

Street Children and U.S. Immigration Law: What Should Be Done

Laura P. Wexler

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Street Children and U.S. Immigration Law: What Should Be Done?

Laura P. Wexler†

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Introduction

Of the forty million refugees worldwide, approximately half are children.¹ Although refugee children may flee their home countries for some of the same reasons as adult asylum seekers—to escape armed conflict, persecution, or poverty—they also flee to escape child-specific human

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1. See WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, PROTECTING THE RIGHTS OF CHILDREN: THE NEED FOR U.S. CHILDREN'S ASYLUM GUIDELINES 3 (1998), available at http://www.womenscommission.org/pdf/ins_child.pdf.

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rights violations, family abuse, and neglect.² As a result, “separated and unaccompanied children constitute a small but significant percentage of all asylum seeker[s]” in the United States.³

“Street children” are a subset of unaccompanied and separated minors who endure particularized persecution.⁴ Street children are defenseless victims of brutal violence, sexual exploitation, neglect, chemical addiction, and human rights violations.⁵ The United Nations estimates that the population of street children worldwide is approximately 100 to 170 million,⁶ but the true number is unknown.⁷ It is likely that the number of street children will increase as the global population swells and urbanization continues.⁸ Due to problems with comparability and data availability, there are no comprehensive government statistics on how many unaccompanied children enter the United States each year.⁹ Moreover, the Immigration Court does not track birth dates, so there is no annual data on how many children go through Immigration Court proceedings.¹⁰

Under current U.S. immigration law, the United States grants asylum to certain aliens as refugees if they are unable or unwilling to return to their home country because of a well-founded “fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹ This definition of refugee presents significant issues with respect to whether unaccompanied minors and street children can obtain asylum in the United States.¹²

Due to the growing numbers of unaccompanied minors and separated children who claim asylum, there is a need to fashion a U.S. immigration jurisprudence that addresses child persecution, specifically street children.

2. See THE UNITED NATIONS CHILDREN’S FUND, *THE STATE OF THE WORLD’S CHILDREN 2006: EXCLUDED AND INVISIBLE* 41 (2005); WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN, *supra* note 1, at 3.

3. JACQUELINE BHABHA & SUSAN SCHMIDT, *SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S.* 15 (2006)

4. See *id.* at 6.

5. See THE UNITED NATIONS CHILDREN’S FUND, *supra* note 2, at 41.

6. See *Protecting Street Children: Vigilantes or the Rule of Law?: Hearing Before the Subcomm. on Africa, Global Human Rights, and Int’l Operations of the H. Comm. on Int’l Relations*, 109th Cong. 1 (2005), available at <http://www.foreignaffairs.house.gov/archives/109/23435.pdf> [hereinafter *Protecting Street Children Subcommittee Hearing*]; Thomas J. Scanlon et al., *Street Children in Latin America*, 316 *BRIT. MED. J.* 1596, 1597 (1998).

7. *Protecting Street Children Subcommittee Hearing*, *supra* note 6, at 1; see THE UNITED NATIONS CHILDREN’S FUND, *supra* note 2, at 40-41 (2005).

8. THE UNITED NATIONS CHILDREN’S FUND, *supra* note 2, at 40-41.

9. *Id.*

10. *Id.*

11. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

12. See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (finding that fear of future persecution was a viable theory of asylum for a Ugandan child who a rebel group abducted and forced into military service but upholding the BIA’s rejection of petitioner’s asylum claim that he suffered persecution as a former child soldier); *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (refusing to grant asylum status to young, urban Salvadoran males of military age who had not served in the military).

Although in *Escobar v. Gonzales*,¹³ the Court of Appeals for the Third Circuit ruled that Honduran street children do not qualify as a “particular social group” under Section 101(a)(42)(A) of the Immigration and Nationality Act,¹⁴ this Note argues for a broader interpretation of “refugee” to include “street children” for asylum claims. Part I defines “street children” and describes how they constitute a subtype of “separated and unaccompanied minors.” Part II explains some of the challenges facing a minor seeking asylum in the United States. Part III analyzes conflicting results for street children seeking asylum in Board of Immigration Appeals (BIA) and federal court decisions, and critiques the Third Circuit’s recent opinion in *Escobar v. Gonzales*. Part IV suggests modifications to U.S. asylum law that would open the gates of asylum to millions of suffering street children around the world. Part V concludes.

I. What is a “Street Child?”

A. The Concept

In 1851, Henry Mayhew coined the term “street children” in his book *London Labour and the London Poor*.¹⁵ The term came into general use, however, only after the United Nations proclaimed 1979 the International Year of the Child, which directed attention to the problems affecting children around the world.¹⁶ The most commonly used definition identifies street child as “any girl or boy who has not reached adulthood, for whom the street (in the broadest sense of the word, including unoccupied dwellings, wasteland, etc.) has become her or his habitual abode and/or sources of livelihood, and who is inadequately protected, supervised or directed by responsible adults.”¹⁷ One author characterizes street children as:

children who survive by expedients, by theft, and by violence. Children who coalesce into gangs and re-invent a family; a structure they have never known; a security that always eluded them. Children who are used unscrupulously by others; mistreated, imprisoned, even eliminated. Children whom the world tries to forget or ignore. Children who see grown-ups as their enemies. Children nobody smiles to, nobody cuddles, nobody protects, nobody comforts.¹⁸

The Save the Children Fund adds that “a street child is any minor who is without a permanent home or adequate protection.”¹⁹

Although there is no precise definition of “street children” or specific

13. 417 F.3d 363 (3d Cir. 2005).

14. See *id.* at 364.

15. Scanlon et al., *supra* note 6, at 1596.

16. See *id.*

17. B. MUCHINI, A STUDY ON STREET CHILDREN IN ZIMBABWE, in UNICEF, ORPHANS AND OTHER VULNERABLE CHILDREN AND ADOLESCENTS IN ZIMBABWE 89 (2001).

18. SUSANNA AGNELLI, STREET CHILDREN, A GROWING URBAN TRAGEDY: REPORT FOR THE INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES 11 (1986).

19. Catherine Panter-Brick, *Street Children, Human Rights, and Public Health: A Critique and Future Directions*, 31 ANN. REV. OF ANTHROPOLOGY 147, 149 (2002).

scientific criteria that identifies a street child,²⁰ most definitions concentrate on two important elements: presence on the street and little or no contact with family.²¹ The United Nations International Children's Emergency Fund (UNICEF) divides street children into two co-existing categories: (1) children "on the street" who work on the street, maintain some ties to their families, and usually return home to sleep at night, and (2) children "of the street" who have little or no contact with their families and live permanently on the street.²² This terminology has been adopted worldwide (*de la calle/en la calle* in Spanish; *de la rue/dans la rue* in French) but is not used in practice.²³

B. Geographic and Age Distribution

The street children phenomenon is not new and is not restricted to certain geographical areas.²⁴ Tragically, street children live in every country and virtually every city in the world.²⁵ Although they are part of both developed and developing countries, street children are most prevalent in the poor nations of Latin America, Asia, and Africa.²⁶

Street children are most highly concentrated in Latin America,²⁷ particularly in Brazil.²⁸ In 1996, the Inter-American Development Bank (IADB) and UNICEF reported that out of the 500 million people in Latin America, 40 million children lived or worked on Latin America's streets.²⁹ Mexico alone estimates that it has about two million street children.³⁰

In 1998, UNICEF estimated that there were 25 million street children in Asia and 10 million in Africa.³¹ In Africa, street children first appeared due to massive population displacements and rapid urbanization.³² Recently, the numbers have swelled as a result of civil wars and the onset of HIV/AIDS.³³ The Department of Social Welfare and Development of the Philippines estimated in 1991 that the Philippines contained 1.2 million

20. AGNELLI, *supra* note 18, at 32.

21. Panter-Brick, *supra* note 19, at 148; Scanlon et al., *supra* note 6, at 1596.

22. See HUMAN RIGHTS WATCH, POLICE ABUSE AND KILLINGS OF STREET CHILDREN IN INDIA vii (1996), available at <http://www.hrw.org/reports/1996/India4.htm>; UNICEF, STREET AND UNSUPERVISED CHILDREN OF MONGOLIA 9 (2003), available at http://www.unicef.org/mongolia/street_children_Report_Eng.pdf.

23. Panter-Brick, *supra* note 19, at 150 (arguing that street children themselves defy generalizations as either children "on the street" or children "of the street").

24. See Muchini, *supra* note 17.

25. See *Protecting Street Children Subcommittee Hearing*, *supra* note 6, at 1; THE UNITED NATIONS CHILDREN'S FUND, *supra* note 2, at 40-41.

26. See AGNELLI, *supra* note 18, at 35-36; THE UNITED NATIONS CHILDREN'S FUND, *supra* note 2, at 40-41.

27. AGNELLI, *supra* note 18, at 35.

28. See Scanlon et al., *supra* note 6, at 1597.

29. CASA ALIANZA, EXPLOITATION OF CHILDREN: A WORLDWIDE OUTRAGE 2 (2000), available at <http://www.hiltonfoundation.org/press/16-pdf3.pdf>.

30. *Id.*

31. *Id.* at 1.

32. AGNELLI, *supra* note 18, at 35.

33. *Protecting Street Children Subcommittee Hearing*, *supra* note 6, at 1.

street children.³⁴ Although the exact number of street children in India is unknown, India has the largest population of street children in the world.³⁵ In 1983, the Operations Research Group Baroda reported that there were 44 million working children in India, of which 11 million were street children.³⁶ Additionally, India's 1991 Census estimated that 18 million children worked and lived in India's slums, which qualified them as street children under the Indian government's definition of the term.³⁷ Considering, however, that both studies are outdated, the numbers probably significantly underestimate the current numbers in India.

Historically, street children were typically boys between the ages of ten and fourteen.³⁸ In recent years, however, the age range of street children has slid downward.³⁹ For example, the average age of a Latin American street child is reported as nine years old.⁴⁰ In addition, the number of female street children has increased.⁴¹ Female street children face particular problems: they are more likely to be domestically and sexually abused and are more likely to become prostitutes, which increases certain health risks such as contracting HIV/AIDS.⁴² Statistics regarding street children, however, constantly vary due to migration, exclusion from societal structures like schools, and the differing regional definitions of what constitutes "street children."⁴³

C. Common Characteristics

In general, street children are children who—in response to family problems, hunger, neglect, and domestic violence—escape from their homes and to the streets.⁴⁴ Many street children beg and scavenge on the streets by day and return home at night.⁴⁵ Others flee dysfunctional, broken homes to escape psychological, physical, or sexual abuse and find permanent homes in the streets.⁴⁶ Regardless of how street children wind up on the streets, many quickly assimilate into street life once they leave home.⁴⁷

Street children face innumerable problems. Competition is ruthless in

34. See CASA ALIANZA, *supra* note 29, at 1.

35. See HUMAN RIGHTS WATCH, *supra* note 22, at 1.

36. See *id.* at 1 n.3.

37. *Id.* (concluding that because the Indian population increases by eighteen to twenty million people per year, the number of street children in 1996 must have been significantly higher than eighteen million).

38. *Protecting Street Children Subcommittee Hearing, supra* note 6, at 1; see also AGNELLI, *supra* note 18, at 34.

39. *Protecting Street Children Subcommittee Hearing, supra* note 6, at 1; see also AGNELLI, *supra* note 18, at 34.

40. Scanlon et al., *supra* note 6, at 1597.

41. AGNELLI, *supra* note 18, at 34.

42. *Protecting Street Children Subcommittee Hearing, supra* note 6, at 1.

43. See *id.* at 72; Panter-Brick, *supra* note 19, at 153.

44. See *Protecting Street Children Subcommittee Hearing, supra* note 6, at 92.

45. See THE UNITED NATIONS CHILDREN'S FUND, *supra* note 2, at 41.

46. See *Protecting Street Children Subcommittee Hearing, supra* note 6, at 92.

47. See, e.g., NANCY LEIGH TIERNEY, *ROBBED OF HUMANITY: LIVES OF GUATEMALAN STREET CHILDREN* 23 (1997).

the game of street survival.⁴⁸ Living on the street means surviving by stealing or finding odd jobs in the "informal sector" of society. Street children shine shoes, wash taxis, find parking spaces, "guard" cars, push handcarts, carry shopping bags, sell postcards or gum, sing or play instruments, and sort through rubbish for objects to sell.⁴⁹ Joining street gangs is another method of survival.⁵⁰ Gangs provide protection, camaraderie, and a substitute family.⁵¹

Street life can cause numerous physical and mental health problems for street children. Trauma and infections are common problems for street children,⁵² and drug consumption is almost universal.⁵³ Several studies have confirmed that about 80% of street children use drugs regularly.⁵⁴ Traditionally they sniff glue,⁵⁵ shoe polish, paint-thinner, or cleaning solvents—all of which offer a "cheap high" for children coping with hunger, fear, loneliness, and despondency.⁵⁶ Additionally, recent reports indicate that crack cocaine use has increased dramatically among street children, although accurate data is unavailable.⁵⁷

Not only must street children worry about threats to their physical health, like illness and poor nutrition,⁵⁸ they must also be wary of the police, who often harass or beat them.⁵⁹ In fact, many street children have been murdered in certain countries as part of a "social cleansing" process, often with the complicity of local authorities.⁶⁰ In Latin America, for example, members of the judiciary, the police force, the media, and general society believe that street children are delinquents who cannot be rehabilitated and who represent a moral threat to civilized society—a threat that must be eliminated.⁶¹ Scanlon notes, "The most frightening manifestation of this view is the emergence of 'death squads': self proclaimed vigilantes, many of whom are involved with security firms and the police and seek to solve the problem by elimination."⁶² A nongovernmental organization in Brazil reported 457 murders of street children between March and August 1989, and a state juvenile court recently stated that an average of three street children are killed every day in the State of Rio de Janeiro.⁶³

48. AGNELLI, *supra* note 18, at 37.

49. *Id.*

50. *Id.* at 39; see also *Protecting Street Children Subcommittee Hearing*, *supra* note 6, at 92.

51. AGNELLI, *supra* note 18, at 39.

52. See Scanlon et al., *supra* note 6, at 1597.

53. AGNELLI, *supra* note 18, at 40; see also Scanlon et al., *supra* note 6, at 1597.

54. Scanlon et al., *supra* note 6, at 1597.

55. *Id.*

56. *Id.*; see also AGNELLI, *supra* note 18, at 40.

57. Scanlon et al., *supra* note 6, at 1597.

58. *Id.*

59. See THE UNITED NATIONS CHILDREN'S FUND, *supra* note 2, at 41.

60. See *id.*

61. See Scanlon et al., *supra* note 6, at 1598.

62. *Id.*

63. *Id.* Moreover, on July 23, 1993, several police officers opened fire on a group of fifty street children sleeping in front of a church in the center of Rio de Janeiro, killing seven street children and injuring many others. *Id.*

D. Street Children: A Subset of Unaccompanied and Separated Minors

Some children who seek asylum in the United States do so alone, although relatives or other adults accompany others.⁶⁴ To provide the special treatment necessary for children seeking asylum alone, the United Nations High Commissioner of Refugees (UNHCR) has defined two separate categories of children: “unaccompanied children,” defined as “children under 18 years of age who have been separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so,” and “separated children,” defined as “children under 18 years of age who are separated from both parents or from their previous legal or customary caregiver.”⁶⁵

Due to inconsistency and confusion in the identification and treatment of these terms, U.S. law has combined both categories. In 2002, the Department of Homeland Security introduced the term “unaccompanied alien child.”⁶⁶ The 2002 Homeland Security Act defines an “unaccompanied alien child” as one who:

- a) has no lawful immigration status in the United States;
- b) has not yet attained 18 years of age; and
- c) with respect to whom i) there is no parent or legal guardian in the United States or ii) there is no parent or legal guardian in the United States who can provide care and physical custody.⁶⁷

Under this definition, a street child is an “unaccompanied alien child” for immigration and asylum purposes.⁶⁸ As a foreign national living outside of the United States, a street child has no lawful immigration status in the United States. If the street child is under eighteen years old, which most street children are,⁶⁹ he or she is an unaccompanied alien child. Most street children have abandoned their homes to live or work on the streets *locally*, remaining within their home countries or traveling to bordering countries.⁷⁰ They only travel to the United States to find their families or pursue asylum applications.

Additionally, unaccompanied minors and street children share com-

64. See Kate Halvorsen, *Separated Children Seeking Asylum: The Most Vulnerable of All*, 12 FORCED MIGRATION REV. 34, 34 (2002).

65. U.N. HIGH COMM’R FOR REFUGEES, TRENDS IN UNACCOMPANIED AND SEPARATED CHILDREN SEEKING ASYLUM IN INDUSTRIALIZED COUNTRIES, 2001-2003, at 2 (2004), available at <http://www.unhcr.org/statistics/STATISTICS/40f646444.pdf>.

66. See BHABHA & SCHMIDT, *supra* note 3, at 31.

67. Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2006).

68. *Id.*

69. See Scanlon et al., *supra* note 6, at 1597 (providing that “[street children’s] ages range from 8 to 17 years, with the average age on entering the street being 9 years”).

70. See e.g., Brus Wilson Fuentes-Ortega, A78 677 043 (BIA Nov. 6, 2001) (detailing life of the respondent, who moved to and lived in various cities in Nicaragua and Costa Rica as a street child) (on file with author); Josue Enrique Andrade Garcia, A95 282 407 (2002) (detailing life of a native Honduran street child who relocated to various Mexican cities, returned to Honduras to find his family, then returned to Mexico, and eventually crossed into the United States to pursue an asylum claim) (on file with author).

mon characteristics and face similar forms of persecution.⁷¹ Often, unaccompanied children in refugee camps form support groups, led by an elder child, for protection and survival.⁷² Similarly, street children may join street gangs, which offer the promise of protection and companionship.⁷³ Moreover, unaccompanied minors and street children are groups prone to persecution in their home countries, and face physical, sexual, and mental abuse from which their governments do not protect them.⁷⁴

II. Uniqueness of Being a Child/Minor in U.S. Immigration Law

The United States assesses asylum claims by children under the same standard used for adult asylum seekers. Under this standard, a person must meet the conventional definition of a refugee to be eligible for asylum in the United States.⁷⁵

The 1951 United Nations Convention Relating to the Status of Refugees (Convention) defines a refugee as any person

seeking protection owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [who] is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.⁷⁶

The 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol) maintained the 1951 Convention's definition but removed the geographical and temporal restrictions from the Convention.⁷⁷

With the passage of the U.S. Refugee Act of 1980,⁷⁸ the United States incorporated into its immigration law the definition of refugee from the Convention and the 1967 Protocol, neither of which specifically address the needs of children.⁷⁹ Finally, the 2006 Immigration and Nationality Act (INA) codified the 1980 Act, defining a refugee as a person unable or unwilling to return to his or her home country because of "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁸⁰ Thus, to succeed on an

71. See Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 885, 892-93 (2004) (arguing that street children are a specific social group of unaccompanied minors).

72. See *id.*

73. AGNELLI, *supra* note 18, at 40-41.

74. See Seugling, *supra* note 71, at 893.

75. Immigration and Nationality Act § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2006).

76. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

77. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

78. 8 U.S.C. § 1101 (2006).

79. See Convention Relating to the Status of Refugees, *supra* note 76, art. 1.

80. Immigration and Naturalization Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

asylum claim, the asylum seeker—adult or child—must establish his or her persecution on one of the five enumerated grounds of the statute.

By not distinguishing unaccompanied minors from adults and thereby requiring child refugees to conform to the same standards as adult refugees,⁸¹ U.S. immigration law deeply disadvantages children seeking asylum.⁸² Child refugee experiences do not fit neatly into the normal requirements for asylum refugee status.⁸³ Thus, refugee children have difficulty meeting one of the five grounds that constitute a well-founded fear of persecution.

For example, a child asylum applicant may not be able to articulate acceptable reasons for fleeing his native country. A child may be more reluctant to talk to an immigration interviewer about the experiences that caused him to flee his home country because doing so might incite embarrassment, emotional distress, or trauma.⁸⁴ Persecuted adult asylum seekers have reached all the appropriate developmental milestones required for relating to other adults before their victimization. The lives of child asylum seekers, however, are dramatically altered before the child has developed the appropriate coping skills necessary for navigating the kind of stressful situation presented in an immigration proceeding.

Additionally, children cannot give adult-like accounts of their experiences and memories.⁸⁵ One reason for this deficiency is that children may not understand questions or statements about their past because their cognitive and conceptual skills are not sufficiently developed.⁸⁶ Secondly, their age-related and cultural-related language may impede communication with asylum officers.⁸⁷ For example, a child may say that an individual “went away” or “disappeared” instead of stating that a relative died or was killed.⁸⁸ Further, when asked why a child fled his home country, the child may reply “because of the situation” or “because of war.”⁸⁹ These responses demonstrate a gap in understanding due to a child’s age, stage of language development, background, and level of sophistication. Unfortunately, such general responses will not constitute the “well-founded fear of persecution” required for a successful asylum claim.

81. See Office of the U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 213, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979) (commenting that “the same definition of a refugee applies to all individuals, regardless of their age”), available at <http://www1.umn.edu/humanrts/instree/refugeehandbook.pdf> [hereinafter *UNHCR Handbook*].

82. See BHABHA & SCHMIDT, *supra* note 3, at 143.

83. Michael Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL’Y REV. 159, 162 (2000) (arguing that refugee children particularly need protection in the arena of asylum law).

84. JEFF WEISS, IMMIGRATION AND NATURALIZATION SERVICE GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS 4 (1998), available at http://www.abanet.org/publicserv/immigration/ins_guidelines_for_children.pdf.

85. *Id.* at 6.

86. *Id.*

87. *Id.*

88. *Id.*

89. Olivas, *supra* note 83, at 162.

A child's lack of sophistication, early stage of development, and special vulnerability may also have an impact on the child's credibility.⁹⁰ Children may appear "evasive or suspiciously reticent" when recounting past traumatic events.⁹¹ They may be unable to present testimony with the same degree of precision as adults⁹² and may struggle remembering dates and certain facts accurately.⁹³ Paradoxically, adolescent asylum seekers may suffer from the misconception that physical maturity always accompanies cognitive maturity and understanding.⁹⁴ Misunderstandings based on cultural differences may also contribute to the difficulty of assessing a child's credibility.⁹⁵ Thus, asylum officers and immigration judges should give special consideration to a child's emotional and developmental capabilities when assessing the authenticity of their testimonies.

Child asylum seekers may also lack the necessary tools to succeed in their quests for asylum. First, children in immigration proceedings do not have the right to a government-funded attorney or to a guardian *ad litem*.⁹⁶ Although some unrepresented children receive asylum, children with legal representation have a significantly higher chance of receiving asylum.⁹⁷ In addition, children may have difficulty presenting their own evidence;⁹⁸ they may focus on irrelevant information, and their memories may not be reliable.⁹⁹

A significant problem with a child asylum claim is that one's understanding of persecution is relative, and children perceive persecution differently than adults.¹⁰⁰ A finding of persecution depends on the circumstances of each case and includes both a subjectively genuine fear of persecution and an objectively reasonable possibility of persecution.¹⁰¹ The subjective component is satisfied by showing genuine fear.¹⁰² The objective component, however, requires showing credible, direct, and specific evidence that that the fear is reasonable.¹⁰³ Objective factors include conditions in the applicant's home country, that country's justice system, the asylum seeker's experience while living there, and the experiences of the applicant's friends, relatives, or other members of the same racial or

90. See BHABHA & SCHMIDT, *supra* note 3, at 110-15.

91. *Id.* at 112.

92. *Id.* at 111.

93. *Id.* at 113.

94. *Id.* at 114.

95. *Id.* at 111.

96. *Id.* at 33.

97. *Id.* at 143 (citing INS Asylum Office statistics that 48% of child applicants with legal representation were granted asylum compared to 27% without legal representation).

98. *Id.*

99. See *id.* at 144.

100. See Aurelio Mauricio Lopez, A78 677 018 (BIA Nov. 28, 2001) (on file with author); Jacqueline Bhabha & Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 762 (1998).

101. See *INS v. Cardoza-Fonseca*, 480 U.S. at 430-31 (1987); *UNHCR Handbook*, *supra* note 81, ¶¶ 41, 52.

102. See *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986).

103. *Id.*; see also *DeValle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990).

social group.¹⁰⁴ For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for a court to assess.¹⁰⁵ For example, children under the age of sixteen may lack the maturity to form a well-founded fear of persecution that would require an adjudicator to give more weight to objective factors.¹⁰⁶

Actions that adults perceive as mere harassment or annoyance may amount to persecution when directed at children.¹⁰⁷ For example, although an adult may not consider aggressive police questioning, threats, handcuffing, or rough handling serious harm, these tactics may produce lasting damage or psychological trauma for a child amounting to persecution—especially if the child is particularly young or fragile.¹⁰⁸ Moreover, behavior that is addressed to others but affects a child's sensibility and sensitivity may also constitute persecution.¹⁰⁹ For example, infliction of harm on close relatives of a child may constitute persecution of the child—this could be true in cases of death, torture, domestic abuse, rape, or disappearance.¹¹⁰

One reason for the disparity in perception between an adult and child is a child's heightened sensitivity.¹¹¹ Harmful situations are more likely to traumatize children than adults because of children's lack of maturity and vulnerability.¹¹² Additionally children, more than adults, have a tendency to believe dubious threats or to be terrified by unfamiliar circumstances.¹¹³ Children also experience persecution to a greater extent than adults because of their heightened dependency and need for protection and assistance.¹¹⁴ For example, although separating an adult from his parents may not constitute persecution, forced separation from parents or a close relative may constitute persecution for a child.¹¹⁵

U.S. immigration law requires an asylum seeker to prove persecution either by governmental action or by non-governmental action that the government is unwilling or unable to control.¹¹⁶ With child persecution, however, the government or public may not always produce the harm; the community, the school, or even the home may be the venue in which persecution arises.¹¹⁷ Absent government involvement in persecution, the asy-

104. See *Cardoza-Fonseca*, 480 U.S. at 424-25.

105. See Josue Enrique Andrade Garcia, A95 282 407 (2002).

106. See *UNHCR Handbook*, *supra* note 81, ¶¶ 215, 217.

107. Bhabha & Young, *supra* note 100, at 762.

108. See *id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*; see also *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring) (suggesting that a child losing her parents and brother amounts to persecution).

116. See *UNHCR Handbook*, *supra* note 81, ¶ 34; see also *Immigration and Naturalization Act* § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006); *McMullen v. INS*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981); *Matter of Acosta*, 19 I&N Dec. 211, 235 (BIA 1985).

117. Bhabha & Young, *supra* note 100, at 763-64.

lum seeker bears the burden of proving that the government was or should have been aware of the persecution yet did nothing to protect the victim.¹¹⁸ This burden is difficult for children asylum seekers to satisfy because a child may have difficulty identifying the persecution and requesting that the proper authorities alleviate the persecution.

In seeking asylum, street children bear a more difficult burden than other unaccompanied and separated children. One author, remarking on the comment that “refugee children are in double jeopardy, because they are children and because they are refugees,”¹¹⁹ has argued that “an unaccompanied minor is in triple jeopardy: as a child, as a refugee, and as someone with no protector.”¹²⁰ Extending this metaphor even further, a street child is actually in quadruple jeopardy: as a child, a refugee, someone with no protector, and as a member of a particular, “invisible” social group.

Street children are among the most physically visible of all children, living and working on the streets of cities all over the world; yet they are also among the most invisible—the hardest to reach with vital services, such as education and health care, and the most difficult to protect.¹²¹ A significant reason for their invisibility is street children’s demonization by mainstream society as a threat and a source of criminal behavior.¹²² Because street children are typecast as unredeemable vagabonds, they have become specific targets of “social cleansing” in certain countries, particularly in Latin America.¹²³ As discussed earlier, police and public authorities have silently acquiesced in this behavior.¹²⁴ Thus, those who should protect this poor, vulnerable group actually sanction their persecution.

III. Street Child Asylum Seekers: Members of a Particular Social Group

Membership in a particular social group under INA Section 101(a)(42)(A) is the most likely grounds under which street children would claim asylum in the United States. The BIA and the few federal courts that have addressed the issue, however, are in conflict as to whether street children constitute a “particular social group.” As this Note argues, the BIA has formulated the better interpretation of the statute. Furthermore, allowing street children to claim asylum under the statute would be consistent with recent expansions of the category of “particular social

118. *Id.*

119. Seugling, *supra* note 71, at 888 (quoting Nyorovai Whande, *General Issues Relating to Refugee Children*, in JUSTICE FOR CHILDREN 84, 85 (Stewart Asquith & Malcolm Hill eds., 1992)).

120. *Id.*

121. See THE UNITED NATIONS CHILDREN’S FUND, *supra* note 2, at 41.

122. *Id.*

123. See *id.*; Scanlon et al., *supra* note 6, at 1598; *Vigilantes in Colombia Kill Hundreds in a ‘Social Cleansing,’* N.Y. TIMES, Oct. 31, 1994, at A8.

124. See THE UNITED NATIONS CHILDREN’S FUND, *supra* note 2, at 41.

group.”¹²⁵

A. Definition of “A Particular Social Group”

Membership in a particular social group is the vaguest of the five persecution grounds for asylum purposes,¹²⁶ and immigration judges and federal courts have struggled to define its parameters.¹²⁷ Courts, however, have been reluctant to expand the particular social group category to include new particular social groups for fear of the category becoming overbroad.¹²⁸

In *In re Acosta*, the BIA first defined a “particular social group” following the enactment of the Refugee Act of 1980.¹²⁹ The Board described it as “a group of persons all of whom share a common, immutable characteristic.”¹³⁰ The Board more thoroughly explained:

The shared characteristic might be an innate one such as sex, color, kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹³¹

In subsequent cases, the BIA continued to opine on the parameters and meaning of the phrase “particular social group.” The Board added that “the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as member of a particular social group.”¹³² Additionally, the group should be highly visible and recognizable by others in the country in question.¹³³ A nexus must also exist between the shared trait of the social group and the persecution

125. See *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (recognizing Cuban homosexuals as a particular social group); see also *Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007) (establishing that spouses of Chinese women forced to undergo abortions based on restrictive population control programs are eligible for asylum); *In re* [name not provided], A- -- -- (May 2, 2007) (granting asylum status to Latin American youths fleeing persecution from violent criminal gangs), available at <http://www.ansari-lawfirm.com/docs/5-2-07-El-Salvador-MS-13-asylum-grant.pdf>.

126. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 916 (5th ed. 2003).

127. See *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (observing that courts and commentators have struggled to define a “particular social group”). Compare *In re Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (interpreting a particular social group as “a group of persons all whom share a common, immutable characteristic”), with *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575-76 (9th Cir. 1986) (interpreting a particular social group as a flexible category that “does not encompass every broadly defined segment of a population” but “implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest”).

128. See, e.g., *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996).

129. *Acosta*, 19 I&N Dec. at 233.

130. *Id.*

131. *Id.*

132. *In re R-A-*, 22 I&N Dec. 906, 919 (BIA 1999).

133. See *In re C-A-*, 23 I&N Dec. 951, 955-56 (BIA 2006).

suffered such that the persecutors are motivated, at least in part, by the immutable characteristic and view the members of the social group as warranting suppression or infliction of harm.¹³⁴

Federal courts have accepted and clarified *Acosta's* definition of "particular social group."¹³⁵ For example, the Court of Appeals for the Ninth Circuit, in *Sanchez-Trujillo v. INS*,¹³⁶ stated that:

[T]he "social group" category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion. Still, the scope of the term cannot be without some outer limit. . . . [T]he term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.¹³⁷

The Ninth Circuit Court of Appeals subsequently held that a particular social group "is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."¹³⁸ The Court of Appeals for the Second Circuit, however, construed a particular social group as "individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor," and noted that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."¹³⁹

In an effort to combine elements of the *Acosta* immutable characteristic standard and the Second Circuit's "social perception" approach, the UNHCR recently adopted Guidelines on International Protection regarding a "particular social group."¹⁴⁰ The UNHCR Guidelines define a "particular social group" as

134. Sandra [last name not provided], A- -- -- (BIA Nov. 8, 2006) (on file with author).

135. See *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3d Cir. 2003) (citing *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998)) (applying the interpretation from *Acosta* to the facts of the case and noting that the First and Seventh Circuits have endorsed the *Acosta* definition); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

136. 801 F.2d 1571 (9th Cir. 1986).

137. *Id.* at 1576.

138. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (noting that the court's formulation recognizes the holding of *Sanchez-Trujillo v. INS* and harmonizes with *Acosta's* immutability requirement).

139. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

140. See U.N. High Comm'r for Refugees, *Guidelines on International Protection: "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*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at http://cgrs.uchastings.edu/documents/legal/unhcr_psg-guidelines.doc [hereinafter *UNHCR Guidelines*].

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹⁴¹

This definition recognizes that although the "particular social group" category "cannot be interpreted as a "catch all" that applies to all persons fearing persecution,"¹⁴² "there is no 'closed list' of what groups may constitute a 'particular social group.'"¹⁴³

B. Application of the Definition to Street Children

Before the Third Circuit's decision in *Escobar v. Gonzales*, immigration judges and the BIA had granted asylum for street children.¹⁴⁴ Such decisions, however, are not precedential cases and thus are not binding on the BIA, immigration judges, or federal courts.¹⁴⁵

In 1999, the BIA upheld an immigration judge's ruling that the respondent, a seventeen-year-old native and citizen of Honduras whose father had abused and beaten him since age three, was eligible for asylum.¹⁴⁶ The respondent provided testimony that if he were to return to Honduras, he would become a street child because he could not return to his parent's home.¹⁴⁷ The Board agreed that the petitioner had a well-founded fear of persecution if returned to Honduras on account of his membership in a particular social group, "minors without resources who have been abused by a custodial parent/guardian."¹⁴⁸ Relying heavily on documentary evidence—including the Department of State's Report on Human Rights Practices for 1996 that indicated that the Honduran police torture street children, that vigilante groups participate in killing street children, and that police routinely arrest street children without charge—the Board found that the respondent had an objective fear of persecution because of his potential fate as a Honduran street child.¹⁴⁹

141. *Id.* ¶ 11.

142. *Id.* ¶ 2.

143. *Id.* ¶ 3.

144. Aurelio Mauricio Lopez, A78 677 018 (BIA Nov. 28, 2001) (on file with author); Brus Wilson Fuentes-Ortega, A78 677 043 (BIA Nov. 6, 2001) (on file with author); Juan Carlos Martinez-Mejia, A76 312 250 (BIA Jan. 20, 1999) (on file with author); Josue Enrique Andrade Garcia, A95 282 407 (2002) (on file with author); R-D- [full name not provided], A79 165 644 (Aug. 2, 2001).

145. The BIA publishes approximately 50 decisions a year; these published decisions are binding on the BIA and Immigration Judges but not on federal courts. However, even if a federal court of appeals overturns a precedent BIA decision, the BIA will still apply its own precedent in cases arising in other circuits. The BIA also publishes approximately 20,000 non-precedent decisions a year; these unpublished decisions are not binding on anyone, even the BIA.

146. Juan Carlos Martinez-Mejia, A76 312 250 (BIA Jan. 20, 1999) (on file with author).

147. *Id.* at 2.

148. *Id.* at 1.

149. *Id.* at 3.

Similarly, in *Brus Wilson Fuentes-Ortega*, the BIA upheld an immigration judge's ruling that the respondent, a sixteen-year-old native and citizen of Nicaragua, was eligible for asylum based on his well-founded fear of future persecution on account of his membership in a particular social group, abandoned street children in Nicaragua.¹⁵⁰ After witnessing his parents' murders, the respondent and his brother took to the streets—first in the city of Esteli, then Managua, and eventually Chinandega—where they begged for food, faced continued threats of police harassment and arrest, and sought the company and protection of other street children.¹⁵¹ Forced to live in the streets of towns and villages that did not provide access to governmental authority or protection, the respondent had no one to turn to for help.¹⁵² Thus, the BIA affirmed the immigration judge's ruling that the respondent had a subjective fear of persecution for asylum purposes.¹⁵³

Likewise, in *Aurelio Mauricio Lopez*, an immigration judge held that "Guatemalan street children" constituted a particular social group.¹⁵⁴ The respondent, a juvenile male citizen of Guatemala, had moved with his parents to Guadalajara, Mexico but lost ties with his family when he moved by himself to find work in Hermosillo, Mexico.¹⁵⁵ At the time the respondent filed his asylum application, all efforts by the Immigration and Naturalization Service (INS) to locate his parents were unsuccessful and the Mexican government refused to accept him into Mexico.¹⁵⁶ The respondent testified that he had no family in Guatemala and if deported there he would have no place to live.¹⁵⁷ The judge reasoned that, as a homeless youth in Guatemala, the respondent would become part of the social group of "Guatemalan street children" whom society had abandoned and the government had neglected and exploited.¹⁵⁸ The judge also found that street children share a fundamental characteristic: all members live and beg on the streets and have no home or family.¹⁵⁹ He analogized street children to a family unit and concluded that they were a distinct and recognizable group of people, distinguishable from Guatemalan society by their membership in the family of "street children."¹⁶⁰ Thus, the respondent successfully demonstrated that he was a refugee pursuant to the statutory definition, and the judge granted his asylum application.¹⁶¹

In stark contrast to the aforementioned BIA decisions, in 2005, the Court of Appeals for the Third Circuit ruled that Eldin Jacobo Escobar, a

150. *Brus Wilson Fuentes-Ortega*, A78 677 043 (BIA Nov. 6, 2001) (on file with author).

151. *Id.* at 2.

152. *Id.* at 3.

153. *Id.*

154. *Aurelio Mauricio Lopez*, A78 677 018 (BIA Nov. 28, 2001) (on file with author).

155. *Id.* at 3.

156. *Id.* at 2.

157. *Id.* at 3.

158. *Id.* at 14.

159. *Id.*

160. *Id.*

161. *Id.* at 16.

fifteen-year old Honduran street child, was not entitled to asylum.¹⁶² Originally, the immigration judge had found that children living on the streets of Honduras constituted a particular social group for purposes of asylum but denied Escobar's claim because he failed to present credible and persuasive testimony regarding his membership in that group.¹⁶³ Escobar appealed to the BIA, which held that "even if the respondent credibly testified, Honduran street children do not qualify as a particular social group for purposes of asylum."¹⁶⁴

The facts alleged in *Escobar*, however, are quite similar to those in which the BIA and immigration judges had previously granted asylum to street children.¹⁶⁵ From birth, Escobar had no contact with his father and during infancy, his mother abandoned him, leaving Escobar to share a crude dwelling without heat, beds, or toilets with his extended family.¹⁶⁶ In addition to hunger, Escobar suffered severe physical abuse in the home—his grandfather and uncles regularly beat him with belts, ropes, and cables—and, at the age of nine, he fled for life on the streets of Honduran villages and cities.¹⁶⁷ Once on the street, Escobar lived in fear of the gangs, which threatened and robbed him, and in fear of the police, who went as far as to demand that Escobar rob and steal for them and threatened him with violence when he refused.¹⁶⁸ These outrageous violations of core human rights are among those that the Board and immigration judges previously found to be so egregious as to constitute persecution for street children seeking asylum.¹⁶⁹

The Third Circuit, however, held that Honduran homeless children are not a particular social group.¹⁷⁰ The court reasoned that the group was indistinguishable from similarly unfortunate groups around the world and that poverty, homelessness, and youth were far too vague and all-encompassing to set parameters for protected grounds under the refugee statute:

It may well be conceded that young individuals from Honduras face extremely depressing, bleak prospects. But the record fails to show any real-

162. *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005).

163. *See id.*

164. *Id.* at 365.

165. *See* Aurelio Mauricio Lopez, A78 677 018 (BIA Nov. 28, 2001) (on file with author); Josue Enrique Andrade Garcia, A95 282 407 (2002) (on file with author).

166. Matthew D. 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, 243 (2006).

167. *Id.*

168. *Id.*

169. *See* Juan Carlos Martinez-Mejia, A76 312 250 (BIA Jan. 20, 1999) (granting asylum to a minor without resources who had been abused by a custodial parent) (on file with author); Josue Enrique Andrade Garcia, A95 282 407 (2002) (granting asylum for a victim of severe child abuse who would most likely suffer malnutrition and homelessness upon returning to life on the streets of Honduras) (on file with author); R-D- [full name not provided], A79 165 644 (IJ Aug. 2, 2001) (Los Angeles, Ca.) (Muñoz, IJ) (granting asylum to homeless Honduran street child who would more likely than not be subjected to torture by law enforcement personnel and police brutality if he were to return to Honduras) (on file with author).

170. *Escobar v. Gonzales*, 417 F.3d 363, 367-68 (3d Cir. 2005).

istic differences between these children and those of Guatemala or Sao Paulo or hundreds of other locations across the globe. Incidents of deprivation and suffering are, unfortunately, universal and not confined to one country. Thus a legitimate distinction cannot be made between groups of impoverished children who exist in almost every country.¹⁷¹

This reasoning, however, is dubious. Just because street children exist in every country and in some sense are “universal,” does not mean that they do not constitute a particular social group. Other social groups are universal in nature, but that does not preclude them from qualifying for asylum. For example, gays and lesbians exist in virtually every society,¹⁷² but their “universal existence” does not preclude them from qualifying for asylum in the United States.¹⁷³

Furthermore, by holding that the characteristics of youth and homelessness were universal and not unique enough to qualify a Honduran street child as a member of a particular social group, *Escobar* seemingly misapplied the “immutability” standard set forth in *Acosta*. Arguably, street children cannot improve their situation or change the “immutable” and unfortunate characteristics for which they have been persecuted—homelessness, poverty, and a lack of familial support. Moreover, street children applying for asylum have a shared past experience that is “fundamental to their individual identities.” Their lifestyle on the streets, where they are targets of social cleansing,¹⁷⁴ are addicted to drugs,¹⁷⁵ and generally are exploited by adults,¹⁷⁶ is what defines them as street children. Furthermore, they share the same habits of street survival by begging, working odd jobs, and engaging in petty crimes.¹⁷⁷

Homeless adults or female asylum seekers may also possess similar characteristics, but the future for a street child is bleaker. Street children have little, if any, ability to improve their conditions because their national

171. *Id.* at 367.

172. See Peter M. Nardi, *The Globalization of the Gay & Lesbian Socio-Political Movement: Some Observations About Europe with a Focus on Italy*, 41 SOC. PERSP. 567 (arguing for a globalization of the international gay and lesbian social movement, focusing primarily on Europe and Italy). “The emergence of gay communities in Europe can be traced to various early movements, in particular to Germany in the late 19th century, Britain and the Netherlands in the early 1900s, and Sweden in the 1930s.” *Id.* at 572; see also STUART MICHAELS, *THE PREVALENCE OF HOMOSEXUALITY IN THE UNITED STATES*, reprinted in *TEXTBOOK ON HOMOSEXUALITY AND MENTAL HEALTH* 43, 67 (Robert P. Cabaj & Terry S. Stein eds., 1996) (discussing various studies to debunk the preconception that homosexuality is rare or absent from most societies).

173. See *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (recognizing for the first time that sexual orientation can be the basis for establishing a particular social group for asylum purposes); see also *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (establishing that “all alien homosexuals are members of a ‘particular social group’”); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-96 (9th Cir. 2000) (expanding the social group definition to include the “distinct and readily identifiable group” of gay men in Mexico with female sexual identities who are persecuted for their membership in that group).

174. See Scanlon et al., *supra* note 6, at 1598.

175. See AGNELLI, *supra* note 18, at 40; Scanlon et al., *supra* note 6, at 1597.

176. See AGNELLI, *supra* note 18, at 35-40.

177. See *id.*

governments repress rather than support them. In particular, the Honduran government provides virtually no shelter and educational programs for street children.¹⁷⁸ Instead, the government displays deliberate vengeance toward and outwardly persecutes street children as targets of “social cleansing.”¹⁷⁹ Homeless adults and female asylum seekers, on the other hand, can change their status with the help of governmental programs, shelters, food kitchens, and social workshops.

The Third Circuit also concluded that the characteristic of youth does not fall within *Acosta*’s immutability requirement. The more correct view, which the BIA has taken, is that a street child’s claim is not undermined by the temporary nature of youth. The BIA addressed youth as a component of a particular social group in *In re Kasinga*.¹⁸⁰ There, the Board granted asylum to an applicant on the basis of her persecution for membership in the social group of “young women of the Tchamba-Kunsuntu tribe who had not had [female genital mutilation], as practiced by that tribe, and who oppose the practice.”¹⁸¹ The BIA reasoned that the characteristics of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” cannot be changed.¹⁸² Although the asylum applicant in *Kasinga* would eventually “age out” of her youth status, the BIA found youth to be an integral component in defining her particular social group.¹⁸³

Street children, like the asylum seeker in *Kasinga*, will eventually mature, but this is not a good reason to deny street children recognition as a particular social group. The reality that children will become adults does not warrant ignoring their needs while they are children. In fact, the INS Guidelines for Children’s Asylum Claims instruct adjudicators and asylum officers to pay particular attention to the needs and sensitivities of child asylum seekers.¹⁸⁴ Moreover, a refugee does not have to face a permanent threat of persecution in her home country;¹⁸⁵ rather, an asylum applicant must only show a well-founded fear of persecution at the time of the application.¹⁸⁶

The “social visibility” concept articulated in BIA cases such as *In re C-A*-¹⁸⁷ and *In re R-A*-¹⁸⁸ further supports “particular social group” treatment for street children. As mentioned previously, street children are perceived as posing threats that must be dealt with and are sometimes targeted for serious harm or death.¹⁸⁹ There may be room for debate regarding whether these children are targeted because of some alleged

178. See Josue Enrique Andrade Garcia, A95 282 407 (2002) (on file with author).

179. *Id.* at 4.

180. See *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996).

181. *Id.* at 365.

182. *Id.* at 366.

183. Muller et al., *supra* note 166, at 246.

184. See WEISS, *supra* note 84, at 3-10.

185. Muller et al., *supra* note 166, at 246-47.

186. See Josue Enrique Andrade Garcia, A95 282 407, at 10 (2002) (on file with author).

187. *In re C-A*-, 23 I&N Dec. 951, 955-56 (BIA 2006).

188. *In re R-A*-, 22 I&N Dec. 906 (BIA 1999).

189. See *supra* notes 58-63 and accompanying text.

action (e.g., stealing, robbing, or begging) or because of their status as street children. Yet the overall perception of street children as a social ill satisfies the “social visibility” element of a “particular social group.”

Escobar is also inconsistent with the UNHCR Guidelines’ definition of a “particular social group.”¹⁹⁰ The Guidelines provide that members of a particular social group share “characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.”¹⁹¹ This description is particularly relevant to street children, because their persecution is so intimately linked to their identity.¹⁹²

The BIA recently cited the UNHCR definition as authority.¹⁹³ Federal courts should give that definition deference, regardless of the Board’s general reliance on the *Acosta* definition.¹⁹⁴ Moreover, the U.S. Supreme Court has observed that the UNHCR Handbook provides significant guidance in construing the 1967 Protocol, to which the United States acceded in 1968 and which Congress sought to follow in enacting U.S. refugee law.¹⁹⁵

The Third Circuit was correct, however, in its hesitation to expand the definition of refugee to include a new “street children” category. Nevertheless, that reluctance should not impede or end the analysis. There is, and there ought to be, another way to deal with the Third Circuit’s concern.

Rather than broadly characterizing the social group for street child asylum seekers, courts should particularly define the category. For example, the degree of categorical specificity for the particular social group in *Kasinga* could be reasonably replicated in a claim from a street child. Just as the BIA found “member[ship] of the Tchamba-Kunsuntu Tribe” to be a cognizable characteristic,¹⁹⁶ the particular social group for street children could take into account a street child’s specific affiliation with a local community or neighborhood group. The social group could also include prior abuse by police officers or security forces or other relevant factors, such as length of time living on the streets. The more specific a street child asylum seeker’s testimony of persecution—beatings by police, repeated illegal detentions, and unprovoked arrests—the more particulars a court would have to define the child’s particular social group.¹⁹⁷

190. See *supra* notes 162–69 and accompanying text.

191. *UNHCR Guidelines*, *supra* note 140, ¶ 12.

192. See Scanlon et al., *supra* note 6, at 1598.

193. See *In re C-A-*, 23 I&N Dec. 951, 956 (BIA 2006) (noting that “[h]aving reviewed the range of approaches to defining particular social group, we continue to adhere to the *Acosta* formulation”).

194. See *supra* notes 125–37 and accompanying text.

195. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–39 (1987).

196. *In re Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996).

197. See BHABHA & SCHMIDT, *supra* note 3, at 119 (arguing “whereas one act of beating a street child for sleeping in a public place may not constitute persecution, a pattern of such conduct over time certainly could”).

IV. Legislative Solutions Beyond Expanding the Definition of Refugee

A. Possible Ratification of the Convention on the Rights of the Child

Apart from the judicial debate concerning the interpretation of Section 101(a)(42)(A) of the Immigration and Naturalization Act, a legislative response to street children asylum claims is possible. Indeed, one such remedy would be ratification by the United States of the Convention on the Rights of the Child (CRC).¹⁹⁸

More countries have ratified the CRC than any other human rights treaty in history—as of November 2005, 192 countries have become state parties to the CRC.¹⁹⁹ Although the United States is a signatory to the CRC, it remains, along with Somalia, one of two UN nations that have not ratified the agreement.²⁰⁰ The distinction between ratifier and signatory is important. As a signatory, the United States is obligated not to enact new legislation that would undermine the objective of the CRC, but the United States is not legally required to enforce CRC provisions in its current domestic law as are ratifiers of the agreement.²⁰¹

The fifty-four provisions of the CRC identify basic human rights to which children everywhere are entitled: “the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life.”²⁰²

The CRC is probably the international instrument most relevant to the plight of unaccompanied and separated children. Article 20 places obligations on State Parties to provide “special protection and assistance” to a child “temporarily or permanently deprived of his or her family environment.”²⁰³ Article 22 requires that

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee . . . shall, whether unaccompanied or accompanied . . . receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the [CRC] . . . and in other international human rights or humanitarian instruments to which the said States are Parties.²⁰⁴

Article 37 is also relevant because it provides that detained children must have access to legal assistance and the right to challenge their detention.²⁰⁵

198. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (Nov. 20, 1989), available at <http://untreaty.un.org/English/TreatyEvent2001/pdf/03e.pdf>.

199. UNICEF, Convention on the Rights of the Child: Frequently Asked Questions, http://www.unicef.org/crc/index_30229.html (last visited Jan. 14, 2008) [hereinafter UNICEF, CRC FAQ].

200. See *id.*

201. BHABHA & SCHMIDT, *supra* note 3, at 34.

202. U.N. Children’s Fund [UNICEF], Convention on the Rights of the Child: Introduction, <http://www.unicef.org/crc/> (last visited Jan. 14, 2008).

203. See United Nations Convention on the Rights of the Child, *supra* note 198, art. 20.

204. *Id.* art. 22.

205. See *id.* art. 37(d).

The centerpiece of the CRC, however, is Article 3, which requires that “[i]n 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.*”²⁰⁶ In other words, to act in the child’s best interest, states must provide special care to children without families, assist and protect children seeking asylum, contribute to efforts to reconnect separated children from their families, and grant child asylum seekers the same protection as domestic children deprived of parental care.²⁰⁷ Although the United States has applied the framework of the “best interests of the child” by incorporating the concept into two official immigration manuals, in reality, U.S. immigration law does not consider the best interests of the child in decision-making.²⁰⁸

If the United States were to ratify the CRC, it would not only be required to conform to the CRC’s principles but actively uphold them legislatively. Such dual responsibility would commit the United States to protecting and enforcing children’s rights, and ensure that it holds itself accountable for this commitment before the international community.

In addition to honoring its commitments to the agreement, a party to (or ratifier of) the CRC must also follow the guidance prescribed by the UN Committee on the Rights of the Child (the Committee), an internationally elected body of independent experts that monitors the CRC’s implementation. In June 2005, the Committee published a “General Comment” on the treatment of unaccompanied and separated minors outside their country of origin.²⁰⁹ Among other things, the Committee recommended superior access to asylum procedures and reformed legal safeguards and rights in the area of asylum law.²¹⁰ Specifically, the Committee urged nations to adopt a child-sensitive assessment of protection needs and to take into account child-specific persecution when determining refugee claims.²¹¹ The Committee recommended:

[W]hen assessing refugee claims of unaccompanied or separated children, States shall take into account the development of, and formative relationships between international human rights and refugee law. . . . In particular, the refugee definition of the 1951 Refugee Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related

206. *Id.* art. 3 (emphasis added).

207. BHABHA & SCHMIDT, *supra* note 3, at 34.

208. *Id.* at 34-35.

209. *Id.*

210. U.N. Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Child Outside Their Country of Origin, CRC/GC/2005/6, ¶¶ 66-73 (June 3, 2005), available at <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>.

211. *Id.* at ¶ 74.

to one of the 1951 Refugee Convention grounds.²¹²

If the United States were to ratify the CRC, and to adhere to the guidance provided by the Committee, it would have to actively reform its asylum law system for a more child-sensitive scheme. In particular, in assessing a street child's asylum claim, the U.S. government would have to interpret the refugee definition in an age and gender-sensitive manner and take into account the *particular* persecution experienced by street children.

Despite calls from some quarters to recognize the CRC's principles,²¹³ if not ratify it,²¹⁴ previous attempts in the United States to ratify the agreement have proved vastly unsuccessful²¹⁵ and future ratification is unlikely. The current political climate in the United States is unreceptive to ratification of the CRC, and political opponents have presented a number of arguments against ratification.²¹⁶ Considering the obstacles to ratification, lawmakers should look beyond the CRC for purposes of reforming the U.S. immigration system to adopt more child-sensitive asylum procedures.

B. Consideration of Immigration Practices of Countries That Have Ratified the CRC

The United States should consider adopting some of the immigration policies of the nations that have ratified the CRC. In this way, lawmakers could narrowly and selectively adopt appropriate policies, without having to ratify the entire CRC.

1. Canada

Canada has ratified the CRC²¹⁷ and is also a signatory to the 1951

212. *Id.*

213. See e.g., BHABHA & SCHMIDT, *supra* note 3, at 34-35 (explaining that although the United States has not ratified the CRC, as a signatory the United States is obligated under international law to refrain from acts that would defeat the object and purpose of the CRC); Maria Bucci, Note, *Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 276-80 (2004) (analyzing the history and formulation of the CRC and highlighting reasons why the United States has failed to ratify it); Royce Bernstein Murray, Note, *Sex for Food in a Refugee Economy: Human Rights Implications and Accountability*, 14 GEO. IMMIGR. L.J. 985, 1008-09 (2000) (arguing that under the CRC, the United States has the responsibility to protect children from all forms of sexual exploitation and sexual abuse).

214. See e.g., Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 179 (2006) (arguing that "current events, recent judicial decisions, and the international political climate all support a renewed effort to ratify the CRC," and that "the current state of children's health and development demands that the United States pay closer attention to the inherent human rights of each child"); Seugling, *supra* note 71, at 894 (arguing that the United States should ratify the CRC).

215. See Rutkow & Lozman, *supra* note 214, at 170-72.

216. See e.g., *id.* at 173-80. For example, political opponents argue that the CRC impedes parental rights by giving the government too much responsibility for the well-being of the child and view the CRC as a threat to national sovereignty by mandating how to raise children. *Id.* at 174-79.

217. Canada ratified the CRC in 1991. See SUZANNE WILLIAMS, INT'L INST. FOR CHILD RIGHTS AND DEV., MEETING CANADA'S OBLIGATIONS UNDER THE UN CONVENTION ON THE

Geneva Convention Relating to the Status of Refugees and its 1967 Protocol.²¹⁸ It is estimated that between 25,000 and 35,000 refugee claims are made in Canada each year.²¹⁹ Data on refugee claims filed by separated children, however, is not consistently gathered and not necessarily comprehensive.²²⁰

Under Canadian law, an applicant seeks asylum either as a convention refugee or a person in need of protection.²²¹ A convention refugee is a refugee as defined under the 1951 Convention:

[A] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.²²²

A person in need of protection is “a person in Canada whose removal to their country of nationality or former habitual residence would subject them to the possibility of torture, risk of life, or risk of cruel and unusual treatment or punishment.”²²³ Yet, with respect to the risk to life or the risk of cruel and unusual treatment or punishment, there are some limits: the risk in question must exist throughout the country, the risk must be personal and cannot be a risk faced generally by other people in or from the country, the risk must not come from a lawful punishment or penalty that meets accepted international standards, and the risk must not be caused by the country’s inability to provide adequate health or medical care.²²⁴

Another manner in which a refugee can receive asylum in Canada is

RIGHTS OF THE CHILD: FROM PAPER CONCEPTS TO LIVING BENEFITS FOR CHILDREN 3 n.3 (2005), available at [http://web.uvic.ca/iicrd/graphics/IICRDBrieftoSenateCommittee\(final\).pdf](http://web.uvic.ca/iicrd/graphics/IICRDBrieftoSenateCommittee(final).pdf).

218. Shikha Mishra, *Seeking Greener Pastures*, GULF NEWS, July 24, 2006, available at http://archive.gulfnews.com/supplements/canada/more_stories/10054436.html.

219. See CITIZENSHIP & IMMIGRATION CAN., FACTS AND FIGURES: IMMIGRATION OVERVIEW, PERMANENT AND TEMPORARY RESIDENTS 12 (2006), available at <http://www.cic.gc.ca/english/pdf/pub/facts2006.pdf> (referencing that refugees have comprised 30,094; 27,919; 25,122; 25,984; 32,687; 35,768; and 32,492 of Canada’s permanent residents from 2000 to 2006, respectively); see also Citizenship & Immigration Canada, *Backgrounders 2007: Refugees and Canada’s Refugee System*, June 20, 2007, <http://www.cic.gc.ca/english/department/media/backgrounders/2007/2007-06-20.asp> (describing how Canada generally accepts more than 25,000 refugees a year and anticipates granting permanent residence to 25,900 to 30,800 refugees in 2007 from around the world).

220. See U.N. HIGH COMM’R FOR REFUGEES, SEPARATED CHILDREN SEEKING ASYLUM IN CANADA 3 (2001), available at <http://www.web.net/-ccr/separated.PDF> (adopted from an original report researched and written by Wendy Ayotte) (referencing conflicting data on the number of unaccompanied children seeking asylum in Canada in 1999 and 2000).

221. IMMIGRATION & REFUGEE BOARD OF CAN., IMMIGRATION & REFUGEE BOARD OF CANADA: AN OVERVIEW 9 (2006), available at <http://dsp-psd.pwgsc.gc.ca/Collection/MQ21-32-2006E.pdf> [hereinafter CANADA: AN OVERVIEW].

222. *Id.*

223. *Id.*

224. *Id.* at 9-10.

on humanitarian or compassionate grounds.²²⁵ This approach includes refugee protection claimants whose claims are not approved by the Immigration and Refugee Board (IRB). Applications to become a permanent resident on humanitarian and compassionate grounds, however, are approved only in exceptional circumstances, and it can take many years to process such an application.²²⁶

The IRB determines an applicant's asylum claim during a non-adversarial hearing, a process that takes into account the "best interests of the child" principle and conforms to the CRC. IRB guidelines provide that for each asylum applicant under eighteen, whether accompanied or unaccompanied, the IRB must appoint a "designated representative" whose duty is to act in the best interest of the child.²²⁷ The guidelines also establish a panel that considers the child's maturity and development at the time of the alleged persecution to determine the best way to elicit testimonial evidence from the child applicant.²²⁸ Evidence at the hearing can either be testimonial (provided by family members in Canada or another country, members of the child's community, medical personnel, teachers, social workers, community workers, and others who have dealt with the child) or documentary (reports of persons similarly situated to the child or the child's group, and general country conditions).²²⁹

Other provisions of Canadian immigration law are designed to protect the best interests of the child. The manual for Processing Claims for Refugee Protection in Canada explicitly directs immigration officials to ensure that the best interests of the child are a primary consideration.²³⁰ The Canadian Supreme Court also relied on the best interests principle in a deportation case, *Baker v. Canada*,²³¹ and established that immigration officials must consider the best interests of the child when exercising discretion in deportation cases.²³² *Baker* was of tremendous importance because it directed administrative decisionmakers to consider international human rights instruments as important sources of law when determining whether an administrator has reasonably exercised discretion.²³³

225. See Citizenship & Immigration Can., *Refugees: Refugee Claims in Canada—Humanitarian and Compassionate Review*, <http://www.cic.gc.ca/english/refugees/inside/h-and-c.asp> (Mar. 31, 2007).

226. See *id.*

227. See IMMIGRATION AND REFUGEE BOARD OF CANADA, *CHILD REFUGEE CLAIMANTS: PROCEDURAL AND EVIDENTIARY ISSUES AI, All & app.* at 4 n. 12 (1996), available at http://www.asylumlaw.org/docs/canada/child_refugee_complete.pdf (discussing the role of the designated representative as "distinct" from legal counsel, which may also be appointed).

228. See *id.* at AIII, B1.

229. *Id.* at B1.

230. CITIZENSHIP AND IMMIGRATION CAN., *PP 1 PROCESSING CLAIMS FOR REFUGEE PROTECTION IN CANADA* 56-58, 63 (Apr. 4, 2008), available at <http://www.cic.gc.ca/english/resources/manuals/pp/pp01e.pdf>.

231. *Baker v. Canada*, [1999] 2 S.C.R. 817.

232. David Dyzenhaus & Evan Fox-Decent, *Rethinking the Process/Substance Decision: Baker v. Canada*, 51 U. TORONTO L.J. 193, 194 (2001).

233. *Id.* at 194.

2. Sweden

The Swedish Aliens Act (Aliens Act) provides an asylum right in Sweden.²³⁴ The Aliens Act incorporates the UN Convention Relating to the Status of Refugees and requires Sweden to examine every asylum application and grant asylum to those who are refugees as defined in the Convention.²³⁵ Convention refugees are those who have reason to fear persecution in their native country due to their race, nationality, religious or political beliefs, gender or sexual orientation, or their membership in a particular social group.²³⁶

According to the Aliens Act, persons who do not satisfy the Convention's refugee criteria but are still in need of protection can be granted a residence permit as "persons in need of protection"—those who left their native country and have a well-grounded fear of suffering the death penalty, torture, etc., or those that need protection due to an internal or external armed conflict or an environmental disaster in their native country.²³⁷ Sweden may also grant permission to stay in Sweden to people who can demonstrate exceptionally distressing circumstances.²³⁸ For example, those suffering from a grave illness for which no treatment is available in their home country may be allowed refugee status in Sweden.²³⁹

A few hundred asylum-seeking unaccompanied children arrive in Sweden each year.²⁴⁰ When deciding a child's asylum claim, Swedish migration authorities consider the child's age, state of health, and other circumstances.²⁴¹ Usually, a legal representative and a trustee assist the child asylum seeker.²⁴² Under the CRC, a child is entitled to be reunited with his or her parents. Consequently, the Swedish Migration Board makes considerable efforts to find the children's parents or another custodian.

3. The United Kingdom

On paper, the asylum process in the United Kingdom (U.K.) conforms to international standards. For example, U.K. domestic law incorporates both the Refugee Convention and the European Convention on Human Rights, and the United Kingdom has ratified the CRC.²⁴³ U.K. governmental bodies have also issued various instruments of guidance recommending

234. MIGRATIONSVERKET, ASYLUM RULES IN SWEDEN I (2007) available at http://www.migrationsverket.se/infomaterial/asyl/allmant/asylregler_en.pdf.

235. *Id.*

236. Migrationsverket, Who Can Get Asylum?, <http://www.migrationsverket.se/english.jsp?english/easyl/evemfar.html> (July 27, 2006).

237. *Id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. JACQUELINE BHABHA & NADINE FINCH, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.K. 9, 17 n.3 (2006) (providing that the U.K. ratified the CRC on Jan. 15, 1992).

good practice in regard to asylum applications from unaccompanied and separated children.²⁴⁴ The Immigration Service provides immigration officers with the manual *Best Practice: Unaccompanied Minors: Unaccompanied Asylum and Non-asylum Seeking Children and Guidance on Children Arriving in the U.K.*²⁴⁵ The Immigration and Nationality Directorate (IND) includes a chapter in its manual entitled "Processing Applications from Children."²⁴⁶ Moreover, domestic courts follow the advice contained in the UNHCR's Handbook on procedures and criteria for determining refugee status.²⁴⁷

Despite such guidance, researchers Jacqueline Bhabha and Nadine Finch have found that in practice "U.K. authorities have failed to provide adequate support and protection to unaccompanied or separated children" seeking asylum.²⁴⁸ For example, just 2% of unaccompanied or separated children were granted asylum upon application in 2004, and only about 12% succeeded in appeals of initial refusals.²⁴⁹

Although the United Kingdom has ratified the CRC, the relevance of its ratification is limited as a result of its reservation to the Convention. The reservation states:

[T]he United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.²⁵⁰

Notwithstanding this reservation, the Court of Appeal has referenced and relied on the CRC in recent cases.²⁵¹ Yet, the Committee on the CRC has voiced its concern that the U.K.'s reservation is contrary to Article 2 of the CRC, which states "that the [CRC] should apply to all children without discrimination of any kind."²⁵² The Committee has recommended a reformation regarding the circumstances of children in asylum and immigration proceedings, so that they are more in line with principles and provisions of the CRC.²⁵³

244. *Id.* at 9.

245. *Id.* at 9-10.

246. *Id.* at 10.

247. *Id.* at 35.

248. *Id.* at 10.

249. *Id.*

250. *Id.* at 36-37; see also Simon Russell, *Unaccompanied Refugee Children in the United Kingdom*, 11 INT'L J. OF REFUGEE L. 126, 130 ("By this reservation, the UK is saying that refugee children are not entitled to the same rights as resident children, simply because they are not resident.").

251. See BHABHA & FINCH, *supra* note 243, at 37 (discussing the case *ID & Others v. The Home Office*, where "Lord Justice Brooke relied on Article 37(b) of the [CRC] and held that he was under a duty to interpret the European Convention on Human Rights in the light of other obligations in international law, including treaty obligations").

252. *Id.*; see also Russell, *supra* note 250, at 131 ("The UN Committee on the Rights of the Child has characterised the broad nature of the reservation as one of its principal subjects of concern about the UK's record under the Convention, raising questions about the compatibility of the reservation.").

253. See BHABHA & FINCH, *supra* note 243, at 37.

Despite these shortcomings, the United Kingdom has in place some important authoritative measures for child asylum seekers. First, the United Kingdom established the Refugee Council Panel of Advisors for Unaccompanied Refugee Children, which provides advice and support to child asylum applicants in the initial stages after arriving in the United Kingdom and “acts as a liaison rather than the guardian of the child’s interests.”²⁵⁴ Second, although legal representation is not required, the Legal Services Commission provides legal advice to unaccompanied children seeking asylum and funds legal representatives to attend the screening and interviewing process.²⁵⁵

C. Recommendations to Reform U.S. Asylum Law

U.S. immigration law should be amended to take into account the best interests of the child principle, to require a designated representative or a panel of advisers, and to provide that unaccompanied children in immigration proceedings with a government-funded attorney or a guardian *ad litem*.²⁵⁶ These are minimum safeguards that are part of the law of Canada and the United Kingdom and would be consistent with other related areas of American law. For example, the child welfare and juvenile justice systems generally provide for child-specific assistance, such as guaranteeing legal representation, guardians *ad litem*, or both.²⁵⁷

By integrating the best interests principle into U.S. asylum law, the United States would be in accord with immigration procedural guidelines provided by the Immigration and Naturalization Services and the American Bar Association (ABA). The INS Guidelines recognize that although the best interests principle “does not play a role in determining substantive eligibility under the U.S. refugee definition,” it is still “a useful measure for determining appropriate interview procedures for child asylum seekers.”²⁵⁸ The ABA manual *Standards for Care and Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* also recommends using the best interests of the

254. See Russell, *supra* note 250, at 146 (noting, however, that the Panel of Advisers “do[es] not play any part in achieving a durable solution to the unaccompanied and refugee child’s need for protection” and is “not comparable to Guardians Ad Litem”).

255. *Id.* at 102.

256. See WEISS, *supra* note 84, at 3, 19 n.12 (noting that “it is generally in the child’s best interests for Asylum Officers to allow a trusted adult to attend an asylum interview with the child asylum applicant” but that “there is no requirement that a child bring an adult to the inter-view [sic] either to serve as a support person, attorney, or accredited representative”); see also BHABHA & SCHMIDT, *supra* note 3, at 33.

257. See BHABHA & SCHMIDT, *supra* note 3, at 33. Statistically, given the complexity of immigration proceedings, child asylum applicants in the United States are much more likely to win their cases if they have representation. See *id.* at 190 (citing data from the Asylum Office Headquarters that from 1999 to 2003 only 32% of child asylum applicants were represented by an attorney, and of those, 48% were granted asylum while only 27% were granted asylum without an attorney); see also Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 157 (2006) (arguing that asylum seekers are about five times more likely to win their cases if they have legal representation).

258. WEISS, *supra* note 84, at 1.

child principle, and provides the general rule that “[e]xcept as otherwise required by law, the best interests of the Child shall be a primary concern of the Custodial Agency, Advocate for Child Protection, Adjudicator, and all Immigration Enforcement Agency personnel responsible for the Child in the United States in all actions and decisions concerning the Child.”²⁵⁹ The ABA also urges that to incorporate the best interests principle, one should, at minimum, take the following factors into account:

- a) the age, gender, and religious and cultural background of the Child;
- b) the possible reunification with a parent, other Adult Family Members or legal guardians, with consideration given to any evidence that may indicate whether the custodial relationship is harmful to the Child;
- c) the Child’s expressed interests;
- d) the past experiences of the Child;
- e) the social, emotional, mental, developmental and physical challenges the Child faces or will face; and
- f) if the Child is detained, the impact on the Child of continued detention versus immediate release to a parent, other Adult Family Member, or legal guardian.²⁶⁰

The United States should also create a category of “protected persons” for refugee purposes that would protect street children upon a particularized showing. This category could mirror the existing Special Immigrant Juvenile Status (SIJS), a program that currently provides permanent legal status to approximately 500 children a year.²⁶¹ For an applicant to qualify for an SIJS visa, a juvenile court must first declare the applicant a dependent or place the applicant in the care of a child welfare agency.²⁶² In addition, a juvenile court must deem the minor eligible for long-term foster care due to abuse, neglect, or abandonment.²⁶³ Second, a court must find that it would be in the child’s best interest not to return to his or her home country.²⁶⁴ Lastly, the Attorney General must expressly consent to the prerequisite dependency order.²⁶⁵ The United States should not limit this opportunity for permanent legal residence to the 500 children a year that currently qualify; instead, it should widen the category to include children who suffer similar hardships.

The SIJS law is a unique immigration provision for unaccompanied minors because it uses the best interest principle as its main criteria, rather than requiring a child to prove persecution on one of the five enumerated

259. COMM’N ON IMMIGRATION, AM. BAR ASSOC., STANDARDS FOR THE CUSTODY, PLACE-
MENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN
CHILDREN IN THE UNITED STATES 11 (2004) available at [http://www.abanet.org/public
serv/immigration/Immigrant_Standards.pdf](http://www.abanet.org/public
serv/immigration/Immigrant_Standards.pdf).

260. *Id.*

261. BHABHA & SCHMIDT, *supra* note 3, at 51. Yet, the number of children who apply
for SIJS each year is unknown; the only statistics available are the number of juvenile
court dependents granted permanent resident status each year. *See id.* at 53.

262. Immigration & Naturalization Act § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)
(J)(i) (2006).

263. *Id.*

264. 8 U.S.C. § 1101(a)(27)(J)(ii).

265. 8 U.S.C. § 1101(a)(27)(J)(iii).

grounds under the INA.²⁶⁶ In fact, the SIJS visa program has been honored as a “welcome example within the U.S. system of a legal provision which introduces both best interest considerations into substantive immigration law and requires collaboration of child welfare and immigration, state and federal systems.”²⁶⁷ Another author has characterized this program as “a radical break from the dominant modes of thinking about children in immigration law” because decisionmakers “view children as persons, not objects.”²⁶⁸ A new category of “protected persons” formulated on this basis—in which preserving the child’s best interest is required and not just considered—would be a perfect vehicle with which unaccompanied minors could pursue asylum claims.

The United States should model this new category on Canadian and Swedish immigration systems, which already offer refugee status to “persons in need of protection.” Although Canada offers protection to those “whose removal to their home country would subject them personally to a danger of torture, a risk of their life, or a risk of cruel and unusual treatment or punishment,”²⁶⁹ Sweden offers protection to “those who have left their native country and have a well-grounded fear of suffering the death penalty, torture, etc.” or “need protection due to an internal or external armed conflict or an environmental disaster in their native country.”²⁷⁰ The plight of some unaccompanied minors, particularly street children, would fit squarely within these definitions of protected persons. And like the SIJS, these definitions do not require proof of persecution based on the five enumerated grounds.

Unaccompanied minors and street children would greatly benefit from the aforementioned suggested reforms to U.S. asylum law. Strictly incorporating the best interests principle into U.S. immigration law would require the appointment of a legal representative for every child asylum applicant, as well as a careful, child-sensitive analysis of the particular alleged persecution. This approach would guarantee the child applicant’s understanding of the entire asylum proceeding and would require adjudicators to deeply analyze child-specific forms of persecution. Creating a new category of “protected persons” would widen the category of applicants eligible for legal permanent residence and lessen the burden on child asylum seekers trying to prove persecution.

Conclusion

Persuading a court or judge to recognize a new particular social group is a difficult obstacle when presenting an asylum claim based on persecu-

266. See David B. Thronson, *Kids Will be Kids?: Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1004-15 (2002) (arguing that the best interests principle should be further integrated into U.S. immigration law and policy).

267. BHABHA & SCHMIDT, *supra* note 3, at 51.

268. Thronson, *supra* note 266, at 1004.

269. See CANADA: AN OVERVIEW, *supra* note 221, at 9.

270. See Migrationsverket, *Who Can Get Asylum?*, *supra* note 236.

tion for membership in a particular social group. Those preferring to restrict the scope of particular social group categories argue that, because it represents a privileged form of migration, refugee status should be given only to a limited number of people.²⁷¹ Moreover, these advocates argue that victims of economic or structural violence should first seek help in their home countries via internal governmental policies or with external initiatives, before applying for asylum status in the United States.²⁷²

If the judiciary is unwilling to interpret the INA statute to find street children as a particular social group, the other branches of the U.S. government should take action to protect these defenseless children. Congress should finally ratify the CRC but should also refrain from imposing reservations that would go against its objective, as the United Kingdom seems to have done. The United States should also consider implementing the aforementioned proposed reforms to U.S. asylum law.

271. ARISTIDE R. ZOLBERG ET AL., *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 269-72 (1998).

272. *Id.*

