

# A “CHILD-CENTERED APPROACH” TO ASYLUM CLAIMS OF CHILDREN FLEEING THE CENTRAL AMERICAN TRIANGLE<sup>1</sup>

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## **I. INTRODUCTION**

This presentation advocates for a “child-centered approach” to the representation of children fleeing severe harm and death in Central America’s Northern Triangle region.<sup>3</sup> One challenge in these cases is overcoming the misconception that these children are only fleeing

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<sup>1</sup> This presentation is limited to asylum claims. While the “child-centered approach” also applies in most respects to the preparation and presentation of withholding of removal and CAT claims, they are not specifically addressed (i.e., standards of proof).

<sup>2</sup> We give special thanks to Carmen Halford, HLS ’16, for her wonderful assistance in researching and writing this presentation.

<sup>3</sup> El Salvador, Honduras and Guatemala.

general crime and violence so are not true refugees.<sup>4</sup> Key to the child-centered approach is understanding these children as *asylum seekers*, not as “*gang cases*.”

## **II. WHAT IS A CHILD-CENTERED APPROACH?**

### **A. *Historical Overview of the “Child-Centered Approach”***

The “child-centered approach” to asylum has been formalized over the past three decades and continues to evolve today. The recognition of children’s special challenges in seeking asylum grew out of advocacy efforts by women’s and children’s rights activists beginning in the 1990s. Advocates’ successes in the field of women’s asylum claims especially, such as the landmark issuance of gender guidelines, paved the way for a more nuanced understanding of child asylum seekers.

As a response to these advocacy efforts, the UNHCR issued guidelines on refugee children and unaccompanied minors seeking asylum in the late 1990s.<sup>5</sup> Canada followed with its own guidelines in 1997.<sup>6</sup> The U.S. government has likewise produced a significant body of guidelines and other sub-regulatory directives on child asylum applicants. First were the 1998 Legacy INS Guidelines for Children’s Asylum Claims.<sup>7</sup> The EOIR issued its own guidelines in 2007 for child applicants in immigration courts.<sup>8</sup> In 2008, Congress, in enacting the William Wilberforce Trafficking Protection Act (TVPPRA) also, for example, recognized the “legal disability” of unaccompanied minor asylum seekers.<sup>9</sup> On that basis, the TVPPRA granted children certain additional procedural protections not available to adults. In 2009, the USCIS also issued Asylum Officer training materials on children’s asylum claims.<sup>10</sup>

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<sup>4</sup> AILA, *An Update on Particular Social Groups* 4 (Webinar, Dec. 16, 2014) (hereinafter AILA PSG Update).

<sup>5</sup> UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Feb. 1997) (hereinafter UNHCR Unaccompanied Children Guidelines).

<sup>6</sup> Immigration and Refugee Board, Canada, *Child Refugee Claimants: Procedural and Evidentiary Issues* (1996).

<sup>7</sup> Jeff Weiss, Acting Director, Office of International Affairs, INS, Immigration and Naturalization Service, *Guidelines for Children’s Asylum Claims* (File 120/11.26, Dec. 10, 1998). Note that in 2007, the INS issued new guidelines: Legacy INS—Asylum Office, *Updated Procedures for Minor Principal Applicant Claims – Asylum Division Memorandum* (August 2007) (hereinafter “INS Children’s Guidelines”).

<sup>8</sup> Memorandum from David L. Neal, Chief Immigration Judge, Executive Office for Immigration Review (EOIR), *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (May 22, 2007), available at <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf> (hereinafter EOIR Children’s Guidelines).

<sup>9</sup> See William Wilberforce Trafficking Victims Protection Act of 2008 8 C.F.R. §§ 1208.4(a)(5)(ii), 208.4(a)(5)(ii) (the “TVPPRA”).

<sup>10</sup> USCIS Asylum Office, *Lesson Plan Overview—Asylum Officer Basic Training Course—Guidelines for Children’s Asylum Claims* (2009) available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Gui>

In 2010, the First Circuit decided *Mejilla-Romero*, a landmark case for children’s asylum claims. In that case, following a strong dissent by Judge Stahl, the First Circuit reversed its initial denial of Celvyn Mejilla-Romero’s petition for review and remanded the case, directing adjudicators to apply the child-sensitive approach prescribed in agency guidelines and international standards.<sup>11</sup> The IJ based his conclusions solely on the testimony of Celvyn, a child, who had characterized the harm suffered as isolated incidents of bullying by other children and quarrels with one neighbor.<sup>12</sup> On review, the applicant’s attorneys argued that the IJ’s failure to consider age in his analysis was clear error.<sup>13</sup> They emphasized the special challenges that children face both in understanding the context for harm inflicted upon them and in testifying. They characterized the testimony of Celvyn, the child applicant, as age-appropriate, and called on the court to understand it in light of the extensive background information submitted.<sup>14</sup> Key to the claim was Celvyn’s membership in a family which had been targeted for decades due to political activism.<sup>15</sup> Celvyn’s attorneys also stressed that relocating elsewhere in Honduras would not be reasonable in light of the absence of caretakers who could provide him protection.<sup>16</sup> To strengthen this claim, they submitted evidence of the severe harms Honduran street children faced. J. Stahl’s powerful dissent itself adopted the child-centered approach and applauded the strong body of evidence from family members and country experts.<sup>17</sup>

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delines-for-Childrens-Asylum-Claims-31aug10.pdf (hereinafter Asylum Officer Basic Training Course)(hereinafter Asylum Officer Basic Training Course.)

<sup>11</sup> *Mejilla-Romero v. Holder*, 600 F.3d 63, 77 (1<sup>st</sup> Cir. 2010) (Stahl, J., dissenting); *vacated* and remanded by same panel, *Mejilla-Romero v. Holder*, 614 F.3d 572, 573 (1<sup>st</sup> Cir. 2010) (holding “in light of the Guidelines [for Children’s Asylum Claims (1998) and Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (2004)] standards regarding children asylum seekers... we vacate both the panel decision and the BIA’s decision and we remand this case to the BIA”); INS Children’s Guidelines, *supra* note 7; *see also* Deborah Anker et al., *Mejilla-Romero: A New Era for Child Asylum*, 12-09 Immigr. Briefings 1, 7-8 (2012)(hereinafter A New Era For Child Asylum.)

<sup>12</sup> *Mejilla-Romero*, 600 F.3d at 82 (Stahl, J., dissenting).

<sup>13</sup> Brief for petitioner at 18-19 *Mejilla-Romero*, 600 F.3d 63 (1<sup>st</sup> Cir. 2010) (on file with authors).

<sup>14</sup> Background information included affidavits from (1) Celvyn, (2) his mother, (3) his aunt, and (4) numerous country experts addressing human rights in Honduras, including gang violence, street children, the political situation in the Olancho area and (5) a psychologist, evaluating Celvyn Mejia. Additional country conditions documentation included: (6) reports of the Inter-American Commission on Human Rights addressing the situation of Honduran street children, (7) documents addressing human rights conditions in Honduras, (8) documents addressing violence against youth, particularly street children, in Honduras, (9) documents addressing widespread violence and the unwillingness or inability of police to contain violence in Honduras, (10) documents addressing growing and uncontrollable gang activity and violence in Honduras, (11) documents addressing police corruption and brutality in Honduras, (12) documents addressing the history of land struggles in Olancho and the history of Lincoln Coleman.

<sup>15</sup> Brief for petitioner, *Mejilla-Romero*, 600 F.3d. *supra* note 13 at 24-27.

<sup>16</sup> *Id.* at 28; *see also* *Mejilla-Romero*, 600 F.3d at 91 (Stahl, J., dissenting)

<sup>17</sup> *Mejilla-Romero*, 600 F.3d at 77.

**B. TAKEAWAYS: WHAT IS A “CHILD-CENTERED APPROACH?”**

A “child-centered approach” recognizes that children face special challenges in bringing an asylum claim. For example, a young age at the time of *harm* can impede both memory and understanding of what occurred and why.<sup>18</sup> Adults may have shielded children from the underlying reasons for which the child and his family were harmed. Adults may also have shielded children from the harm suffered by other members of the family and community. Age at the time of *application* can affect ability to grasp the theory of the case and to tell a complete and coherent story.<sup>19</sup> In addition, harm experienced at a young age can result in lasting trauma, also impeding ability to testify.<sup>20</sup>

While the law is evolving in favor of this child-centered approach, advocates bear the responsibility to continue educating adjudicators and advocating for recognition of children’s special challenges in the asylum context. Advocates should keep the approach in mind when constructing each part of a client’s case.

**III. THERE’S NO SUCH THING AS A “GANG CASE”: HOW TO APPROACH EACH ELEMENT IN A CHILD-CENTERED CLAIM**

A large number of children seeking asylum in the U.S. over the last several years have fled harm at the hands of Central American gangs and gang members.<sup>21</sup> The fact that a child faces gang-based harm, however, does not transform a claim into a new type of case. Like any asylum claim, practitioners must separately consider each of the following elements: (1) standard of proof, (2) well-founded fear (3) harm, (3) lack of state protection, (4) grounds, (5) nexus and (6) country-wide persecution. The persecutors in these claims (gangs and gang members) are

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<sup>18</sup> See, e.g., *Civil v. INS*, 140 F.3d 52, 62 (1st Cir. 1998)(Bownes, J., dissenting); *Kahssai v. INS*, 16 F.3d 323, 329 (9<sup>th</sup> Cir. 1994); INS Children’s Guidelines *supra* note 7; EOIR Guidelines, *supra* note 8.

<sup>19</sup> See *Mejilla-Romero*, 600 F.3d at 59 (J. Stahl, dissenting); UNHCR Unaccompanied Children Guidelines; *supra* note 5 Asylum Officer Basic Training Course, *supra* note 10.

<sup>20</sup> Aspects of the “child-centered approach” may also apply to adults who are presenting claims of the harm they suffered as children.

<sup>21</sup> UNHCR, in *Children On The Run; Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*,” (UNHCR, 2014) reports on the targeting of children from Mexico, El Salvador, Honduras and Guatemala by “organized armed criminal actors” which the includes the “third generation gangs” specifically addressed in this presentation. UN High Commissioner for Refugees (UNHCR), *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection*, 13 March 2014, available at: <http://www.refworld.org/docid/532180c24.html> [accessed 18 April 2016]

non-state actors, often complicitous with state actors.<sup>22</sup> Persecution by non-state actors has long been recognized. Practitioners should seek to present these claims as the asylum claims they are, rather than simply as “gang cases” seeking asylum.

#### **A. STANDARD OF PROOF**

Under U.S. law, a refugee is a person unable or unwilling to return to his or her country of origin or last habitual residence because of either “persecution or a well-founded fear of persecution” on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>23</sup>

Various guidelines, for both asylum officer and immigration judges, recognize that children are less able than adults to present a clear and complete narrative of what they experienced. This challenge for children is described in various sources as a (1) lesser “ability to understand what happened,”<sup>24</sup> (2) lesser “skill in describing the event in a way that is intelligible to adults,”<sup>25</sup> (3) lesser ability to be as precise<sup>26</sup> for both developmental and cultural reasons,<sup>27</sup> (4) lack of knowledge about “conditions in the home country, as well as their vulnerability in that country” and “the specific details or circumstances that led to their departure,”<sup>28</sup> (4) hesitancy to talk about the facts of their case because they may seek to avoid reliving their trauma and (5) fear of testifying in a foreign environment.<sup>29</sup>

Accordingly, guidelines instruct adjudicators to keep in mind children’s special challenges when evaluating their testimony. This extends to evaluating problematic aspects of

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<sup>22</sup> Gang-based harm may also be quasi-governmental or even actually governmental, for example, where a gang member is also a police officer. In the case of Central America, many gangs are now “third generation gangs”: “Third generation gangs function as de facto governments, controlling significant territory (competing with the state for power); the gangs often use brutal tactics to fight for territorial and political power... . The U.S. Agency for International Development (USAID) report that these groups “exercise[], [their] own justice demanding certain behavior from...citizens and sanctioning those who do not obey.” Anker and Lawrence, “*Third Generation Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground*,” 14-10 Immigration Briefings 3 (Oct. 2014) (hereinafter “Third Generation Gangs”)— citing U.S. Agency for International Development Bureau for Latin America and the Caribbean, Central America and the Mexico Gang Assessment 51 (2006), available at [http://pdf\\_docs/PNADG834.pdf](http://pdf_docs/PNADG834.pdf) (citation omitted). Children and their families who stand up to the gangs and their life styles, are targeted with great violence

<sup>23</sup> INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42).

<sup>24</sup> EOIR Children’s Guidelines *supra* note 8 at 3, 7.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Asylum Officer Basic Training Course, *supra* note 10 at 29-30.

<sup>28</sup> *Id.* at 35.

<sup>29</sup> See INS Children's Guidelines, *supra* note 10 at 5.

testimony (i.e., incompleteness or inconsistency) and to the way that adjudicators elicit testimony and the way the adjudicator should interpret the testimony.

Where a child applicant's testimony appears incomplete, adjudicators should place greater weight on "objective factors" and give children a "liberal benefit of the doubt."<sup>30</sup> Guidelines require use of country conditions information to "supplement the record as necessary to ensure a full analysis of the claim."<sup>31</sup> Where there are inconsistencies in the testimony, immigration judges should "not assume that inconsistencies are proof of dishonesty..."<sup>32</sup> For both completeness (i.e., detail) and consistency, asylum officers are instructed to only require a level consistent with "the child's age and maturity level."<sup>33</sup>

Training materials instruct asylum officers to elicit testimony in a child-sensitive manner. Acknowledging that children may be hesitant to talk freely, the TVPRA emphasizes "building rapport to enable the child to recount his or her fears."<sup>34</sup> Asylum officers are also trained in child-specific questioning and listening techniques.<sup>35</sup> They must consider certain factors that could impede the child from developing a claim, including: "chronological age," "physical, psychological, and emotional development," "cognitive processes," "educational experience," "language ability," "experience with forms of violence," "chaotic social conditions," and "physical...and mental disabilities."<sup>36</sup> In addition, children may simply lack knowledge about the details of their circumstances.<sup>37</sup> Taking all of this into account, training materials require asylum officers to probe the child to find out relevant details, including, e.g., possible religious or political affiliation of family members.<sup>38</sup> Where a child has not been able to articulate an asylum claim, guidelines "demand that asylum officers thoroughly research conditions in the countries of origin and first asylum when evaluating a child's case."<sup>39</sup>

Finally, the testimony should be evaluated as words spoken by a child, and, often, as words spoken by a *traumatized* child. Asylum officers must "evaluate the child's words from a

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<sup>30</sup> *Id.* at 26.

<sup>31</sup> *Id.* at 27.

<sup>32</sup> EOIR Children's Guidelines *supra* note 8 at 7.

<sup>33</sup> *Id.* at 26.

<sup>34</sup> INS Children's Guidelines, *supra* note 7 at 7-13; *see also* Asylum Officer Basic Training Course, *supra* note 10, at 22.

<sup>35</sup> *Id.*

<sup>36</sup> Asylum Officer Basic Training Course, *supra* note 10, at 13-14.

<sup>37</sup> *Id.* at 35.

<sup>38</sup> *Id.* at 29-30.

<sup>39</sup> *Id.* at 52.

child's point of view.”<sup>40</sup> “An adjudicator should also consider the child's emotional state in assessing testimony.”<sup>41</sup> Asylum Office training materials emphasize that trauma may affect a child's memory and emotional state, thus impairing her ability to testify.<sup>42</sup> The materials warn that effects of trauma may “be mistaken as indicators of fabrication or insincerity.”<sup>43</sup> To avoid such mischaracterization, they then instruct asylum officers on how to recognize trauma: “[s]ymptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation ... . A child may appear numb or show emotional passivity ... [or] ... may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds ... .”<sup>44</sup>

### ***1. Well-Founded Fear***

An applicant establishes a well-founded fear of persecution upon a showing that the objective facts exist causing one to fear persecution, and that the feared persecution is a reasonable possibility.<sup>45</sup> An applicant “can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.” The Supreme Court in *Cardoza-Fonseca* found that, “There is simply no room in the United Nations definition for concluding that because an applicant has only a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.”<sup>46</sup>

Establishing a well-founded fear of persecution requires meeting both subjective and objective tests. Children, however, often experience and exhibit fear differently from adults. Adjudicators and the UNHCR Handbook have recognized this fact, opining that children (especially those under the age of 16) may lack the maturity to form a well-founded fear of persecution.<sup>47</sup> In *Abay v. Ashcroft*, the Sixth Circuit considered an immigration judge's finding

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<sup>40</sup> *Id.* at 26.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 32.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

<sup>46</sup> *Cardoza-Fonseca*, 480 U.S. at 431.

<sup>47</sup> *Abay v. Ashcroft*, 368 F.3d 634, 640, 2004 FED App. 0145P (6th Cir. 2004); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 215-16 (rev. ed. 1992), available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> (hereinafter UNHCR Handbook) (stating that children under the

that a nine-year old girl lacked “imminent fear” where her in-court testimony seemed “general” or “ambiguous.”<sup>48</sup> The court overturned the IJ’s finding, holding that adjudicators should follow INS training manuals and UNHCR guidelines on children and “keep[] in mind that very young children may be incapable of expressing fear to the same degree or with the same level of detail as an adult.”<sup>49</sup>

UNHCR and INS Guidelines also recognize that a parent’s reasons for sending the child abroad can be important in analyzing the child’s well-founded fear.<sup>50</sup> A parent’s decision to send the child away based on objectively reasonable fear of persecution can be important evidence of the child’s well-founded fear.<sup>51</sup>

## **2. Past Persecution**

An applicant may establish eligibility for asylum based on evidence of past persecution alone.<sup>52</sup> An applicant who has suffered past persecution is presumed to also have a well-founded fear of future persecution.<sup>53</sup> The persecution can only be rebutted by evidence that: (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or (2) that the applicant could avoid future persecution by relocating to another part of his country.<sup>54</sup> Even where the adjudicator finds that the applicant’s fear is not well-founded, the adjudicator may grant asylum if: (1) the applicant has demonstrated compelling reasons for being unwilling or unable to return to her country arising out of the severity of the past persecution or (2) the applicant has established a reasonable possibility that she may suffer other serious harm upon removal to the home country.<sup>55</sup>

Rebuttal of a presumption of past persecution at this time for cases involving children fleeing Central America is generally highly unlikely due to: the worsening of country conditions

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age of 16 may lack maturity to form a well-founded fear and suggesting adjudicators thus give more weight to the objective part of the well-founded fear test).

<sup>48</sup> *Abay*, 368 F.3d at 640.

<sup>49</sup> *Abay*, 368 F.3d at 640 (grounding its decision in the INS Children’s Guidelines, *supra* note 7 and the UNHCR Handbook, *supra* note 47).

<sup>50</sup> INS Children’s Guidelines, *supra* note 7 at 20.

<sup>51</sup> *Id.*

<sup>52</sup> 8 C.F.R. § 1208.13(b), *See Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996); *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1995); *Matter of B-*, 21 I&N Dec. 66 (BIA 1995); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

<sup>53</sup> 8 C.F.C. § 1208.13(b)(1).

<sup>54</sup> 8 C.F.R. 13(b)(1)(i).

<sup>55</sup> 8 C.F.R. § 1208.13(b)(1)(iii).



affecting these children in Guatemala, Honduras and El Salvador; the level and types of harm to which these children are being subjected, including by “third generation gangs”; the high likelihood of country-wide persecution and the level of trauma these children have been made to suffer and continue to suffer after arriving in the U.S.

Furthermore, large numbers of these children are eligible for asylum on humanitarian grounds because of both the overwhelming harm they have already suffered, and the “other serious harm” they will suffer if returned, even when that harm has not been recognized as persecution.

### **C. HARM**

First, an applicant may show “persecution” of a child through a lesser degree of harm than the minimum required to show persecution of an adult,<sup>56</sup> as the effects of harm are more intense and long lasting when harm is inflicted at a younger age.<sup>57</sup> In *Kholyavskiy v Mukasey* the court found that adjudicators should consider the “cumulative significance” of harm suffered as a child.<sup>58</sup> That language suggests that harm at a young age leaves a deeper imprint. Ongoing psychological and emotional harm stemming from persecution suffered at a young age has been found to constitute persecution sufficient for a grant of asylum.<sup>59</sup>

Second, harm to family member(s) may constitute harm to the applicant where such events were perceived when the applicant was a child.<sup>60</sup> Indeed, a claim may rely predominantly on the child’s ongoing emotional response to harm to the family,<sup>61</sup> as a child is necessarily dependent on her family and community.<sup>62</sup> Four circuits have now recognized that children react

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<sup>56</sup> See, e.g., *Ordonez-Quino v. Holder* 760 F.3d 80, 84 (1st Cir. 2014); *Mejilla-Romero*, 600 F.3d 63; INS Children's Guidelines, *supra* note 7 at 19 (stating that “the harm a child fears or has suffered ... may be relatively less than that of an adult and still qualify as persecution.”).

<sup>57</sup> *Civil v. INS*, 140 F.3d 52, 62 (1<sup>st</sup> Cir. 1998)(Bownes, J. dissenting); *Khassai v. INS*, 16 F.3d 323, 329 (9<sup>th</sup> Cir. 1994).

<sup>58</sup> *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7<sup>th</sup> Cir. 2008).

<sup>59</sup> *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314-15 (9<sup>th</sup> Cir. 2012) (finding sufficient “harm” to constitute persecution where an infant born during the Guatemalan Civil War was exposed to ongoing violence in vitro, then born prematurely, severely malnourished, and suffered continuous fear).

<sup>60</sup> *Jorge-Tzoc v. Gonzalez*, 435 F.3d 146, 149-51 (2<sup>d</sup> Cir. 2006) (finding persecution where the indigenous Guatemalan applicant, at age seven, had family targeted by the army, a sister and cousin who were fatally shot, and who was displaced and suffered economic hardship, among other harms); *Kahsaai v INS*, 16 F.3d 323 (9<sup>th</sup> Cir. 1994).

<sup>61</sup> *Jorge-Tzoc*, 435 F.3d.

<sup>62</sup> *Jorge-Tzoc*, 435 F.3d at 150.

differently to injuries to family members,<sup>63</sup> and that harm to a family member leaves greater emotional scars when experienced at a young age.<sup>64</sup> The Third Circuit has found that harm to family members must be considered even where the child was unable to recall or testify about it.<sup>65</sup> Additionally, an advocate may frame harm to family members as harm to individuals similarly situated.<sup>66</sup>

Finally, a child may be more vulnerable to specific forms of harm. The INS Children's Guidelines recognize children are at a higher risk for the following harms: "sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment."<sup>67</sup> Cultural practices like female genital mutilation are also seen as a high risk.<sup>68</sup> Adjudicators, too, have recognized certain harms to which children are more likely to fall prey, including targeting due to imputed political opinion based on their families or communities.<sup>69</sup> Finally, violations of a child's fundamental human rights may be persecution.<sup>70</sup>

#### **D. LACK OF STATE PROTECTION**

The fact that a child did not seek state protection need not necessarily undermine the claim.<sup>71</sup> In such a scenario, adjudicators must "explore what, if any, means the child had of seeking protection."<sup>72</sup> To do so, the adjudicator is likely to "have to rely on objective evidence of government laws and enforcement."<sup>73</sup> Evidence of "government efforts to address criminal activities related to children" is considered particularly pertinent.<sup>74</sup>

#### **E. GROUNDS**

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<sup>63</sup> *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Jorge-Tzoc v. Gonzales*, 435 F.3d at 150; *Abay v. Ashcroft*, 368 F.3d at 640, 2004 FED App. 0145P (6th Cir. 2004).

<sup>64</sup> *Hernandez-Ortiz*, 496 F.3d at 1045.

<sup>65</sup> *Hernandez-Ortiz*, 496 F.3d at 1045-46.

<sup>66</sup> *Ananeh-Firempong v. INS*, 766 F.2d 621, 627 (1st Cir. 1985).

<sup>67</sup> INS Children's Guidelines, *supra* note 7 at 19.

<sup>68</sup> *Id.*

<sup>69</sup> *Mejilla-Romero*, 600 F.3d at 90 (Stahl, J., dissenting) (citing INS Children's Guidelines, *supra* note 7); *Andres v. Holder*, 312 Fed. Appx. 905 (9th Cir. 2009).

<sup>70</sup> See INS Children's Guidelines, *supra* note 7; Asylum Officer Basic Training Course, *supra* note 10 at 7-12.

<sup>71</sup> INS Children's Guidelines, *supra* note 7 at 26.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

A child may base a claim on any of the five grounds of asylum: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, and (5) political opinion.<sup>75</sup> Important in constructing the child's case is exploring all five grounds, and not necessarily jumping to a PSG based on resistance to gangs.

Well-recognized grounds for children's cases include: actual or imputed political opinion, family membership, race, religion, ethnicity, domestic violence, gender identity and gender (PSG). Note that gang violence is often directed disproportionately against certain groups, including women, religious organizations (churches etc), children, members of a particular family, indigenous people and community activists.<sup>76</sup>

**Religion, race and nationality.** Asylum claims have successfully been brought based on gang violence against religious and racial/ethnic groups. The UNHCR recognizes that certain individuals may resist joining gangs based on their religious convictions.<sup>77</sup> The UNHCR Guidance also note that gangs may operate based on racist or nationalist philosophies or in environments where severe discrimination for such reasons is common.<sup>78</sup> Practitioners should not hesitate to frame a case of persecution by gangs as a religion, race, ethnicity or nationality claim.

**Political Opinion.** Attorneys should also explore whether a child client has a political opinion claim. The premise, that a child may hold political opinions, has been accepted.<sup>79</sup> Indeed, the INS Children's Guidelines emphasize that asylum officers "should not assume that age alone prevents a child from holding political opinions for which he or she may be persecuted."<sup>80</sup> On the other hand, the guidelines also note that the ability to form such a political opinion "may be more difficult for a young child to establish."<sup>81</sup> However, even where a child fails to characterize certain views as "political opinions" there may still be a cognizable political opinion claim.

The political opinion ground is not limited to opinions in favor of or against recognized political parties. It extends to opinions on any matter in which the government may be involved,

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<sup>75</sup> See Deborah Anker, LAW OF ASYLUM IN THE UNITED STATES §§ 5:1 et seq. (2012).

<sup>76</sup> AILA PSG Update, *infra* note 85 at 4. See also UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 4-6 (2010)(hereinafter UNHCR Gang Guidance).

<sup>77</sup> UNHCR Gang Guidance, *supra* note 76 at 11.

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

<sup>79</sup> *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

<sup>80</sup> INS Children's Guidelines, *supra* note 7 at 22.

<sup>81</sup> INS Children's Guidelines, *supra* note 7 at 22.

and to matters involving a non-state persecutor from which the government fails to provide protection.<sup>82</sup> Expressions of fundamental human rights are generally protected as political opinions (i.e., the right to express dissident opinions, to be free from physical abuse, etc.).<sup>83</sup> The UNHCR recognizes that coercing someone to join a gang or preventing her from leaving a gang conflicts with protected human rights such as freedoms of association, to liberty and security.<sup>84</sup> For children fleeing Central America, the advocate should pay attention to any opposition to gangs by the applicant or her family. Resistance to gangs has been held to be a “political opinion.”<sup>85</sup> When arguing that opposition to gangs is a political opinion, the quasi-political nature of Central American gangs should factor into the adjudicator’s decision.<sup>86</sup> The argument for political opinion is considered stronger if the opinion was expressed publically<sup>87</sup> though expression of the opinion is not required.<sup>88</sup> Examples of expression include (1) membership in an organization,<sup>89</sup> (2) refusal to be an informant,<sup>90</sup> (3) exposing corruption,<sup>91</sup> (4) flight,<sup>92</sup> (5)

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<sup>82</sup> Third Generation Gangs, *supra* note 23; *see also* Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 746 (Can.). *See also* Chang v. I.N.S., 119 F.3d 1055, 1063 n. 5 (3d Cir. 1997) (defining “political” as “Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy.” (quoting Black’s Law Dictionary (5th ed. 1979))).

<sup>83</sup> Third Generation Gangs, *supra* note 23 at 3.

<sup>84</sup> UNHCR Gang Guidance, *supra* note 76 at 7.

<sup>85</sup> AILA PSG Update, *supra* note 4 at 4; *see also* Perez v. Holder, 761 F.3d 61 (1st Cir. 2014).

<sup>86</sup> *Henriquez-Rivas v. Attorney General*, No. 09-71571 (9th Cir. 2009) (12-year-old girl fled El Salvador when she testified against gang member defendants in her father’s murder trial then received death threats. Her asylum claim was based on numerous grounds, including political opinion, focusing on her expressed opposition to the gangs and her testimony against them).

<sup>87</sup> AILA PSG Update, *supra* note 4 at 4; *Perez v. Holder* 761 F.3d 61.

<sup>88</sup> Third Generation Gangs, *supra* note 24 at 3.

<sup>89</sup> *Fuentes-Colocho v. Holder*, 13-70470 (9th Cir. Aug. 13, 2014) (membership in a soccer team that actively opposed gangs);

<sup>90</sup> *See, e.g.,* Chang v. I.N.S., 119 F.3d 1055, 1064 (3d Cir. 1997) (finding evidence of political persecution where the applicant refused to report on violations of China’s Security Law).

<sup>91</sup> *See, e.g.,* Jin Hua Bian v. Holder, 538 Fed. Appx. 79, 80-81 (2d Cir. 2013) (citing *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010) (noting opposition to government corruption may constitute a political opinion)). *See also* *Matter of N-M-*, 25 I. & N. Dec. 526, 529, 2011 WL 2297860 (B.I.A. 2011) (finding that refusal to falsify statistics, opposition to “rebuild[ing] a costly filing system,” and opposition to awarding of improperly vetted contracts may prove political opinion, but remanding to immigration judge to determine nexus).

<sup>92</sup> *See, e.g.,* Lazo-Majano v. I.N.S., 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled in part on other grounds by, *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996)) (holding repeated rape of applicant was an expression of male dominance and that the applicant, through her ultimate refusal to submit, including flight from the country, was expressing an opposing political belief).

participating in demonstrations,<sup>93</sup> (6) refusing to join an organization or group,<sup>94</sup> (7) refusal to provide material support to an organization (sometimes successfully argued as political opinion,<sup>95</sup> but not always),<sup>96</sup> (8) attempts to maintain neutrality in a conflict, and (9) whistleblowing.<sup>97</sup> One of these actions in isolation may not be sufficient to establish political opinion. The inquiry is context-specific. In each case, the attorney should present evidence either that the applicant's action was motivated by actual political opinion or that the persecutors perceived the action as a political opinion (imputed). For example, statements by gang members

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<sup>93</sup> See *Matter of Villalta*, 20 I. & N. Dec. 142, 1990 WL 385749 (B.I.A. 1990) (granting asylum on account of political opinion based on Salvadoran applicant's membership in an antigovernment student group and where he participated in demonstrations and printing of leaflets).

<sup>94</sup> See, e.g., *Jabr v. Holder*, 711 F.3d 835, 839-40 (7th Cir. 2013) (opposition and resistance to recruitment for Islamic Jihad organization because applicant favored cooperation with Israel established his political opinion); *Sherpa v. Holder*, 533 Fed. Appx. 827 (10th Cir. 2013) (applicant who "discouraged the villagers from joining the Maoists" showed that he had a political opinion); *Mayorga-Esquerro v. Holder*, 409 Fed. Appx. 81, 83 (9th Cir. 2010) (overruling the Board and finding that the petitioner was persecuted on account of imputed political opinion where he rejected membership in guerrilla organization, an act "understood by guerillas to be motivated by political objection to the rebels' cause"); *Martinez-Buendia v. Holder*, 616 F.3d 711, 716-17 (7th Cir. 2010) (finding that Martinez-Buendia's "political beliefs were the reason for her refusal to cooperate with the FARC" and the FARC "interpreted Martinez-Buendia's repeated refusal to cooperate as her expressing an anti-FARC political opinion"); *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 992 (9th Cir. 2000) (finding that guerrillas imputed an oppositional political opinion to a Guatemalan applicant who had taught literacy for the government and refused to join guerrillas); *Tecun-Florian v. I.N.S.*, 207 F.3d 1107, 1112 (9th Cir. 2000) (holding applicant's religiously-motivated refusal to join guerrilla group constituted expression of a political opinion and inferring that opinion was the reason for his torture); *Arteaga v. I.N.S.*, 836 F.2d 1227, 1231 (9th Cir. 1988) (finding that resistance to forced recruitment is expression of political neutrality hostile to non-state persecutor's politically motivated conscription efforts).

<sup>95</sup> See, e.g., *Espinosa-Cortez v. Attorney General of U.S.*, 607 F.3d 101 (3d Cir. 2010) (holding that FARC's threats to petitioner were centrally motivated by political opinion where petitioner refused to stop supplying food to the Colombian government and military and act as an informant to FARC); *Martinez-Buendia v. Holder*, 616 F.3d 711, 713 (7th Cir. 2010) (holding FARC had imputed anti-FARC political opinion to petitioner when she refused to attribute the work of her volunteer medical organization to the FARC); *Briones v. I.N.S.*, 175 F.3d 727, 729 (9th Cir. 1999) (holding Filipino applicant who had refused to contribute money to the New People's Army (NPA) had "sid[ed] with the military in a conflict that was political at its core [which would] certainly be perceived [by the NPA] as a political act"); *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1295-96 (9th Cir. 1997), opinion amended, 133 F.3d 726 (9th Cir. 1998) (overruling Board where Peruvian applicant told Shining Path guerrillas that he opposed them and would not pay their extortionate taxes in the future).

<sup>96</sup> *Khozaynova v. Holder*, 641 F.3d 187, 195-96 (6th Cir. 2011) (finding that store owner's "mere refusal to pay extortion demands [to the Russian mafia] does not constitute a political opinion in this instance"); *Rivera v. U.S. Atty. Gen.*, 487 F.3d 815, 822 (11th Cir. 2007) (the court appeared not to view the applicant's opposition to extortion as an expression of political opinion that should be protected, basing its opinion on an immigration judge's finding that "even a grudging payment of the war tax ordinarily ends the harassment"); *Desir v. Ilchert*, 840 F.2d 723, 727-28 (9th Cir. 1988) (finding refusal to pay bribes to the Macoutes because "Haitian government under Duvalier operated as a 'kleptocracy,' or government by thievery, from the highest to the lowest level," and "[t]o challenge the extortion by which the Macoutes exist is to challenge the underpinnings of the political system" (internal quotations and citations omitted)).

<sup>97</sup> *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000) (recognizing whistleblowing and opposition to corruption as "political opinions"). See also *Ly v. Holder*, 614 F.3d 20, 25 (1st Cir. 2010), *Jin Hua Bian v. Holder*, 538 Fed. Appx. 79, 80-81 (2d Cir. 2013), *Baghdasaryan v. Holder*, 592 F.3d 1018, 1020 (9th Cir. 2010), *Haxhiu v. Mukasey*, 519 F.3d 685, 690-91 (7th Cir. 2008).

that they consider anyone who resists recruitment to be an enemy would be evidence of imputed political opinion.<sup>98</sup> In addition, practitioners should emphasize the mixed reasons rule—that persecution may occur for many reasons and that the applicant need only show one central reason is a protected ground.<sup>99</sup>

Children may also be persecuted due to imputed political opinion. Political opinions may be imputed for many reasons, including family membership, race, nationality, gender, or sexual identity. The INS Children’s Guidelines emphasize the possibility that persecutors may impute political opinions onto children. Accordingly, the guidelines call on adjudicators to “carefully review the family history of the child and ... explore as much as possible the child’s understanding of his or her family’s activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.”<sup>100</sup> The *Mejilla-Romero* dissent illustrates this approach: there, Judge Stahl found that the child’s testimony must be interpreted in light of his membership in a family long involved in the land disputes in Honduras.<sup>101 102</sup>

**PSG.** UNHCR guidelines recognize that subsets of children may be PSGs.<sup>103</sup> Age has been recognized as an immutable characteristic under the *Acosta* test where economic, social, physical or other constraints prevent children from extricating themselves from situations of harm.<sup>104</sup> While age is not permanent, a person has no ability to change her age at any particular

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<sup>98</sup> Third Generation Gangs, *supra* note 23 at 5; *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481-83, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992); *see also Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008), and *Matter of E-A-G-*, 24 I. & N. Dec. 591, 2007 WL 5367673 (B.I.A. 2008), where the Board found that no testimony was presented that the applicants were politically opposed to the Mara Salvatrucha; *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745 (9th Cir. 2008) (finding no political motive for applicant’s opposition or refusal to join the gang).

<sup>99</sup> Third Generation Gangs, *supra* note 23 at 5.

<sup>100</sup> Asylum Officer Basic Training Course, *supra* note 10, at 44-45.

<sup>101</sup> *See Mejilla Romero*, 600 F.3d at 63 (Stahl, J. dissenting).

<sup>102</sup> “Adjudicator should carefully review the family history of the child’ where the child claims persecution on account of an imputed political opinion. *Emphasis added by court. Mejia Romero*, 600 F.3d at 78.

<sup>103</sup> UNHCR, *Guidelines on International Protection*, 19 para. 50, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), at <http://www.unhcr.org/50ae46309.html> (hereinafter UNHCR International Protection Guidelines).

<sup>104</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 1985 WL 56042 (B.I.A. 1985); *see also Matter of S-E-G-*, 24 I. & N. Dec. 579, 583-84, 2008 WL 2927590 (B.I.A. 2008); *but see Escobar v. Gonzales*, 417 F.3d 363, 667-68 (3d Cir. 2005); *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003). *See also* Muller, et al., *Escobar v. Gonzales: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Asylum Claims*, 10 U.C. DAVIS J. JUV. L. & POL’Y 243 (2006).

moment in time. Some recognized PSGs based on age in part,<sup>105</sup> include: (1) street children,<sup>106</sup> (2) orphans,<sup>107</sup> (3) disabled children in Russia,<sup>108</sup> (4) abandoned street children in Nicaragua, (5) children in a situation of domestic violence—framed as unable to leave or treated as property, (6) young Albanian women between the ages of 15 and 25.<sup>109</sup>

Practitioners presenting claims involving PSG formulations specifically incorporating gang and anti-gang aspects of a child's interaction with gang members have long faced resistance. Adjudicators have rejected many such PSGs as failing to meet the BIA requirements of particularity and social visibility/distinction.<sup>110</sup> Other formulations have been rejected either because they were circular in nature or based on the persecution feared. Increasingly, however, PSG formulations involving compounds of anti-gang attributes with other commonly recognized PSGs are successful.<sup>111112</sup>

## **E. NEXUS**

For children's claims, nexus may be particularly difficult to establish, because the child may not be able to articulate reasons for the harm. This could be because the child fears talking about the underlying facts or because the child did not understand the persecutors' intent. When that is the case, the attorney may develop the nexus using expert testimony as well as the testimony of the adults in the child's life.<sup>113</sup> INS Children's Guidelines emphasize that such

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<sup>105</sup> Anker, *supra* note 75 at § 5:61; *see* INS Children's Guidelines, *supra* note 7.

<sup>106</sup> UNHCR International Protection Guidelines, *supra* note 103 at para. 38; *IJ Grants Asylum to Guatemalan Street Child*, 79 Interpreter Releases 440 (Mar. 25, 2002); Boyle, *Paths to Protection: Ideas, Resources, and Strategies for Presenting Central American Gang-related Asylum Claims*, 07-11 Immigration Briefings 1 (Nov. 2007).

<sup>107</sup> UNHCR International Protection Guidelines, *supra* note 103 at para. 38.

<sup>108</sup> *Tchoukhrova v. Gonzalez*, 404 F.3d 1181, 1188-89 (9th Cir. 2005).

<sup>109</sup> *See Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014).

<sup>110</sup> AILA Practice Advisory: Children and Asylum (2008); *see, e.g., Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012)(rejecting a PSG of "Salvadoran males, aged 8 to 15, who have been recruited by Mara 18 but refused to join due to principled opposition to gangs" due to lack of particularity and social visibility); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006) (for example affirmed by 11 Cir. In *Castillo-Arias v. U.S. AG*, 46 F. 3d 1190 (1<sup>st</sup> Cir. 2006)(finding "noncriminal drug informants working against the Cali drug Cartel a drug cartel in Cali" was not a cognizable PSG for several reasons, mainly because it failed to show social visibility. The court reasoned that the members of the group were actively attempting to conceal their conduct from public view so were not visible). *See also Rojas-Perez v Holder*, 699 F.3d 74, 81 (1st Cir. 2012)(rejecting PSG of "persons who oppose gangs or...the group of persons of perceived wealth"); *Mendez-Barrera v. Holder*, 602 F.3d 21, 25 (1st Cir. 2010) (rejecting PSG of "young women recruited by gang members who resist such recruitment.").

<sup>111</sup> *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011)(accepting PSG of "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses"); *see also Vigil de Clara v. Holder*, No. 11-1538 (1st Cir. February 22, 2013)(unpublished order).

<sup>112</sup> As stated above, many of these claims are better brought on political opinion grounds.

<sup>113</sup> *See Mejilla-Romero*, 600 F.3d at 63.

external evidence may be sufficient where “the objective circumstances support the child's asylum claim that the persecutor targeted the child based on one of the protected grounds.” In addition, Asylum Office training materials explicitly recognize that a child may lack documentation to corroborate their identity and the other aspects of their claim. Therefore, “the asylum officer may have to rely solely on the testimony of the child ... .”<sup>114</sup> The training materials stress that the child’s testimony may alone be sufficient to show nexus.<sup>115</sup>

When constructing a child’s case, it is worthwhile to ask the following: First, did the state fail to protect a child for reasons of a protected ground?<sup>116</sup> Second, could harm imposed for customary reasons be framed to show nexus? Such “customary harm” may constitute persecution even where the persecutors may not have had a malicious intent (For example, female genital mutilation and forced marriage).<sup>117</sup>

#### **F. COUNTRY-WIDE PERSECUTION**

If an applicant could escape persecution by relocating within her country of origin, her asylum claim would fail. When the persecutor is a state actor, there is a rebuttable presumption that the feared persecution is statewide.<sup>118</sup> However, when the persecutor is a *non-state* actor (often the case for Central American children) the applicant must affirmatively show that she cannot escape persecution by reasonably relocating elsewhere in the country. Here, too, children deserve a special inquiry. INS guidelines direct adjudicators to “take into account whether or not it is reasonable for the child to relocate by himself or herself, as well as the possibility of return to protection of the state, as opposed to the protection of the parents.”<sup>119</sup>

For example, in his dissent in *Mejilla Romero*, Judge Stahl considered Celvyn's age as a relevant factor in whether he could safely relocate within Honduras.<sup>120</sup> He looked to Celvyn’s remaining two family members in Honduras, and found it was not reasonable to expect his father to care for him because the man had never done so.<sup>121</sup> He also found it unreasonable to expect

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<sup>114</sup> Asylum Officer Basic Training Course, *supra* note 10, at 43.

<sup>115</sup> *Id.*

<sup>116</sup> See generally Anker, *supra* note 75 §§ 5:1 et seq; see also Hathaway et al., *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 207, 211, 215 (2002).

<sup>117</sup> *Id.*; see also A New Era For Child Asylum Claims, *supra* note 11 at 9.

<sup>118</sup> Of course, where DHS carries its burden to rebut this presumption, the applicant must show the same evidence of the un-reasonableness of internal relocation as for claims of non-state actor persecutors.

<sup>119</sup> INS Children Guidelines, *supra* note 7 at 26.

<sup>120</sup> *Mejilla-Romero*, 600 F.3d at 63 (Stahl, J. dissenting).

<sup>121</sup> *Mejilla-Romero*, 600 F.3d at 81-82 (J. Stahl dissenting).



the grandmother to care for him because she was in extremely poor health. Generally, it is not “reasonable” to expect a child to relocate by herself.<sup>122</sup>

When children are fleeing targeting by gangs, it is important to address the reach of “third generation gangs” as they are well-coordinated, extremely violent and have a sophisticated national and international structure, making it unreasonable to expect a child to flee within the country, with or without the protection of adults in their family.

#### **IV. BEST PRACTICES**<sup>123</sup>

The child-centered approach should influence all aspects of working with your child client. To most effectively represent your client, it is important to (a) construct a clear theory of the case and addresses every element of the claim, (b) conduct interviews in light of the client’s age, (c) turn to adults who can provide detail to the child’s story and (d) present evidence that reminds the adjudicator she is dealing with a child. Below are some tips on how to succeed in each of those goals.

##### **A. Construct a clear asylum theory that addresses every element of the claim**

As stressed in Part IV above, being a child does not exempt the client from any part of the asylum claim. Indeed, addressing every element remains of paramount importance.

***Harm.*** Present evidence that the child suffered harm or fears harm that amounts to persecution. Also present evidence of the harm suffered by child for witnessing the harm done to a close family member or care taker. If possible, provide documentation of the harm. Address the severity of harm and provide accompanying documentation, e.g., a psychological evaluation and possible diagnoses of PTSD, depression and/or anxiety disorder. Where the harm violates human rights instruments cite accordingly.

***Failure of state protection.*** Where the persecutor was a non-state actor, present evidence to show the state failed to protect the child or fails to protect children generally. Home country laws that deny protection are relevant evidence. If the laws on the books do provide protection, seek to include evidence that they are not enforced effectively. That could be a failure to enforce

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<sup>122</sup> *Mejilla-Romero*, 600 F.3d.

<sup>123</sup> *See*, AILA’s 2012 Practice Advisory on Children and Asylum.

nationally, locally, or with regard to a group of which the client is a member. If the persecutor's professional or personal position or ties allow him to act with impunity, provide relevant evidence of that as well. Did the child or her caretakers unsuccessfully seek state protection? If so, include evidence. If they did not seek protection, include any evidence that they felt it would be to no avail (e.g., past experiences).

**Nexus.** Present evidence of a nexus between the harm and one or more of the five grounds. As in all asylum claims, the protected ground must be a central reason for the harm but need not be the only reason.

Include any testimonial evidence that directly links the harm to the protected ground. For example, statements by the persecutor (e.g. "You are a stupid Indian kid," "Your place is in the house," "You are a worthless kid and have no rights," "You must do as I say," "You are a bad Christian"). Remember that the persecutor does not have to be acting with malicious intent—their actions could have stemmed from a desire to help or "cure" the applicant.

Also include evidence of entrenched societal discontent that suggests nexus. For example, evidence of laws or their application, historical and social context, and perception of children in the region.

Certain harms are closely related to age or gender. Thus, they may help establish a persuasive nexus to an appropriate PSG. Examples of such harms include: peonage, forced labor, trafficking, rape and other sexual abuse/assault, FGM, forced marriage, forced abortion or sterilization, forced prostitution, severe parental abuse, infanticide and gender selection, severe discrimination and other forms of human rights violations such as the deprivation of food and medical treatment.

**Grounds.** Where possible, argue that harm occurred on account of multiple protected grounds.<sup>124</sup> Prioritize recognized grounds such as political opinion, race, and religion over

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<sup>124</sup> AILA PSG Update, *supra* note 4 at 5.

PSGs.<sup>125</sup> Where PSGs are used, use formulations that track recognized PSGs.<sup>126</sup> Also, try to present more than one formulation of the PSG.<sup>127</sup> In constructing these formulations, avoid definitions based on the harm suffered.<sup>128</sup> Instead focus on the reasons the persecutor did or will inflict harm. For any novel PSG, practitioners must address immutability and social visibility/particularity as interpreted in their jurisdiction.

***Changed conditions.*** Has anything changed since the time of departure? If country conditions have worsened since the time of arrival, argue for a refugee sur place claim. Then present relevant evidence. Will the fact that the client is now older result in new or more intense persecution upon return to the home country? If so, include evidence of that and of any new reasons for potential future persecution.

***Internal relocation.*** Where the persecutor was a state actor, there is a presumption of state-wide persecution. Where the persecutor is a non-state actor, the attorney should demonstrate why it is not reasonable for the child to relocate. Example avenues include showing (1) the child would face serious harm elsewhere in the country, (2) lack of proper caretakers for the child elsewhere, (3) serious harm to the child if she became a “street child,” (4) inadequacy or unavailability of government protection for homeless children, (5) ongoing war or civil strife in the home country, (6) treatment of children in prisons in the home country, (7) how home country administrative, judicial and/or economic infrastructure would impair the child’s ability to relocate, (8) geographical limitations, (9) cultural or social issues which would make relocation impossible—such as age, gender, health, language and social and family ties and (10) a persecutor’s ability to use personal or professional ties to find the child elsewhere in the country of origin.

## **B. Interview your child client in an age-appropriate way**

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (“e.g. nuclear family, gay men, transgender individuals, women in domestic relationships they cannot leave, women who fail to conform to societal and cultural norms, women who have resisted or opposed certain cultural practices”).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (stating that such a PSG “may weaken the viability of the PSG and make it challenging to establish nexus. For example, a woman who fears gang recruitment should not assert a PSG defined as “women fearing gang recruitment.”)

Interviewing the child in a child-sensitive manner will produce better testimony for her case. Throughout all interactions with the client, be sensitive to potential effects of trauma and feelings of safety.

During the interview, make sure questions are concise, clear and age-appropriate. Encourage the client to put things in her own words. Ask questions to determine (1) what the child personally experienced and heard, (2) the child's developmental stage at the time and other factors which may impede her ability to recall or understand the experience, (3) any underlying assumptions of the child that may make her reticent to reveal certain relevant things, (4) how the people and environment surrounding the child influenced the child's interpretation and feelings about her experiences and (5) how the child herself views the possibility of harm if returned.

#### **C. Collecting evidence from other sources to help develop the claim**

Because children do understand and retell facts differently, evidence beyond the applicant's testimony is especially important. To develop a better understanding of what happened and the context of events, the child applicant's attorney should seek to interview caretakers, other adults in the child's life and elder siblings. If the child is dealing with ongoing trauma, a psychological evaluation is useful evidence of that harm. Attorneys should also use country experts along with other country conditions documentation.

#### **D. Presenting corroborating documentation**

The corroborating documentation should be presented properly categorized, paginated and tabbed. Each document submitted should be properly categorized, listed and cited in an annotated index. The listing of each document should include annotations from the document addressing its relevancy to the claim. Supporting documentation submitted to the asylum office should be numbered consecutively, and supporting documentation submitted to the Immigration Court should be lettered consecutively.

#### **E. Presenting evidence that reminds the adjudicator your client is a child**

You are asking the adjudicator to apply a child-centered approach rooted in case law and administrative guidelines. The reason for this approach is special vulnerabilities of a child. When the adjudicator truly appreciates that your client is a child seeking protection in the U.S., a

“child-centered approach” should seem like common sense. Thus, additional evidence that reminds the adjudicator that your client is a child is important.

Examples of such evidence include: (1) evidence of building a new life in the U.S., including community and school activities as well as family life, (2) school records and awards, (3) the child’s age and accompanying vulnerabilities, (4) evidence of harm (including psychological and emotional harm) experienced in the U.S., (5) evidence of harm experienced on the journey to the U.S., (6) evidence that caretakers in the U.S. are providing him with a better quality of life than what he could expect in his home country.