of asylum seeker involved in a political youth group); *Zhang v. Gonzales*, 408 F.3d 1239, 1246-47 (9th Cir. 2005) (finding that parents’ resistance to China’s population-control measures resulted in imputed political opinion to child); *Deloso v. Ashcroft*, 378 F.3d 907, 910 (9th Cir. 2004) (evaluating claim of youth involved in anti-Communist activities), superseded on other grounds, 393 F.3d 858 (9th Cir. 2004); RAI0, Child Claims, at 54 (providing guidance to asylum officers on child asylum claims based on political opinion).

<sup>121</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 19 (Apr. 2001), <https://www.refworld.org/docid/3b20a3914.html>.

by the authorities of a country,” explicitly states that it “may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”<sup>122</sup> Such claims may warrant a more nuanced analysis, but that does not render these claims “less relevant or less deserving of international protection.”<sup>123</sup>

Persecution by non-State actors may give rise to an asylum claim if such persecution is “knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”<sup>124</sup> *Effective protection* is not “merely enacting a law prohibiting persecutory practices,”<sup>125</sup> as the State “may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.”<sup>126</sup> For example, State protection is *ineffective* where “the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence . . . with due diligence.”<sup>127</sup> Instead, effective protection depends on the de jure as well as de facto capabilities of the authorities.<sup>128</sup>

In child asylum claims, the agent of persecution is frequently a non-State actor, such as “militarized groups, criminal gangs, parents and other caregivers, [and] community and religious leaders.”<sup>129</sup> Assessing the inability or unwillingness of the State to protect a child must include consideration of the ability or willingness of State officials to respond effectively to children’s needs and complaints.<sup>130</sup> The existence of legislation that prohibits and sanctions persecutory conduct against children is in itself insufficient evidence to reject a child’s claim for protection.<sup>131</sup> Instead, a case-specific assessment must evaluate “whether or not the authorities ensure that such incidents are effectively investigated and that those responsible are identified and appropriately punished.”<sup>132</sup> Moreover, a child’s access to State protection also depends on the willingness and ability of the child’s parents or other primary caregiver to “exercise rights and obtain protection on behalf of the child,” including filing a complaint with the police or other authorities.<sup>133</sup> Some children may not have an adult who can represent them or not be able to approach law enforcement officials openly themselves, resulting in their claims being more easily dismissed or not taken seriously.<sup>134</sup> All of the above factors must be taken into account when assessing the ability and willingness of a State to protect a child.<sup>135</sup>

Under U.S. law, persecution by non-State actors may give rise to asylum eligibility when the government is unwilling or unable to either control the ‘private’ actor or to protect the asylum seeker.<sup>136</sup> Most courts, administrative bodies, and training materials apply the framing focused on the ‘private’ actor,<sup>137</sup> which

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<sup>122</sup> Handbook, ¶ 65.

<sup>123</sup> UNHCR Comments on Global Asylum Rule, at 44.

<sup>124</sup> Handbook, ¶ 65.

<sup>125</sup> UNHCR Amicus Brief, *Mijangos v. Barr*, 27, No. 19-70489, (9th Cir. Feb. 28, 2020), <https://www.refworld.org/docid/5f60a2bd4.html>.

<sup>126</sup> Gender Guidelines, ¶ 11 (emphasis omitted).

<sup>127</sup> Sexual Orientation Guidelines, ¶¶ 34-37.

<sup>128</sup> UNHCR Amicus Brief, *Mijangos v. Barr*, at 27.

<sup>129</sup> Child Guidelines, ¶ 37

<sup>130</sup> Child Guidelines, ¶ 37; UNHCR Comments on Global Asylum Rule, at 74.

<sup>131</sup> Child Guidelines, ¶ 38.

<sup>132</sup> Child Guidelines, ¶ 38.

<sup>133</sup> Child Guidelines, ¶ 39.

<sup>134</sup> Child Guidelines, ¶ 39.

<sup>135</sup> Child Guidelines, ¶ 39.

<sup>136</sup> *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014); see also *Rosales Justo v. Sessions*, 895 F.3d 154, 159, 163 (1st Cir. 2018) (holding that asylum seeker met the “unable or unwilling” standard where government displayed a “willingness to investigate” the murder of the asylum seeker’s family member by non-State actors but nonetheless could not protect the applicant).

<sup>137</sup> See *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2015) (holding that a non-State actor’s conduct may constitute persecution where the government is “unable or unwilling to control it”); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014) (mentioning the Guatemalan government’s ability to

diverges slightly from the international standard because it focuses on a State’s ability to *control the persecutor*, rather than on its ability to effectively *protect an individual* from persecution. Children do not necessarily have to report their abuse to the authorities for their asylum claims to succeed.<sup>138</sup> There may exist several reasonable explanations for failing to seek protection, including the child’s age, the government’s unwillingness or inability to act in similar situations, or an increased risk to the child based on affirmatively seeking protection.<sup>139</sup> Still, the U.S. government previously attempted to heighten the standard by requiring asylum seekers to show that the State “condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”<sup>140</sup> This development was heavily litigated in federal courts<sup>141</sup> until the decision was vacated and adjudicators received instructions to revert to the previous “unwilling or unable to control” standard.<sup>142</sup>

## VI. Procedural Safeguards and Best Interests of the Child

As set forth above, because of children’s unique vulnerabilities, States must consider the best interests of the child when taking any action affecting children.<sup>143</sup> In light of the potential gravity of their consequences, policies and procedures that impact children, including those governing asylum adjudication, must incorporate strict procedural safeguards.<sup>144</sup> In other words, international standards require that when the asylum applicant is a child, key procedural safeguards must be guaranteed.<sup>145</sup> UNHCR has outlined these in its Best Interests Procedure Guidelines, and they include:<sup>146</sup>

- Allowing children to express their own views and utilizing a child-friendly approach in all aspects of processes impacting children.
- Involving staff with relevant child protection expertise and experience working with children and adolescents.<sup>147</sup>
- Ensuring that children who have been separated from a parent or are otherwise not in the care of a parent or legal guardian have access to an attorney to represent their rights and best interests.

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control the applicant’s husband; RAI0 Directorate, *Officer Training Definition of Persecution and Eligibility based on Past Persecution*, at 4.2 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/Persecution\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf) (“An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.”); Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUMN. RTS. L. REV. 441, 455-91 (Winter 2021) (analyzing the standard applied at the BIA, in each federal Circuit Court, and at the Supreme Court.).

<sup>138</sup> *Bringas-Rodriguez v. Session*, 850 F.3d 1051, 1073-75 (9th Cir. 2017).

<sup>139</sup> RAI0, Child Claims, at 49.

<sup>140</sup> *Matter of A-B- I*, I&N Dec. 316, 337 (A.G. 2018), *Matter of A-B- II*, 28 I&N Dec. 199 (A.G. 2021) vacated by *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

<sup>141</sup> See *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) (finding that implementation of the heightened standard was arbitrary and capricious as the government failed to acknowledge or explain the change); *Jimenez Galloso v. Barr*, 954 F.3d 1189, 1192 (8th Cir. 2020) (holding that the unwilling-or-unable test, rather than the completely helpless test, controls since the two tests conflict and the unwilling-or-unable standard came first). For a detailed discussion on the “unwilling or unable” standard and interpretations in the different federal circuit courts before the vacatur of *Matter of A-B-*, see generally Ellison & Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*.

<sup>142</sup> *Matter of A-B- III*, 28 I&N Dec. 307, 309 (A.G. 2021) (vacating *Matter of A-B- I* and *II*, underscoring confusion over the applicable “unable or unwilling standard,” and instructing courts to follow pre-*A-B- I* precedent until further rulemaking clarifies the standard).

<sup>143</sup> See CRC, art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”); U.N. Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, Art. 3, ¶ 1, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

<sup>144</sup> BIP Guidelines, ch. 2.3.

<sup>145</sup> Child Guidelines, ¶ 65.

<sup>146</sup> See generally BIP Guidelines.

<sup>147</sup> Involving a multidisciplinary team of professionals from various social service providers, such as child protection, refugee protection, social work, psychologist, provides additional safeguards. BIP Guidelines, ch. 2.3.

- Prioritizing decisions regarding children such that they are completed in the shortest time possible, while still respecting the child’s need for adequate time to gain trust and without compromising other procedural aspects.<sup>148</sup>

In addition to the above procedural safeguards, the principle of family unity is fundamental to the best interests of the child and must be respected and upheld in processes impacting families, including in procedures governing asylum processing and adjudication. The right to family life and family unity is enshrined in international human rights, humanitarian, and refugee law,<sup>149</sup> and international law mandates that States protect family unity, recognizing the family unit as the natural, fundamental group of society.<sup>150</sup> Family unity is especially relevant in the context of asylum procedures because any separation from parents or other caregivers could cause or exacerbate trauma that impact a child’s ability to convey their account and because children may not be able to articulate their claims to refugee status in the same way that adults can, making it useful to have family members who can provide relevant information about the child’s asylum claim.<sup>151</sup>

Further, adjudicators must assess the presentation of the asylum claim from a child’s perspective. Children cannot be expected to provide adult-like accounts and may have difficulty articulating their fears.<sup>152</sup> They may be too young or immature to be able to evaluate what information is important or to convey what they have witnessed or experienced in a manner that is easily understandable to an adult.<sup>153</sup> When a child experiences persecution at a young age, these difficulties are compounded because the memories of these experiences are formed at an innocent and impressionable stage of development.<sup>154</sup>

Finally, it is a fundamental principle that an adjudicator has a shared duty with the asylum applicant to develop relevant facts and must consider all evidence in the record.<sup>155</sup> In cases involving children—especially where the child is separated or unaccompanied—the adjudicator may have to assume a greater burden of proof, and the child should be given the benefit of the doubt.<sup>156</sup> Factors including a child’s stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability must be considered to ensure an appropriate application of the eligibility criteria for refugee status.<sup>157</sup> Children may, for instance, have limited knowledge of country conditions or family circumstances, may be unable

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<sup>148</sup> UNHCR, *Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families* (Jan. 25, 2022) (citing BIP Guidelines).

<sup>149</sup> Frances Nicholson, Independent Consultant to the UNHCR Division of International Protection, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, 1, U.N. Doc. PPLA/2018/01 (Jan. 2018), available at <https://www.unhcr.org/5a8c40ba1.pdf>.

<sup>150</sup> G.A. Res. 217(III) A, Universal Declaration of Human Rights, U.N. Doc. A/810, art. 16(3) (Dec. 1948); U.N.G.A., International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 23(1) (Dec. 19, 1966) [hereinafter *ICCPR*]; U.N.G.A., International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 10(1) (Dec. 16, 1966); see also U.N.G.A., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, A/RES/45/158, art. 44 (Dec. 18, 1990) [hereinafter *CMW*]; CRC, art. 3; U.N.G.A., Convention on the Rights of Persons with Disabilities, A/RES/61/106, Annex I (Dec. 13, 2006); U.N. Human Rights Committee, *General Comment No. 19 on Article 23*, adopted at 39th Session (July 27, 1990).

<sup>151</sup> Child Guidelines, ¶ 2; BIP Guidelines, ch. 3.3.3 (explaining that “information about the flight, the parents or other family members and the situation in the country of origin prior to the flight” is relevant information to be collected from people close to the child as part of the Best Interests Procedure); RAI0, Child Claims, at 52.

<sup>152</sup> Child Guidelines, ¶¶ 2, 72. Children may be unable to express fear when it would be expected, or, conversely, express exaggerated fear. Child Guidelines, ¶ 11.

<sup>153</sup> Child Guidelines, ¶ 72.

<sup>154</sup> Child Guidelines, ¶¶ 15-17, 72; Children on the Run, at 43 (noting that “[m]emories of traumatic events may linger in a child’s mind and may result in ongoing, long-term psychological harm”).

<sup>155</sup> Child Guidelines, ¶ 73. Although testimony alone can be sufficient to support a claim for asylum, where corroborating evidence is submitted, the claim must be assessed on the entirety of the record.

<sup>156</sup> Child Guidelines, ¶ 73.

<sup>157</sup> Child Guidelines, ¶ 4.

to fully explain the reasons for the persecution, or may not fully comprehend their vulnerability.<sup>158</sup> In such cases, “a decision maker should make an objective assessment of the risk that child would face”<sup>159</sup> and may need to “use all the means at his [or her] disposal to produce the necessary evidence in support of the application.”<sup>160</sup>

## VII. Overview of UNHCR Resources to Support Children’s Asylum Claims

For a discussion of substantive and procedural considerations relevant to child-specific asylum claims, including in the U.S. context, see:

- [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](#) (Sept. 2009)
- [UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child](#) (2021)
- [Amicus Brief, \*Marroquin-Perez v. Barr\*](#) (Feb. 2020)
- [Amicus Brief, \*Grace v. Barr\*](#) (July 2019)
- [Amicus Brief, \*Matter of O.L.B.D.\*](#) (Mar. 2019)
- [Amicus Brief, \*Mejilla-Romero v. Holder\*](#) (June 2010)
- [UNHCR Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families](#) (Jan. 2022)

For a discussion of the reasons why children who flee Central America and Mexico may need international protection, see:

- [Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection](#) (Mar. 2014)
- [Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico](#) (Oct. 2015)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala](#) (Jan. 2018)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras](#) (July 2016)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador](#) (Mar. 2016)
- [Guidance Note on Refugee Claims Relating to Victims of Organized Gangs](#) (Mar. 2010)

For other country-specific guidelines that discuss the situation and common protection needs of children, see:

- [International Protection Considerations with Regard to People Fleeing the Republic of Iraq](#) (May 2019)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan](#) (Aug. 2018)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka](#) (Dec. 2012)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea](#) (Apr. 2011)

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<sup>158</sup> Child Guidelines, ¶ 73.

<sup>159</sup> Child Guidelines, ¶ 11.

<sup>160</sup> Handbook, ¶ 196.



- [UNHCR Position on Returns to Burkina Faso \(July 2021\)](#)
- [UNHCR Position on Returns to Yemen – Update I \(Oct. 2021\)](#)
- [UNHCR Position on Returns to Mali – Update III \(Jan. 2022\)](#)