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GUIDELINES ON INTERNATIONAL PROTECTION NO. 9:**Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Reissued, Geneva, 2011). In particular, they should be read in conjunction with *UNHCR's Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 2002); *UNHCR's Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 2002); and *UNHCR's Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (April 2004). They replace *UNHCR's Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity* (November 2008).

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

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection* are available as a compilation at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

cited in *Bringas-Rodriguez v. Sessions*, No. 13-72686 archived on March 2, 2017

I. INTRODUCTION

1. In many parts of the world, individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity. While persecution of Lesbian, Gay, Bisexual, Transgender and Intersex (hereafter "LGBTI")¹ individuals and those perceived to be LGBTI is not a new phenomenon,² there is greater awareness in many countries of asylum that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereafter the "1951 Convention").³ Nevertheless, the application of the refugee definition remains inconsistent in this area.
2. It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world.⁴ Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty.⁵ In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.
3. Intersecting factors that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status. Due to these multiple layers of discrimination, LGBTI individuals are often highly marginalized in society and isolated from their communities and families. It is also not uncommon for some individuals to harbour feelings of shame and/or internalized homophobia. Because of these and other factors, they may be inhibited from informing asylum adjudicators that their real fear of persecution relates to their sexual orientation and/or gender identity.
4. The experiences of LGBTI persons vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment. The applicant's background may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly as LGBTI. It is important that decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions. These Guidelines provide substantive and procedural guidance on the determination of refugee status of individuals on the basis of their sexual orientation and/or gender identity, with a view to ensuring a proper and harmonized interpretation of the refugee definition in the 1951 Convention.⁶

II. INTERNATIONAL HUMAN RIGHTS LAW

5. Article 1 of the Universal Declaration of Human Rights provides that "all human beings are born free and equal in dignity and rights", and Article 2 declares that "everyone is entitled to all the rights and freedoms set forth in this Declaration".⁷ All people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination.⁸
6. Although the main international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation and/or gender identity,⁹ discrimination on these grounds has been held to be

¹ For a discussion of terms, see below at III. Terminology. For the purpose of these Guidelines, "gender identity" also incorporates "intersex".

² The 1951 Convention relating to the Status of Refugees was drafted not least as a response to the persecution during World War II, during which intolerance and violence cost the lives of thousands of people with a LGBTI background. See, UNHCR, "Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity", November 2010, Expert Roundtable organized by UNHCR, Geneva, Switzerland, 30 September–1 October 2010 (hereafter "UNHCR, Summary Conclusions of Roundtable"), available at: <http://www.unhcr.org/refworld/docid/4cff99a42.html>, para. 3.

³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951; Protocol Relating to the Status of Refugees, 31 January 1967.

⁴ See, UN Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity", 17 November 2011 (hereafter "OHCHR, Report on Sexual Orientation and Gender Identity"), available at: <http://www.unhcr.org/refworld/docid/4ef092022.html>. For an overview of jurisprudence and doctrine, see also International Commission of Jurists (hereafter "ICJ"), *Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, fourth updated edition, available at: <http://www.unhcr.org/refworld/docid/4c627bd82.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at: <http://www.unhcr.org/refworld/docid/4a54bbb5d.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at: <http://www.unhcr.org/refworld/docid/4ad5b83a2.html>.

⁵ See, International Lesbian, Gay, Bisexual, Trans and Intersex Association, "State-sponsored Homophobia, A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults", May 2012, available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf.

⁶ These Guidelines supplement the UNHCR "Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", 7 May 2002 (hereafter "UNHCR, Guidelines on Gender-Related Persecution"), available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>

⁷ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

⁸ OHCHR, Report on Sexual Orientation and Gender Identity, para. 5.

⁹ However, some regional instruments expressly prohibit discrimination on grounds of sexual orientation. See, for example, Charter of Fundamental Rights of the European Union, Article 21, 18 December 2000, and Resolution of the Organization of American States, Human Rights, Sexual Orientation, and Gender Identity,

prohibited by international human rights law.¹⁰ For example, the proscribed grounds of “sex” and “other status” contained in the non-discrimination clauses of the main international human rights instruments have been accepted as encompassing sexual orientation and gender identity.¹¹ As respect for fundamental rights as well as the principle of non-discrimination are core aspects of the 1951 Convention and international refugee law,¹² the refugee definition must be interpreted and applied with due regard to them, including the prohibition on non-discrimination on the basis of sexual orientation and gender identity.

7. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted in 2007 by a group of human rights experts and, although not binding, reflect well-established principles of international law.¹³ They set out the human rights protection framework applicable in the context of sexual orientation and/or gender identity. Principle 23 outlines the right to seek and enjoy asylum from persecution related to sexual orientation and/or gender identity:

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

III. TERMINOLOGY

8. These Guidelines are intended to be inclusive of and relevant to the range of claims relating to sexual orientation and/or gender identity. The concepts of sexual orientation and gender identity are outlined in the Yogyakarta Principles and this terminology is also used for the purposes of these Guidelines. Sexual orientation refers to: “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender”.¹⁴ Gender identity refers to: “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms”.¹⁵
9. Sexual orientation and gender identity are broad concepts which create space for self-identification. Research over several decades has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex.¹⁶ Gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both. Whether one’s sexual orientation is determined by, *inter alia*, genetic, hormonal, developmental, social, and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation.¹⁷ While for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person’s lifetime. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants.¹⁸
10. Refugee claims based on sexual orientation and/or gender identity often emanate from members of specific sub-groups, that is, lesbian, gay, bisexual, transgender, intersex and queer¹⁹ individuals (usually abbreviated as “LGBT”, “LGBTI” or “LGBTIQ”²⁰). The experiences of members of these various groups will often be distinct from one another; and, as noted above at paragraph 4, *between* members. It is, therefore,

AG/RES. 2721 (XLII-O/12), 4 June 2012.

¹⁰ “[D]iscrimination’ as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”, UN Human Rights Committee, CCPR General Comment No. 18: Non-Discrimination, 10 November 1989, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>, para. 7.

¹¹ The UN Human Rights Committee held in 1994 in the landmark decision *Toonen v. Australia* that the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966, hereafter “ICCPR”) prohibits discrimination on the grounds of sexual orientation, see CCPR/C/50/D/488/1992, 4 April 1994, (hereafter “*Toonen v. Australia*”) available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>. This has subsequently been affirmed by several other UN human rights treaty bodies, including also recognition that gender identity is among the prohibited grounds of discrimination. See further, OHCHR, Report on Sexual Orientation and Gender Identity, para. 7.

¹² 1951 Convention, Preamble para. 1, Article 3.

¹³ ICJ, Yogyakarta Principles - Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, (hereafter “Yogyakarta Principles”), March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>.

¹⁴ Yogyakarta Principles, Preamble.

¹⁵ *Ibid.*

¹⁶ American Psychological Association, “Sexual Orientation and Homosexuality” (hereafter “APA, Sexual Orientation and Homosexuality”), available at: <http://www.apa.org/helpcenter/sexual-orientation.aspx>.

¹⁷ There is no consensus among scientists about the exact reasons that an individual develops a particular sexual orientation. See, APA, Sexual Orientation and Homosexuality.

¹⁸ *Application No. 76175*, New Zealand Appeals Authority, 30 April 2008, available at: <http://www.unhcr.org/refworld/docid/482422f62.html>, para. 92.

¹⁹ *Queer* is traditionally a pejorative term, however, it has been appropriated by some LGBT people to describe themselves.

²⁰ UNHCR has opted to refer to “LGBTI” individuals, which is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity. See further, UNHCR, *Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement*, 2011, available at: <http://www.unhcr.org/refworld/docid/4e6073972.html>. For further information on terminology, see, for example, Gay & Lesbian Alliance Against Defamation, “Media Reference Guide: A Resource for Journalists”, updated May 2010, available at: <http://www.glaad.org/reference>.

essential that decision makers understand both the context of each refugee claim, as well as individual narratives that do not easily map onto common experiences or labels.²¹

Lesbian

A *lesbian* is a woman whose enduring physical, romantic and/or emotional attraction is to other women. Lesbians often suffer multiple discrimination due to their gender, their often inferior social and/or economic status, coupled with their sexual orientation. Lesbians are commonly subjected to harm by non-State actors, including acts such as “corrective” rape, retaliatory violence by former partners or husbands, forced marriage, and crimes committed in the name of “honour” by family members. Some lesbian refugee applicants have not had any experiences of past persecution; for example, if they have had few or no lesbian relationships. Lesbians may have had heterosexual relationships, often, but not necessarily, because of social pressures to marry and bear children. They may only later in life enter into a lesbian relationship or identify as lesbian. As in all refugee claims, it is important to ensure that the assessment of her fear of persecution is future-looking and that decisions are not based on stereotypical notions of lesbians.

Gay men

Gay is often used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although gay can also be used to describe both gay men and women (lesbians). Gay men numerically dominate sexual orientation and gender identity refugee claims, yet their claims should not be taken as a “template” for other cases on sexual orientation and/or gender identity. Gay men are often more visible than other LGBTI groups in public life in many societies and can become the focus of negative political campaigns. It is important, however, to avoid assumptions that all gay men are public about their sexuality or that all gay men are effeminate. Having defied masculine privilege by adopting roles and characteristics viewed as “feminine”, gay men may be viewed as “traitors”, whether they are effeminate or not. They could be at particular risk of abuse in prisons, the military²² and other traditionally male dominated environments and job sites. Some gay men may also have had heterosexual relationships because of societal pressures, including to marry and/or have children.

Bisexual

Bisexual describes an individual who is physically, romantically and/or emotionally attracted to both men and women. The term bisexuality tends to be interpreted and applied inconsistently, often with a too narrow understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes. Bisexuality is a unique identity, which requires an examination in its own right. In some countries persecution may be directed expressly at gay or lesbian conduct, but nevertheless encompass acts of individuals who identify as bisexual. Bisexuals often describe their sexual orientation as “fluid” or “flexible” (see further below at paragraph 47).

Transgender

Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth.²³ Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual.²⁴ Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times. For example, individuals may choose to express their chosen gender only at certain times in environments where they feel safe. Not fitting within accepted binary perceptions of being male and female, they may be perceived as threatening social norms and values. This non-conformity exposes them to risk of harm. Transgender individuals are often highly marginalized and their claims may reveal experiences of severe physical, psychological and/or sexual violence. When their self-identification and physical appearance do not match the legal sex on official documentation and identity documents, transgender people are at particular risk.²⁵ The transition to alter one's birth sex is not a one-step process and may involve a range of personal, legal and medical adjustments. Not all transgender individuals choose medical treatment or other steps to help their outward appearance match their internal identity. It is therefore important for decision makers to avoid overemphasis on sex-reassignment surgery.

²¹ Considerations relating to each group are also integrated elsewhere in these Guidelines.

²² See, for example, *RRT Case No. 060931294*, [2006] RRTA 229, Australia, RRTA, 21 December 2006, available at: <http://www.unhcr.org/refworld/docid/47a707ebd.html>; *MS (Risk - Homosexuality - Military Service) Macedonia v. SSHD*, CG [2002] UKIAT 03308, UK Immigration and Asylum Tribunal, 30 July 2002, available at: <http://www.unhcr.org/refworld/docid/46836aba0.html>, which found that the “atrocious prison conditions” in the particular country would breach the appellant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3. Lesbians may also be at risk in these environments. See, *Smith v. Minister of Citizenship and Immigration*, 2009 FC 1194, Canada, Federal Court, 20 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b3c7b8c2.html>.

²³ The term may include, but is not limited to, transsexuals (an older term which originated in the medical and psychological communities), cross-dressers and other gender-variant people. See further, APA, “Answers to Your Questions about Transgender People, Gender Identity and Gender Expression”, available at: <http://www.apa.org/topics/sexuality/transgender.aspx>.

²⁴ See also, *RRT Case No. 0903346*, [2010] RRTA 41, Australia, Refugee Review Tribunal, 5 February 2010, (hereafter “*RRT Case No. 0903346*”) available at: <http://www.unhcr.org/refworld/docid/4b8e783f2.html>, which concerned a transgender applicant who feared persecution because of her gender identity.

²⁵ The European Court of Human Rights has established that authorities must legally recognize the altered gender. See, *Goodwin v. United Kingdom*, Application no. 28957/95, European Court of Human Rights, 11 July 2002, available at: <http://www.unhcr.org/refworld/docid/4dad9f762.html>, finding a violation of the applicant's right to privacy, noting that “the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality”, para. 77, and that “Under Article 8 of the Convention in particular, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”, para. 90. See also Council of Europe Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, recognizing that “Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way.”, at 21.

Intersex

The term *intersex* or "disorders of sex development" (DSD)²⁶ refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female. These conditions may be apparent at birth, may appear at puberty, or may be discovered only during a medical examination. Individuals with these conditions were previously referred to as "hermaphrodites", however this term is considered outdated and should not be used unless the applicant uses it.²⁷ An intersex person may identify as male or female, while their sexual orientation may be lesbian, gay, bisexual, or heterosexual.²⁸ Intersex persons may be subjected to persecution in ways that relate to their atypical anatomy. They may face discrimination and abuse for having a physical disability or medical condition, or for non-conformity with expected bodily appearances of females and males. Some intersex children are not registered at birth by the authorities, which can result in a range of associated risks and denial of their human rights. In some countries, being intersex can be seen as something evil or part of witchcraft and can result in a whole family being targeted for abuse.²⁹ Similar to transgender individuals, they may risk being harmed during the transition to their chosen gender because, for example, their identification papers do not indicate their chosen gender. People who self-identify as intersex may be viewed by others as transgender, as there may simply be no understanding of the intersex condition in a given culture.

11. Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim. For example, bisexuals are often categorized in the adjudication of refugee claims as either gay, lesbian or heterosexual, intersex individuals may not identify as LGBTI at all (they may not see their condition as part of their identity, for example) and men who have sex with men do not always identify as gay. It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and, as explained above at paragraph 8, they present different aspects of the identity of each person.

IV. SUBSTANTIVE ANALYSIS

A. Background

12. A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that.³⁰ As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.³¹ While one's sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act or by external appearance or dress, it may also be evidenced by a range of other factors, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity.³²
13. An applicant's sexual orientation and/or gender identity can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or social norms. The intersection of gender, sexual orientation and gender identity is an integral part in the assessment of claims raising questions of sexual orientation and/or gender identity. Harm as a result of not conforming to expected gender roles is often a central element in these claims. UNHCR's Guidelines on Gender-Related Persecution recognize that:

²⁶ Note that some individuals (and/or their medical records) will just use the name of their particular condition, such as congenital adrenal hyperplasia or androgen insensitivity syndrome, rather than using the term intersex or DSD.

²⁷ US Citizenship and Immigration Services, "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims", 27 December 2011 (hereafter "USCIS, Guidance for Adjudicating LGBTI Claims"), available at: <http://www.unhcr.org/refworld/docid/4f269cd72.html>, p. 13.

²⁸ See further, Advocates for Informed Choice website: <http://aiclegal.org/faq/#whatisintersex>.

²⁹ Jill Schnoebelen, *Witchcraft Allegations, Refugee Protection and Human Rights: A Review of the Evidence*, UNHCR, New Issues in Refugee Research, Research Paper No. 169, January 2009, available at: <http://www.unhcr.org/4981ca712.pdf>.

³⁰ UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department – Case for the First Intervener (United Nations High Commissioner for Refugees)*, 19 April 2010, (hereafter "UNHCR, *HJ and HT*"), available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>, para. 1. For a comparison with other Convention grounds, see para. 29 of the submission. See also, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UK, [2010] UKSC 31, Supreme Court, 7 July 2010 (hereafter "*HJ and HT*"), available at: <http://www.unhcr.org/refworld/docid/4c3456752.html>.

³¹ See, for example, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993 (hereafter "*Canada v. Ward*"), available at: <http://www.unhcr.org/refworld/docid/3ae6b673c.html>; *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, US, 225 F.3d 1084, A72-994-275, (9th Cir. 2000), 24 August 2000, available at: <http://www.unhcr.org/refworld/docid/3ba9c1119.html>, later affirmed by *Morales v. Gonzales*, US, 478 F.3d 972, No. 05-70672, (9th Cir. 2007), 3 January 2007, available at: <http://www.unhcr.org/refworld/docid/4829b1452.html>; *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia, High Court, 9 December 2003 (hereafter "*S395/2002*"), available at: <http://www.unhcr.org/refworld/docid/3fd9eca84.html>; *Refugee Appeal No. 74665*, New Zealand, Refugee Status Appeals Authority, 7 July 2004 (hereafter "*Refugee Appeal No. 74665*"), available at: <http://www.unhcr.org/refworld/docid/42234ca54.html>; *HJ and HT*, above footnote 30, paras. 11, 14, 78.

³² Yogyakarta Principles, Principle 3, affirms that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. See further, *S395/2002*, para. 81; *Matter of Toboso-Alfonso*, US Board of Immigration Appeals, 12 March 1990, (hereafter "*Matter of Toboso-Alfonso*"), available at: <http://www.unhcr.org/refworld/docid/3ae6b6b84.html>; *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, US, No. 02-72651, (9th Cir. 2005), 7 March 2005 (hereafter "*Karouni*") available at: <http://www.unhcr.org/refworld/docid/4721b5c32.html>, at III[6]; *Lawrence, et al. v. Texas*, US Supreme Court, 26 June 2003, available at: <http://www.unhcr.org/refworld/docid/3f21381d4.html>, which found that "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring", p. 6.

Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex.³³

14. The impact of gender is relevant to refugee claims made by both LGBTI men and women.³⁴ Decision makers need to be attentive to differences in their experiences based on sex/gender. For example, heterosexual or male gay norms or country information may not apply to the experiences of lesbians whose position may, in a given context, be similar to that of other women in her society. Full account needs to be taken of diverse and evolving identities and their expression, the actual circumstances of the individual, and the cultural, legal, political and social context.³⁵
15. Societal disapproval of varied sexual identities or their expression is usually more than the simple disapproval of sexual practices. It is often underlined by a reaction to non-compliance with expected cultural, gender and/or social norms and values. The societal norms of who men and women are and how they are supposed to behave are commonly based on hetero-normative standards. Both men and women may be subject to violent acts to make them conform to society's gender roles and/or to intimidate others by setting "an example". Such harm can be "sexualized" as a means of further degrading, objectifying or punishing the victim for his/her sexual orientation and/or gender identity, but can also take other forms.³⁶

B. Well-founded fear of being persecuted

16. The term "persecution", though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.³⁷
17. Discrimination is a common element in the experiences of many LGBTI individuals. As in other refugee claims, discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.³⁸ Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information.³⁹
18. Not all LGBTI applicants may have experienced persecution in the past (see further below at paragraphs 30-33 on concealment as persecution and at paragraph 57 on *sur place* claims). Past persecution is not a prerequisite to refugee status and in fact, the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin.⁴⁰ The applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of origin.⁴¹
19. Behaviour and activities may relate to a person's orientation or identity in complex ways. It may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. While a certain activity expressing or revealing a person's sexual orientation and/or gender identity may sometimes be considered trivial, what is at issue is the consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity, it does not cause or form the basis of the persecution. In UNHCR's view, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is therefore irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution.⁴²

³³ UNHCR, Guidelines on Gender-Related Persecution, para. 16.

³⁴ UNHCR, Guidelines on Gender-Related Persecution, para. 3.

³⁵ UNHCR, Summary Conclusions of Roundtable, para. 5.

³⁶ UNHCR, Summary Conclusions of Roundtable, paras. 6, 16.

³⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (hereafter "UNHCR, *Handbook*"), paras. 51–53.

³⁸ *Ibid.*, paras. 54–55.

³⁹ *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 98, Canada, Federal Court, 21 January 2005 (hereafter "*Molnar v. Canada*") available at: <http://www.unhcr.org/refworld/docid/4fe81df2.html>.

⁴⁰ See, for example, *Bromfield v. Mukasey*, US, 543 F.3d 1071, 1076-77 (9th Cir. 2008), 15 September 2008, available at:

<http://www.unhcr.org/refworld/docid/498b08a12.html>, *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>, para. 91.

⁴¹ UNHCR, *Handbook*, para. 83.

⁴² *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, CJEU, 5 September 2012, available at:

<http://www.unhcr.org/refworld/docid/505ace862.html>, para. 62; *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, UK Supreme Court, 25 July 2012, available at: <http://www.unhcr.org/refworld/docid/500fdacb2.html>, paras. 75–76 (Lord Kerr); *UNHCR Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive and UNHCR, Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, Case No. 2011/0011, available at: <http://www.unhcr.org/refworld/docid/4fc369022.html>, para. 12(9).

Persecution

20. Threats of serious abuse and violence are common in LGBTI claims. Physical, psychological and sexual violence, including rape,⁴³ would generally meet the threshold level required to establish persecution. Rape in particular has been recognized as a form of torture, leaving “deep psychological scars on the victim”.⁴⁴ Rape has been identified as being used for such purposes as “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity.”⁴⁵
21. Many societies, for example, continue to view homosexuality, bisexuality, and/or transgender behaviour or persons, as variously reflecting a disease, a mental illness or moral failing, and they may thus deploy various measures to try to change or alter someone’s sexual orientation and/or gender identity. Efforts to change an individual’s sexual orientation or gender identity by force or coercion may constitute torture, or inhuman or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of person. Examples at the extreme end and which on their face reach the threshold of persecution include forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal therapy.⁴⁶ Non-consensual medical and scientific experimentation is also explicitly identified as a form of torture or inhuman or degrading treatment under the International Covenant on Civil and Political Rights.⁴⁷ Some intersex individuals may be forced to undergo surgery aimed at “normalcy” and, where it will be applied without their consent, this is likely to amount to persecution. It is also important to distinguish in these cases between surgery necessary to preserve life or health and surgery for cosmetic purposes or social conformity. The assessment needs to focus on whether the surgery or treatment was voluntary and took place with the informed consent of the individual.⁴⁸
22. Detention, including in psychological or medical institutions, on the sole basis of sexual orientation and/or gender identity is considered in breach of the international prohibition against the arbitrary deprivation of liberty and would normally constitute persecution.⁴⁹ Moreover, as noted by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there is usually a strict hierarchy in detention facilities and those at the bottom of this hierarchy such as LGBTI detainees, suffer multiple discrimination. Male-to-female transgender prisoners are⁵⁰ at particular risk of physical and sexual abuse if placed within the general male prison population.⁵¹ Administrative segregation, or solitary confinement, solely because a person is LGBTI can also result in severe psychological harm.⁵¹
23. Social norms and values, including so-called family “honour”, are usually closely intertwined in the refugee claims of LGBTI individuals. While “mere” disapproval from family or community will not amount to persecution, it may be an important factor in the overall context of the claim. Where family or community disapproval, for example, manifests itself in threats of serious physical violence or even murder by family members or the wider community, committed in the name of “honour”, it would clearly be classed as

⁴³ International criminal tribunals in their jurisprudence have broadened the scope of crimes of sexual violence that can be prosecuted as rape to include oral sex and vaginal or anal penetration through the use of objects or any part of the perpetrator’s body. See, for instance, *Prosecutor v. Anto Furundzija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.unhcr.org/refworld/docid/40276a8a4.html>, para. 185; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002, available at: <http://www.unhcr.org/refworld/docid/3debaafe4.html>, para. 128. See also, International Criminal Court, Elements of Crimes, 2011, available at: <http://www.unhcr.org/refworld/docid/4ff5dd7d2.html>, Articles 7 (1) (g)-1 and 8(2)(b)(xxii)-1. For refugee-related jurisprudence, see *Ayala v. US Attorney General*, US, No. 09-12113, (11th Cir. 2010), 7 May 2010 (hereafter “*Ayala v. US Attorney General*”), available at: <http://www.unhcr.org/refworld/docid/4c6c04942.html>, which found that oral rape constituted persecution.

⁴⁴ *Aydin v. Turkey*, 57/1996/676/866, Council of Europe, European Court of Human Rights, 25 September 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b7228.html>, para. 83. See also, *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department* [2005] UKAIT 00120, UK Asylum and Immigration Tribunal (AIT), 4 August 2005, available at <http://www.unhcr.org/refworld/docid/471dfafe0.html>, recognizing as torture the sexual assault the applicant had been subjected to while in detention, paras. 57, 134; *Arrêt n° 36 527*, Belgium: Conseil du Contentieux des Etrangers, 22 December 2009, available at: <http://www.unhcr.org/refworld/docid/4dad94692.html>, referring to torture and serious violations of the appellant’s physical integrity while in prison as constituting persecution.

⁴⁵ *The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment)*, ICTR-96-4-A, International Criminal Tribunal for Rwanda, 1 June 2001, available at: <http://www.unhcr.org/refworld/docid/4084i42f4.html>, para. 687.

⁴⁶ Yogyakarta Principles, Principle 18: “Notwithstanding any classifications to the contrary, a person’s sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed”. See also, *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, US, 95-70887, (9th Cir. 1997), 24 June 1997 (hereafter “*Pitcherskaia v. INS*”), available at: <http://www.unhcr.org/refworld/docid/4152e0fb26.html>.

⁴⁷ ICCPR, Article 7, “... In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. As affirmed, for example, by the UN Committee Against Torture and the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this includes subjecting men suspected of homosexual conduct to non-consensual anal examinations to prove their homosexuality. See further, OHCHR, Report on Sexual Orientation and Gender Identity, para. 37.

⁴⁸ See, UN Committee on the Elimination of Discrimination against Women (CEDAW), *Communication No. 42/004*, 29 August 2006, CEDAW/C/36/D/4/2004, available at: <http://www.unhcr.org/refworld/docid/4fdb288e2.html>, which considered non-consensual sterilization as a violation of women’s rights to informed consent and dignity, para. 11.3. In respect of surgery at birth, the best interests of the child is a primary consideration, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her (Convention on the Rights of the Child (CRC), Article 3). If sex re-assignment or reconstructive surgery is contemplated only later in childhood, “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child” (CRC, Article 12(1)).

⁴⁹ See, UN Working Group on Arbitrary Detention, Opinions No. 22/2006 on Cameroon and No. 42/2008 on Egypt: A/HRC/16/47, annex, para. 8(e). See also, UNHCR, “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention”, 2012, (hereafter “UNHCR, Guidelines on Detention”), available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

⁵⁰ OHCHR, Report on Sexual Orientation and Gender Identity, para. 34.

⁵¹ As noted in the UNHCR Guidelines on Detention, “solitary confinement is not an appropriate way to manage or ensure the protection of such individuals”, para. 65.

persecution.⁵² Other forms of persecution include forced or underage marriage, forced pregnancy and/or marital rape (on rape, see above at paragraph 20). In the context of sexual orientation and/or gender identity cases, such forms of persecution are often used as a means of denial or “correcting” non-conformity. Lesbians, bisexual women and transgender persons are at particular risk of such harms owing to pervasive gender inequalities that restrict autonomy in decision-making about sexuality, reproduction and family life.⁵³

24. LGBTI individuals may also be unable to enjoy fully their human rights in matters of private and family law, including inheritance, custody, visitation rights for children and pension rights.⁵⁴ Their rights to freedom of expression, association and assembly may be restricted.⁵⁵ They may also be denied a range of economic and social rights, including in relation to housing, education,⁵⁶ and health care.⁵⁷ Young LGBTI individuals may be prevented from going to school, subjected to harassment and bullying and/or expelled. Community ostracism can have a damaging impact on the mental health of those targeted, especially if such ostracism has lasted for an extended period of time and where it occurs with impunity or disregard. The cumulative effect of such restrictions on the exercise of human rights may constitute persecution in a given case.
25. LGBTI individuals may also experience discrimination in access to and maintenance of employment.⁵⁸ Their sexual orientation and/or gender identity may be exposed in the workplace with resulting harassment, demotion or dismissal. For transgender individuals in particular, deprivation of employment, often combined with lack of housing and family support, may frequently force them into sex work, subjecting them to a variety of physical dangers and health risks. While being dismissed from a job generally is not considered persecution, even if discriminatory or unfair, if an individual can demonstrate that his or her LGBTI identity would make it highly improbable to enjoy any kind of gainful employment in the country of origin, this may constitute persecution.⁵⁹

Laws criminalizing same-sex relations

26. Many lesbian, gay or bisexual applicants come from countries of origin in which consensual same-sex relations are criminalized. It is well established that such criminal laws are discriminatory and violate international human rights norms.⁶⁰ Where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.⁶¹
27. Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGBTI person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection.
28. Assessing the “well-founded fear of being persecuted” in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country

⁵² UN Human Rights Committee and the Inter-American Commission on Human Rights have concluded that the inaction of State vis-à-vis death threats constitutes a violation of the right to life. See also, *RRT Case No. 0902671*, [2009] RRTA 1053, Australia, Refugee Review Tribunal, 19 November 2009, available at: <http://www.unhcr.org/refworld/docid/4b57016f2.html>, which found that the “applicant’s chance of facing serious harm, possibly death by honour killing, if he returned to [the country of origin] now or in the reasonably foreseeable future is real and amounts to serious harm...in that it is deliberate or intentional and involves persecution for a Convention reason”. See also, *Muckette v. Minister of Citizenship and Immigration*, 2008 FC 1388, Canada, Federal Court, 17 December 2008, available at: <http://www.unhcr.org/refworld/docid/4989a27e2.html>. The case was remanded for reconsideration as the lower instance had “failed to address whether the death threats had a degree of reality to them and in effect dismissed them because no one had attempted to kill the Applicant.”

⁵³ OHCHR, Report on Sexual Orientation and Gender Identity, para. 66.

⁵⁴ *Ibid.*, paras. 68–70.

⁵⁵ *Ibid.*, paras. 62–65.

⁵⁶ *Ibid.*, paras. 58–61.

⁵⁷ *Ibid.*, paras. 54–57.

⁵⁸ *Ibid.*, paras. 51–53.

⁵⁹ USCIS, Guidance for Adjudicating LGBTI Claims, p. 23. See also, *Kadri v. Mukasey*, US, Nos. 06-2599 & 07-1754, (1st Cir. 2008), 30 September 2008, available at: <http://www.unhcr.org/refworld/docid/498b0a212.html>. The case was remanded for consideration of the standard for economic persecution, referring to *In re T-Z*, 241 & N. Dec. 163 (US Board of Immigration Appeals, 2007), which had found that “[nonphysical] harm or suffering . . . such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life may rise to persecution”.

⁶⁰ See, for example, *Toonen v. Australia*, above footnote 11, which found that the sodomy law of the territory concerned violated the rights to privacy and equality before the law.

⁶¹ European Union, European Parliament, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (hereafter “EU Qualification Directive”), Article 9; COC and Vrije Universiteit Amsterdam, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011 (hereafter “Fleeing Homophobia Report”) available at: <http://www.unhcr.org/refworld/docid/4ebba7852.html>, pp. 22–24. See also *Arrêt n° 50 966*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad96712.html>, concerning a lesbian, found that a prison term for homosexual conduct of 1–5 years and fines from 100 000 à 1 500 000 francs CFA and the fact that society was homophobic were sufficient grounds to constitute persecution in the circumstances of the case, para. 5.7.1. Similarly in *Arrêt n° 50 967*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad97d92.html>, concerning a gay man.

concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant needs to be examined.⁶² The “fear” element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted.

29. Even where consensual same-sex relations are not criminalized by specific provisions, laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution.⁶³

Concealment of sexual orientation and/or gender identity

30. LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion.
31. That an applicant may be able to avoid persecution by concealing or by being “discreet” about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.⁶⁴ LGBTI people are as much entitled to freedom of expression and association as others.⁶⁵
32. With this general principle in mind, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person’s will, for example, by accident, rumours or growing suspicion.⁶⁶ It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children, for example). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.⁶⁷
33. Being compelled to conceal one’s sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals⁶⁸ and could in particular cases lead to an intolerable predicament amounting to persecution.⁶⁹ Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one’s sexuality or gender identity are factors to consider, including over the long-term.

⁶² UNHCR, *Handbook*, para. 45.

⁶³ *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>, paras. 89, 96; *RRT Case No. 071862642*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008, available at: <http://www.unhcr.org/refworld/docid/4811a7192.html>.

⁶⁴ For example, *HJ and HT*, above footnote 30; UNHCR, *HJ and HT*, above footnote 30, paras. 26–33; *S395/2002*, above footnote 31; *Refugee Appeal No. 74665*, above footnote 31; *Karouni*, above footnote 32; *KHO:2012:1*, Finland, Supreme Administrative Court, 13 January 2012, available at: <http://www.unhcr.org/refworld/docid/4f3cdf7e2.html>. See also, UNHCR, “Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees”, 7 May 2002, HCR/GIP/02/02 (hereafter “UNHCR, Guidelines on Social Group”), available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>, paras. 6, 12; UNHCR, “Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees”, 28 April 2004, HCR/GIP/04/06, (hereafter “UNHCR, Guidelines on Religion”), para. 13; UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, available at: <http://www.unhcr.org/refworld/docid/4fc369022.html>, para. 9.

⁶⁵ As noted by the UK Supreme Court in *HJ and HT*, above footnote 30: “The underlying rationale of the Convention is ... that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them”, para. 53.

⁶⁶ *S395/2002*, above footnote 31, paras. 56–58.

⁶⁷ *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, UK, CG [2011] UKUT 00251(IAC), Upper Tribunal (Immigration and Asylum Chamber), 24 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e0c3fae2.html>.

⁶⁸ Discrimination of LGBTI individuals has been associated with mental health problems. Studies have shown that internalized negative attitudes towards non-heterosexuality in LGB individuals was related to difficulties with self-esteem, depression, psychosocial and psychological distress, physical health, intimacy, social support, relationship quality, and career development. See further, APA, “Practice Guidelines for LGB Clients, Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients” (hereafter “APA, Practice Guidelines for LGB Clients”), available at: <http://www.apa.org/pi/lgbt/resources/guidelines.aspx?item=3>.

⁶⁹ *Pathmakathan v. Holder*, US, 612 F.3d 618, 623 (7th Cir. 2010), available at: <http://www.unhcr.org/refworld/docid/4d249efa2.html>.

Agents of Persecution

34. There is scope within the refugee definition to recognize persecution emanating from both State and non-State actors. State persecution may be perpetrated, for example, through the criminalization of consensual same-sex conduct and the enforcement of associated laws, or as a result of harm inflicted by officials of the State or those under the control of the State, such as the police or the military. Individual acts of “rogue” officers may still be considered as State persecution, especially where the officer is a member of the police and other agencies that purport to protect people.⁷⁰
35. In situations where the threat of harm is from non-State actors, persecution is established where the State is unable or unwilling to provide protection against such harm. Non-State actors, including family members, neighbours, or the broader community, may be either directly or indirectly involved in persecutory acts, including intimidation, harassment, domestic violence, or other forms of physical, psychological or sexual violence. In some countries, armed or violent groups, such as paramilitary and rebel groups, as well as criminal gangs and vigilantes, may target LGBTI individuals specifically.⁷¹
36. In scenarios involving non-State agents of persecution, State protection from the claimed fear has to be available and effective.⁷² State protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence against LGBTI individuals with due diligence.⁷³ Depending on the situation in the country of origin, laws criminalizing same-sex relations are normally a sign that protection of LGB individuals is not available. Where the country of origin maintains such laws, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant.⁷⁴ As in other types of claims, a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return.
37. Where the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on reliable and up-to-date country of origin information. The reforms need to be more than merely transitional. Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender identity.⁷⁵ The existence of certain elements, such as anti-discrimination laws or presence of LGBTI organizations and events, do not necessarily undermine the well-foundedness of the applicant’s fear.⁷⁶ Societal attitudes may not be in line with the law and prejudice may be entrenched, with a continued risk where the authorities fail to enforce protective laws.⁷⁷ A *de facto*, not merely *de jure*, change is required and an analysis of the circumstances of each particular case is essential.

⁷⁰ See *Ayala v. US Attorney General*, above footnote 42. The treatment by a group of police officers (robbery and sexual assault) constituted persecution and was deemed to be on account of the applicant’s sexual orientation.

⁷¹ *P.S., a/k/a S.J.P., v. Holder, Attorney General*, US, No. 09-3291, Agency No. A99-473-409, (3rd Cir. 2010), 22 June 2010, available at: <http://www.unhcr.org/refworld/docid/4fbf263f2.html>, concerned a gay man who was targeted by a non-State armed group. See also, *RRT Case No. N98/22948*, [2000] RRTA 1055, Australia, Refugee Review Tribunal, 2 November 2000, available at: <http://www.unhcr.org/refworld/docid/4b7a97fd2.html>, which found that the applicant was at risk of persecution at the hands of vigilante groups. The identification of poor gay men as “disposables” put them at risk of “social clean up” operations.

⁷² UNHCR, *Handbook*, paras. 97–101; UN Human Rights Committee, General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <http://www.unhcr.org/refworld/docid/478b26ae2.html>, paras. 8, 15–16; CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, available at: <http://www.unhcr.org/refworld/docid/4d467ea72.html>, para. 36.

⁷³ See, for example, UK Home Office, “Sexual Orientation Issues in the Asylum Claim”, 6 October 2011, available at: <http://www.unhcr.org/refworld/docid/4eb8f0982.html>, p. 6.

⁷⁴ UNHCR, Summary Conclusions of Roundtable, para. 8.

⁷⁵ *RRT Case No. 0905785*, [2010] RRTA 150, Australia, Refugee Review Tribunal, 7 March 2010, available at: <http://www.unhcr.org/refworld/docid/4c220be62.html>, found that the decriminalization of homosexual acts in the particular country was unlikely to have an immediate impact on how people viewed homosexuality, para. 88.

⁷⁶ USCIS, Guidance for Adjudicating LGBTI Claims, p. 25. See also *Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 860, Canada, Federal Court, 8 July 2011, available at: <http://www.unhcr.org/refworld/docid/4fa952572.html>, which noted that the presence of many non-governmental organizations that fight against discrimination based on sexual orientation is in itself a telling factor in considering the country conditions.

⁷⁷ See, *Judgment No. 616907*, K. France, Cour nationale du droit d’asile, 6 April 2009, summary available at *Contentieux des réfugiés: Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile - Année 2009*, 26 October 2010, available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html>, pp. 61–62, which recognized as a refugee a gay man from a particular territory based on the fact that even though a 2004 law banned all discrimination on the basis of sexual orientation those showing their homosexuality in public were regularly subject to harassment and discrimination without being able to avail themselves of the protection of the authorities.

C. The causal link (“for reasons of”)

38. As with other types of refugee claims, the well-founded fear of persecution must be “for reasons of” one or more of the five grounds contained in the refugee definition in Article 1A(2) of the 1951 Convention. The Convention ground should be a contributing factor to the well-founded fear of persecution, though it need not be the sole, or even dominant, cause.
39. Perpetrators may rationalize the violence they inflict on LGBTI individuals by reference to the intention of “correcting”, “curing” or “treating” the person.⁷⁸ The intent or motive of the persecutor can be a relevant factor to establishing the “causal link” but it is not a prerequisite.⁷⁹ There is no need for the persecutor to have a punitive intent to establish the causal link.⁸⁰ The focus is on the reasons for the applicant’s feared predicament within the overall context of the case, and how he or she would experience the harm rather than on the mind-set of the perpetrator. Nonetheless, where it can be shown that the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.⁸¹ Where the persecutor is a non-State actor, the causal link may be established either where the non-State actor is likely to harm the LGBTI person for a Convention reason or the State is not likely to protect him or her for a Convention reason.⁸²

D. Convention grounds

40. The five Convention grounds, that is, race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap. More than one Convention ground may be relevant in a given case. Refugee claims based on sexual orientation and/or gender identity are most commonly recognized under the “membership of a particular social group” ground. Other grounds may though also be relevant depending on the political, religious and cultural context of the claim. For example, LGBTI activists and human rights defenders (or perceived activists/defenders) may have either or both claims based on political opinion or religion if, for example, their advocacy is seen as going against prevailing political or religious views and/or practices.
41. Individuals may be subject to persecution due to their actual or perceived sexual orientation or gender identity. The opinion, belief or membership may be attributed to the applicant by the State or the non-State agent of persecution, even if they are not in fact LGBTI, and based on this perception they may be persecuted as a consequence. For example, women and men who do not fit stereotyped appearances and roles may be perceived as LGBTI. It is not required that they actually be LGBTI.⁸³ Transgender individuals often experience harm based on imputed sexual orientation. Partners of transgender individuals may be perceived as gay or lesbian or simply as not conforming to accepted gender roles and behaviour or associating themselves with transgender individuals.

Religion

42. Where an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity, and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion.⁸⁴ The teachings of the world’s major religions on sexual orientation and/or gender identity differ and some have also changed over time or in particular contexts, ranging from outright condemnation, including viewing homosexuality as an “abomination”, “sin”, “disorder” or apostasy, to complete acceptance of diverse sexual orientation and/or gender identity. Non-LGBTI persons may also be subject to persecution for reasons of religion, for example, where they are (wrongly) perceived as LGBTI or where they support or are seen to support them or their rights.
43. Negative attitudes held by religious groups and communities towards LGBTI individuals can be given expression in a range of ways, from discouraging same-sex activity, or transgender behaviour or expression of identity, among adherents to active opposition, including protests, beatings, naming/shaming and “excommunication”, or even execution. The religion and political opinion grounds may overlap where

⁷⁸ Yogyakarta Principles, Principle 18.

⁷⁹ UNHCR, *Handbook*, para. 66.

⁸⁰ *Piticherskaia v. INS*, above footnote 45, found that the requirement on the applicant to prove the punitive intent of the perpetrator was unwarranted.

⁸¹ UNHCR, “Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees”, April 2001, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>, para. 19.

⁸² UNHCR, *Guidelines on Social Group*, para. 23.

⁸³ UNHCR, *Guidelines on Gender-Related Persecution*, para. 32; UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4551c0d04.html>, para. 5. See also, *Kwasi Amanfi v. John Ashcroft, Attorney General*, US, Nos. 01-4477 and 02-1541, (3rd Cir. 2003), 16 May 2003, available at: <http://www.unhcr.org/refworld/docid/47fd92c1a.html>, which concerned an applicant who claimed persecution on account of imputed homosexuality.

⁸⁴ UNHCR, *Guidelines on Gender-Related Persecution*, para. 25. See by analogy, *In Re S-A*, Interim Decision No. 3433, US Board of Immigration Appeals, 27 June 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6f224.html>.

religious and State institutions are not clearly separated.⁸⁵ Religious organizations may impute opposition to their teachings or governance by LGBTI individuals, whether or not this is the case. LGBTI applicants may continue to profess adherence to a faith in which they have been subject to harm or a threat of harm.

Membership of a Particular Social Group

44. The 1951 Convention includes no specific list of particular social groups. Rather, “the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”⁸⁶ UNHCR defines a particular social group as:

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.⁸⁷

45. The two approaches – “protected characteristics” and “social perception” - to identifying “particular social groups” reflected in this definition are *alternative*, not cumulative tests. The “protected characteristics” approach examines whether a group is united *either* by an innate or immutable characteristic *or* by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The “social perception” approach, on the other hand, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group’s members apart from society at large.

46. Whether applying the “protected characteristics” or “social perception” approach, there is broad acknowledgment that under a correct application of either of these approaches, lesbians,⁸⁸ gay men,⁸⁹ bisexuals⁹⁰ and transgender persons⁹¹ are members of “particular social groups” within the meaning of the refugee definition.⁹² Relatively fewer claims have been made by intersex applicants, but they would also on their face qualify under either approach.

47. Sexual orientation and/or gender identity are considered as innate and immutable characteristics or as characteristics so fundamental to human dignity that the person should not be compelled to forsake them. Where the identity of the applicant is still evolving, they may describe their sexual orientation and/or gender identity as fluid or they may express confusion or uncertainty about their sexuality and/or identity. In both situations, these characteristics are in any event to be considered as fundamental to their evolving identity and rightly within the social group ground.

48. There is no requirement that members of the social group associate with one another, or that they are socially visible, for the purposes of the refugee definition. “Social perception” does not mean to suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other.⁹³

49. Decision makers should avoid reliance on stereotypes or assumptions, including visible markers, or a lack thereof. This can be misleading in establishing an applicant’s membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a pre-condition for recognition of the group.⁹⁴ In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid persecution (see above paragraphs 30-33).⁹⁵ The “social perception” approach requires neither that the common attribute be literally visible to the naked

⁸⁵ UNHCR, Guidelines on Gender-Related Persecution, para. 26.

⁸⁶ UNHCR, Guidelines on Social Group, para. 3.

⁸⁷ UNHCR, Guidelines on Social Group, para. 11. Emphasis added.

⁸⁸ See, for example, *Pitchevkaia v. INS*, above footnote 45; *Decisions VA0-01624 and VA0-01625 (In Camera)*, Canada, Immigration and Refugee Board, 14 May 2001, available at: <http://www.unhcr.org/refworld/docid/48246f092.html>; *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, UK House of Lords (Judicial Committee), 25 March 1999, available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>, pp. 8–10.

⁸⁹ See, for example, *Matter of Toboso-Alfonso*, above footnote 32; *Refugee Appeal No. 1312/93, Re GJ*, New Zealand, Refugee Status Appeals Authority, 30 August 1995, available at: <http://www.unhcr.org/refworld/docid/3ae6b6938.html>.

⁹⁰ See, for example, *VRAW v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 1133, Australia, Federal Court, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4dada05c2.html>; *Decision T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000, available at: <http://www.unhcr.org/refworld/docid/4dada1672.html>.

⁹¹ See, for example, *RRT Case No. 0903346*, above footnote 24; *CE, SSR, 23 juin 1997, 171858, Ourbih*, 171858, France, Conseil d’Etat, 23 June 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b67c14.html>.

⁹² Sexual orientation and/or gender identity has been explicitly included in the refugee definition in some regional and domestic legislation. For instance, the European Union has adopted a definition of particular social group, recognizing that “depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation”, EU Qualification Directive, Article 10.

⁹³ UNHCR, Guidelines on Social Group, paras. 15–16.

⁹⁴ *Judgment No. 634565/08015025, C*, France, Cour nationale du droit d’asile, 7 July 2009, summary available at Contentieux des réfugiés: Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile - Année 2009, 26 October 2010, available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html>, pp. 58–59, recognizing as a refugee a gay man who had neither claimed nor manifested his homosexuality openly.

⁹⁵ UNHCR, *HJ and HT*, above footnote 30, para. 26.

eye nor that the attribute be easily identifiable by the general public.⁹⁶ It is furthermore not necessary that particular members of the group or their common characteristics be publicly known in a society. The determination rests simply on whether a group is “cognizable” or “set apart from society” in a more general, abstract sense.

Political Opinion

50. The term political opinion should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged.⁹⁷ It may include an opinion as to gender roles expected in the family or as regards education, work or other aspects of life.⁹⁸ The expression of diverse sexual orientation and gender identity can be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values. Anti-LGBTI statements could be part of a State’s official rhetoric, for example, denying the existence of homosexuality in the country or claiming that gay men and lesbians are not considered part of the national identity.

E. INTERNAL FLIGHT OR RELOCATION ALTERNATIVE

51. The concept of an internal flight or relocation alternative (IFA) refers to whether it is possible for an individual to be relocated to a specific area of the country where the risk of feared persecution would not be well-founded and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself and live a normal life.⁹⁹ Protection would need to be available in a genuine and meaningful way. United Nations agencies, non-governmental organizations, civil society and other non-State actors are not a substitute for State protection.
52. Within the context of the holistic assessment of a claim for refugee status, the assessment of whether or not there is an IFA requires two main analyses: (i) the relevance analysis¹⁰⁰ and (ii) the reasonableness analysis.¹⁰¹ In considering the relevance and reasonableness of a proposed site of internal flight or relocation, gender considerations must be taken into account.
53. In respect of the relevance analysis, if the country in question criminalizes same-sex relations and enforces the relevant legislation, it will normally be assumed that such laws are applicable in the entire territory. Where the fear of persecution is related to these laws, a consideration of IFA would not be relevant. Laws which do not allow a transgender or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on his or her documents, would also normally be applicable nationwide and should be taken into account when considering the proposed place of relocation.
54. Furthermore, intolerance towards LGBTI individuals tends to exist countrywide in many situations, and therefore an internal flight alternative will often not be available. Relocation is not a relevant alternative if it were to expose the applicant to the original or any new forms of persecution. IFA should not be relied upon where relocation involves (re-)concealment of one’s sexual orientation and/or gender identity to be safe (see paragraphs 30-33).¹⁰²
55. Some countries have seen social and political progress which is sometimes localized in urban areas and these locations may in certain circumstances constitute a relocation alternative. In this context, it is important to recall that the decision maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case, including identifying the proposed place of relocation and collecting country of origin information about it (see further below at paragraph 66).¹⁰³
56. In determining whether internal flight is reasonable, the decision maker needs to assess whether return to the proposed place of relocation would cause undue hardship, including by examining the applicant’s personal circumstances;¹⁰⁴ the existence of past persecution; safety and security; respect for human rights;

⁹⁶ See, for example, UNHCR, *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 April 2009, available at: <http://www.unhcr.org/refworld/docid/49ef25102.html>; *Gatimi et al. v. Holder, Attorney General*, No. 08-3197, United States Court of Appeals for the Seventh Circuit, 20 August 2009, available at: <http://www.unhcr.org/refworld/docid/4aba40332.html>.

⁹⁷ *Canada v. Ward*, above footnote 31.

⁹⁸ UNHCR, Guidelines on Gender-Related Persecution, para. 32.

⁹⁹ See UNHCR, ‘Guidelines on International Protection No. 4: ‘Internal Flight or Relocation Alternative’ Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees’, 23 July 2003, HCR/GIP/03/04 (hereafter “UNHCR, Guidelines on Internal Flight Alternative”), para. 6.

¹⁰⁰ The elements to be examined under this analysis are the following: Is the area of relocation practically, safely and legally accessible to the individual? Is the agent of persecution a State or non-State agent? Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

¹⁰¹ The criterion to be examined under this analysis is: Can the claimant lead a relatively normal life without facing undue hardship?

¹⁰² See, for example, *Okoli v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, Canada, Federal Court, 31 March 2009, available at: <http://www.unhcr.org/refworld/docid/4a5b4bfa2.html>, which found that the concealment of an immutable characteristic, that is, the applicant’s sexual orientation, was an “impermissible requirement” for the assessment of internal flight alternative, paras. 36–37, 39; *HJ and HT*, above footnote 30, para. 21.

¹⁰³ UNHCR, Guidelines on Internal Flight Alternative, paras. 33–34.

¹⁰⁴ *Boer-Sedano v. Gonzales*, US, 418 F.3d 1082, (9th Cir. 2005), 12 August 2005, available at: <http://www.unhcr.org/refworld/docid/4821a2ba2.html>, found that the

and possibility for economic survival.¹⁰⁵ The applicant needs to be able to access a minimum level of political, civil and socio-economic rights. Women may have lesser economic opportunities than men, or may be unable to live separately from male family members, and this should be evaluated in the overall context of the case.¹⁰⁶

F. SUR PLACE CLAIMS

57. A *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure.¹⁰⁷ *Sur place* claims may also arise due to changes in the personal identity or gender expression of the applicant after his or her arrival in the country of asylum. It should be noted that some LGBTI applicants may not have identified themselves as LGBTI before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin. Their fear of persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim *sur place*. Many such claims arise where an LGBTI individual engages in political activism or media work or their sexual orientation is exposed by someone else.

V. PROCEDURAL ISSUES

General

58. LGBTI individuals require a supportive environment throughout the refugee status determination procedure, including pre-screening so that they can present their claims fully and without fear. A safe environment is equally important during consultations with legal representatives.
59. Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant's capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared.¹⁰⁸ Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of "safe country or origin" concepts.¹⁰⁹
60. In order to ensure that refugee claims relating to sexual orientation and/or gender identity are properly considered during the refugee status determination process, the following measures should be borne in mind:
- i. An open and reassuring environment is often crucial to establishing trust between the interviewer and applicant and will assist the disclosure of personal and sensitive information. At the beginning of the interview, the interviewer needs to assure the applicant that all aspects of his or her claim will be treated in confidence.¹¹⁰ Interpreters are also bound by confidentiality.
 - ii. Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity.¹¹¹ There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.

applicant's [HIV-positive] health status would make relocation unreasonable.

¹⁰⁵ UNHCR, Guidelines on Internal Flight Alternative, paras. 22–30.

¹⁰⁶ UNHCR, Guidelines on Gender-related Persecution.

¹⁰⁷ UNHCR, *Handbook*, paras. 94, 96.

¹⁰⁸ Some LGBTI applicants may, for instance, change their claims during the process by initially stating that their sexual orientation is imputed to them or making a claim on a ground unrelated to their sexual orientation or gender identity, to eventually expressing that they are LGBTI.

¹⁰⁹ UNHCR, "Statement on the right to an effective remedy in relation to accelerated asylum procedures", 21 May 2010, available at: <http://www.unhcr.org/refworld/docid/4bf67fa12.html>, paras. 11–12.

¹¹⁰ UNHCR, Guidelines on Gender-Related Persecution, paras. 35, 36.iv.

¹¹¹ This issue has been addressed by a number of US Courts: *Shahinaj v. Gonzales*, 481 F.3d 1027, (8th Cir. 2007), 2 April 2007, available at: <http://www.unhcr.org/refworld/docid/4821bd462.html>; *Razkane v. Holder, Attorney General*, No. 08-9519, (10th Cir. 2009), 21 April 2009, available at: <http://www.unhcr.org/refworld/docid/4a5c97042.html>; *Todorovic v. US Attorney General*, No. 09-11652, (11th Cir. 2010), 27 September 2010, available at: <http://www.unhcr.org/refworld/docid/4cd968902.html>.

- iii. The interviewer and the interpreter must avoid expressing, whether verbally or through body language, any judgement about the applicant's sexual orientation, gender identity, sexual behaviour or relationship pattern. Interviewers and interpreters who are uncomfortable with diversity of sexual orientation and gender identity may inadvertently display distancing or demeaning body language. Self-awareness and specialized training (see iv.) are therefore critical aspects to a fair status determination.
 - iv. Specialized training on the particular aspects of LGBTI refugee claims for decision makers, interviewers, interpreters, advocates and legal representatives is crucial.
 - v. The use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant's own language, is essential.¹¹² Use of inappropriate terminology can hinder applicants from presenting the actual nature of their fear. The use of offensive terms may be part of the persecution, for example, in acts of bullying or harassment. Even seemingly neutral or scientific terms can have the same effect as pejorative terms. For instance, although widely used, "homosexual" is also considered a derogatory term in some countries.
 - vi. Specific requests made by applicants in relation to the gender of interviewers or interpreters should be considered favourably. This may assist the applicant to testify as openly as possible about sensitive issues. If the interpreter is from the same country, religion or cultural background, this may heighten the applicant's sense of shame and hinder him or her from fully presenting all the relevant aspects of the claim.
 - vii. Questioning about incidents of sexual violence needs to be conducted with the same sensitivity as in the case of any other sexual assault victims, whether victims are male or female.¹¹³ Respect for the human dignity of the asylum-seeker should be a guiding principle at all times.¹¹⁴
 - viii. For claims based on sexual orientation and/or gender identity by women, additional safeguards are presented in UNHCR's Guidelines on Gender-Related Persecution.¹¹⁵ Women asylum-seekers should, for instance, be interviewed separately, without the presence of male family members in order to ensure they have an opportunity to present their case.
 - ix. Specific procedural safeguards apply in the case of child applicants, including processing on a priority basis and the appointment of a qualified guardian as well as a legal representative.¹¹⁶
61. Where an individual seeks asylum in a country where same-sex relations are criminalized, these laws can impede his or her access to asylum procedures or deter the person from mentioning his or her sexual orientation or gender identity within status determination interviews. In such situations, it may be necessary for UNHCR to become directly involved in the case, including by conducting refugee status determination under its mandate.¹¹⁷

Credibility and Establishing the Applicant's Sexual Orientation and/or Gender Identity

62. Ascertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.¹¹⁸
63. Both open-ended and specific questions that are crafted in a non-judgemental manner may allow the applicant to explain his or her claim in a non-confrontational way. Developing a list of questions in preparation of the interview may be helpful, however, it is important to bear in mind that there is no magic

¹¹² For suggested appropriate terminology, see above at paras. 9–12.

¹¹³ UNHCR, Guidelines on Gender-Related Persecution, para. 36 viii, xi.

¹¹⁴ UNHCR, "Summary Report, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity", 10 September 2011 (hereafter "UNHCR, Summary Report of Informal Meeting of Experts"), available at: <http://www.unhcr.org/refworld/docid/4fa910f92.html>, para. 34.

¹¹⁵ UNHCR, Guidelines on Gender-Related Persecution paras. 35–37.

¹¹⁶ UNHCR, "Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", 22 December 2009, HCR/GIP/09/08, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>, paras. 65–77.

¹¹⁷ It is generally only where States have not yet acceded to the international refugee instruments, or if they have acceded but have not yet established national procedures, or these procedures are not fully functioning that UNHCR may be called upon to undertake individual refugee status determination and recognize refugees under its mandate. This function, therefore, can be exercised either in a State which is, or a State which is not, a signatory to the international refugee instruments. In these situations, UNHCR conducts refugee status determination for protection purposes (in order to protect refugees from *refoulement* and detention, for example) and/or to facilitate a durable solution. See, for example, UNHCR, *MM (Iran) v. Secretary of State for the Home Department - Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 3 August 2010, C5/2009/2479, available at: <http://www.unhcr.org/refworld/docid/4c6aa7db2.html>, para. 11.

¹¹⁸ UNHCR, Summary Report of Informal Meeting of Experts, para. 32.

sexual orientation and/or gender identity. Interviewers and decision makers need to bear in mind that sexual orientation and gender identity are about a person's identity, whether or not that identity is manifested through sexual acts.

- viii. Community Relationship: Questions about the applicant's knowledge of LGBTI contacts, groups and activities in the country of origin and asylum may be useful. It is important to note, however, that applicants who were not open about their sexual orientation or gender identity in the country of origin may not have information about LGBTI venues or culture. For example, ignorance of commonly known meeting places and activities for LGBTI groups is not necessarily indicative of the applicant's lack of credibility. Lack of engagement with other members of the LGBTI community in the country of asylum or failure to join LGBTI groups there may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices or a fear of exposure.¹²²
- ix. Religion: Where the applicant's personal identity is connected with his/her faith, religion and/or belief, this may be helpful to examine as an additional narrative about their sexual orientation or gender identity. The influence of religion in the lives of LGBTI persons can be complex, dynamic, and a source of ambivalence.¹²³

Evidentiary Matters

- 64. The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community. Where there is a lack of country of origin information, the decision maker will have to rely on the applicant's statements alone. Normally, an interview should suffice to bring the applicant's story to light.¹²⁴ Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.
- 65. Medical "testing" of the applicant's sexual orientation is an infringement of basic human rights and must not be used.¹²⁵ On the other hand, medical evidence of transition-related surgery, hormonal treatment or biological characteristics (in the case of intersex individuals) may corroborate their personal narrative.
- 66. Relevant and specific country of origin information on the situation and treatment of LGBTI individuals is often lacking. This should not automatically lead to the conclusion that the applicant's claim is unfounded or that there is no persecution of LGBTI individuals in that country.¹²⁶ The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations. Stigma attached to issues surrounding sexual orientation and/or gender identity also contributes to incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another; however, it may serve as an indication of the applicant's situation in certain circumstances.

¹²² *Essa v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1493, Canada, Federal Court, 20 December 2011, available at: <http://www.unhcr.org/refworld/docid/4f901c392.html>, paras. 30–31, found that the Board's insistence on the applicant going to or have knowledge about gay venues in the country of asylum in order to be gay was not reasonable.

¹²³ APA, Practice Guidelines for LGB Clients.

¹²⁴ UNHCR, *Handbook*, paras. 196, 203–204.

¹²⁵ See further, "UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation", April 2011, available at: <http://www.unhcr.org/refworld/docid/4daeb07b2.html>.

¹²⁶ See, for example, *Molnar v. Canada*, above footnote 39.

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Agenda items 2 and 8

**Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General**

**Follow-up to and implementation of the Vienna
Declaration and Programme of Action**

Discrimination and violence against individuals based on their sexual orientation and gender identity

Report of the Office of the United Nations High Commissioner for Human Rights

Summary

The present report is submitted to the Human Rights Council pursuant to its resolution 27/32, in which the Council requested the United Nations High Commissioner for Human Rights to update the report of the Office of the High Commissioner on violence and discrimination against individuals based on their sexual orientation and gender identity (A/HRC/19/41).

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I. Introduction

1. In 2011, pursuant to Human Rights Council resolution 17/19, the United Nations High Commissioner for Human Rights submitted a report to the Council in which she described a pattern of discrimination and violence directed at people in all regions on the basis of their sexual orientation and gender identity.¹ Almost three years on, in its resolution 27/32, the Council requested the High Commissioner to update the above-mentioned report with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards.

2. The present report draws on recent findings of United Nations human rights bodies, regional organizations and non-governmental organizations, and information submitted by Governments, including 28 replies to a note verbale addressed to Member States on 29 December 2014.²

II. Recent developments

3. In recent years, Governments in all regions have pursued a variety of initiatives aimed at reducing levels of violence and discrimination based on sexual orientation and gender identity. For example, since 2011, 14 States have adopted or strengthened anti-discrimination and hate crime laws, extending protection on grounds of sexual orientation and/or gender identity and, in two cases, also introducing legal protections for intersex persons. Three States have abolished criminal sanctions for homosexuality; 12 have introduced marriage or civil unions for same-sex couples nationally; and 10 have introduced reforms that, to varying degrees, make it easier for transgender persons to obtain legal recognition of their gender identity.

4. In dozens of countries, police, judges, prison guards, medical staff and teachers are receiving gender and sexuality sensitivity training, anti-bullying programmes have been launched in schools, and shelters have been built to house homeless lesbian, gay, bisexual and transgender (LGBT) youth. Popular television programmes have integrated LGBT characters in a positive way and celebrities have helped to raise awareness by “coming out” as LGBT persons themselves or speaking out in support of members of the LGBT community. In all regions, LGBT and intersex³ human rights defenders are more vocal and visible – in several cases successfully challenging in the courts attempts by authorities to restrict their legitimate activities.

5. While these advances are welcome, they are overshadowed by continuing, serious and widespread human rights violations perpetrated, too often with impunity, against individuals based on their sexual orientation and gender identity. Since 2011, hundreds of people have been killed and thousands more injured in brutal, violent attacks – some of which are chronicled below. Other documented violations include torture, arbitrary detention, denial of rights to assembly and expression, and discrimination in health care,

¹ A/HRC/19/41.

² Replies are available on the website of the Office of the High Commissioner at www.ohchr.org/EN/Issues/Discrimination/Pages/SOGIHRC29Replies.aspx.

³ While “LGBT” is used in the present report, other terms are used in different regions. References are also included to violations against intersex persons, who may have any sexual orientation or gender identity. United Nations human rights mechanisms have repeatedly addressed such violations together with those directed at LGBT persons.

education, employment and housing. These and related abuses warrant a concerted response from Governments, legislatures, regional organizations, national human rights institutions and civil society, as well as from United Nations bodies – the Human Rights Council included.

6. Concerns regarding the extent and gravity of violence and discrimination against LGBT and intersex persons have been raised repeatedly by United Nations human rights treaty bodies and special procedures. In recent years, the Office of the High Commissioner (OHCHR) has published a range of guidance and public information materials – including factsheets, booklets and short videos – and has sought to engage States in a constructive dialogue on ways to better protect the rights of LGBT and intersex persons. In July 2013, the High Commissioner launched UN Free & Equal (www.unfe.org), a global education campaign to combat homophobia and transphobia that has so far reached more than a billion people around the world through events and via traditional and social media.

7. The rights of LGBT persons have also been a focus of work going on across the wider United Nations system. In his message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity, the Secretary-General described the fight against homophobia and transphobia as “one of the great, neglected human rights challenges of our time” and pledged to work for an end to criminalization and for action to tackle violence and prejudice. United Nations agencies are increasingly integrating issues of sexual orientation and gender identity into their programmatic work, including in the areas of development, education, labour rights, child rights, gender equality, refugee protection, HIV and public health.⁴

8. Human rights, sexual orientation and gender identity have also been addressed by regional organizations in Africa, the Americas and Europe. In 2014, the African Commission on Human and Peoples’ Rights passed a resolution in which it condemned violence and other human rights violations based on real or imputed sexual orientation and gender identity; the Organization of American States approved its seventh resolution on human rights, sexual orientation and gender identity, having in 2013 adopted the Convention against all forms of Discrimination and Intolerance, which addresses these issues; the Inter-American Commission on Human Rights established the mandate of Rapporteur on the rights of LGBT and intersex persons, having established a dedicated unit in 2011; the European Union adopted guidelines on the promotion and protection of human rights of LGBT and intersex persons, and both the European Parliament and the Parliamentary Assembly of the Council of Europe adopted resolutions on the subject; and the European Court of Human Rights and the Inter-American Court of Human Rights issued several judgements affirming the rights of LGBT persons to equal treatment and protection under the law.

III. Applicable international standards and obligations

9. Application of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination and arbitrary arrest and

⁴ See “The Role of the United Nations in Combatting Discrimination and Violence against Individuals Based on Sexual Orientation and Gender Identity”, OHCHR, 2014.

detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights.

10. States have well-established obligations to respect, protect and fulfil the human rights of all persons within their jurisdiction, including LGBT and intersex persons. These obligations extend to refraining from interference in the enjoyment of rights, preventing abuses by third parties and proactively tackling barriers to the enjoyment of human rights, including, in the present context, discriminatory attitudes and practices. Specific related obligations are elaborated below, building on analysis in the previous report (A/HRC/19/41) and evolving work of United Nations human rights mechanisms.

A. To protect individuals from violence

11. States have an obligation to exercise due diligence to prevent, investigate, punish and redress deprivation of life and other acts of violence. United Nations mechanisms have called upon States to fulfil this obligation by taking legislative and other measures to prohibit, investigate and prosecute all acts of targeted, hate-motivated violence and incitement to violence directed at LGBT and intersex persons, and to provide remedy to victims and protection against reprisals.⁵ They have called for State officials to publically condemn such acts, and to record statistics on such crimes and the outcomes of investigations, prosecutions and remedial measures.⁶ The application of the death penalty on the basis of sexual orientation and gender identity violates fundamental State obligations to protect the rights to life, privacy, equality before the law and freedom from discrimination.⁷

12. States also have an obligation not to return refugees to places where life or freedom would be threatened on account of actual or perceived sexual orientation and gender identity.⁸

B. To prevent torture and ill-treatment

13. States have an obligation to protect all persons, including LGBT and intersex persons, from torture and other cruel, inhuman or degrading treatment or punishment in custodial, medical and other settings. This obligation extends to prohibiting, preventing, investigating and providing redress for torture and ill-treatment in all contexts of State control, including by ensuring that such acts are offences under domestic criminal law.⁹ State responsibility is engaged if public officials, including prison and police officers, directly commit, instigate, incite, encourage, acquiesce in or otherwise participate or are complicit in such acts, as well as if officials fail to prevent, investigate, prosecute and punish such acts by public or private actors.¹⁰

14. The medical practices condemned by United Nations mechanisms in this context include so-called “conversion” therapy, forced genital and anal examinations, forced and

⁵ See CCPR/C/KGZ/CO/2, para. 9, A/HRC/20/22/Add.2, paras. 5, 55, 76, CCPR/C/MWI/CO/1/Add.1, para. 10.

⁶ See CCPR/C/MWI/CO/1, para. 7, A/HRC/26/30/Add.3, para. 88.

⁷ See CCPR/C/MRT/CO/1, para. 8, A/67/275, paras. 36-38.

⁸ See also UNHCR, Guidelines on international protection No. 9, HCR/GIP/12/09, 23 October 2012; CCPR/C/108/D/2149/2012.

⁹ See CAT/C/GC/3, para. 39.

¹⁰ See CAT/C/GC/2, paras. 15-19.

otherwise involuntary sterilization and medically unnecessary surgery and treatment performed on intersex children.¹¹

C. To decriminalize homosexuality and to repeal other laws used to punish individuals on the basis of sexual orientation and gender identity

15. States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. United Nations mechanisms have called upon States to fulfil these obligations by repealing laws used to punish individuals based on their sexual orientation and gender identity, including laws criminalizing homosexuality and cross-dressing, and have rejected attempts to justify such laws on grounds of the protection of public health or morals.¹² States must refrain from arresting or detaining persons on discriminatory grounds, including sexual orientation and gender identity.¹³

D. To protect individuals from discrimination on grounds of sexual orientation and gender identity

16. The protection of rights to equality before the law, equal protection of the law and freedom from discrimination is a fundamental obligation of States under international law, and requires States to prohibit and prevent discrimination in private and public spheres, and to diminish conditions and attitudes that cause or perpetuate such discrimination.¹⁴ To this end, States should enact comprehensive anti-discrimination legislation that includes sexual orientation and gender identity among protected grounds.¹⁵ States should review and repeal discriminatory laws and address discrimination against LGBT and intersex persons, including in the enjoyment of the rights to health, education, work, water, adequate housing and social security.¹⁶

17. States also have obligations to address discrimination against children and young persons who identify or are perceived as LGBT or intersex. This includes harassment, bullying in schools, lack of access to health information and services, and coercive medical treatment.¹⁷ United Nations mechanisms have called upon States to legally recognize transgender persons' preferred gender, without abusive requirements, including sterilization, forced medical treatment or divorce.¹⁸ They have called upon States to develop education campaigns and train public officials to combat stigma and discriminatory attitudes, to provide victims of discrimination with effective and appropriate remedies, and

¹¹ See A/HRC/22/53, paras. 76-79, 88, CRC/C/CHE/CO/2-4, paras. 42-43, CAT/C/DEU/CO/5, para. 20.

¹² See CCPR/C/50/D/488/1992, paras. 8.3-10, E/C.12/IRN/CO/2, para. 7, CEDAW/C/UGA/CO/7, paras. 43-44, CRC/C/GAM/CO/2-3, paras. 29-30, A/HRC/14/20 paras. 17-26, CCPR/C/KWT/CO/2, para. 30.

¹³ See CCPR/C/GC/35, paras. 3, 17, A/HRC/4/40/Add.1, opinion 22/2006, para. 19; A/HRC/22/44, para. 38.

¹⁴ See CCPR/C/PER/CO/5, para. 8, E/C.12/GC/20, paras. 7-11, CEDAW/C/GC/28, para. 18.

¹⁵ See E/C.12/GC/20, para. 32 and, 39, CEDAW/C/CRI/CO/5-6, para. 40, CRC/C/AUS/CO/4, paras. 29-30, CRC/C/CHE/CO/2-4, para. 25.

¹⁶ See E/C.12/GC/20, para. 11, 27 and 32, E/C.12/IDN/CO/1, para. 6, CRC/C/IRQ/CO/2-4, paras. 19-20.

¹⁷ See CRC/C/RUS/CO/4-5, paras. 24-25, 55-56, 59-60, CRC/C/GC/15, paras. 8, 31, 60.

¹⁸ See CCPR/C/IRL/CO/3, para. 8, CCPR/C/IRL/CO/4, para. 7, CCPR/C/UKR/CO/7, para. 10, CEDAW/C/NLD/CO/5, paras. 46-47.

to ensure that perpetrators face administrative, civil or criminal responsibility, as appropriate.¹⁹ States should also provide legal recognition and protection to same-sex couples²⁰ and protect the rights of their children, without discrimination.²¹

E. To protect rights to freedom of expression, association and assembly and to take part in the conduct of public affairs

18. States have obligations to protect rights to freedom of thought and expression, association and peaceful assembly without discrimination on the grounds of sexual orientation or gender identity. To that end, they should review and repeal discriminatory provisions in domestic legislation that have a disproportionate impact on the exercise of these rights by LGBT persons and others advocating for their rights. States should refrain from directly interfering with these rights and protect LGBT persons exercising these rights from attacks and reprisals through preventive measures and by investigating attacks, prosecuting perpetrators and ensuring remedy for victims.²²

19. States must protect the right to take part in the conduct of public affairs, without discrimination, and ensure that LGBT and intersex persons and organizations defending their rights are consulted with regard to legislation and policies that affect their rights.²³ States should take measures to empower LGBT and intersex persons, and to facilitate their participation in economic, social and political life.²⁴

IV. Homophobic and transphobic violence²⁵

A. Context

20. Due diligence requires States to ensure the protection of those at particular risk of violence – including, in the present context, those targeted because of their sexual orientation and gender identity.

21. United Nations human rights mechanisms continue to receive reports of homophobic and transphobic violence committed in all regions. Such violence may be physical (including murder, beatings, kidnapping and sexual assault) or psychological (including threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration). These attacks constitute a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes.

22. In addition to “street” violence and other spontaneous attacks in public settings, those perceived as LGBT remain targets of organized abuse, including by religious

¹⁹ See CCPR/C/ALB/CO/2, para. 8, CRC/C/TZA/CO/3-5, paras. 55-56, CAT/C/RUS/CO/5, para. 15, CEDAW/C/CRI/CO/5-6, para. 41, CCPR/C/UKR/CO/7, para. 8, CCPR/C/21/Rev.1/Add.13.

²⁰ See E/C.12/BGR/CO/4-5, para. 17, E/C.12/SVK/CO/2, para. 10, CCPR/C/JPN/CO/5, para. 29.

²¹ See CRC/C/GC/15, para. 8.

²² See CCPR/C/GC/34, para. 26, CCPR/C/GEO/CO/4, para. 8, A/HRC/25/55/Add.3, para. 364, A/HRC/26/29.

²³ See A/HRC/23/36/Add.2, para. 97, CEDAW/C/DEU/CO/6, para. 61, CCPR/C/IRL/CO/4, para. 7.

²⁴ See A/69/365, paras. 24, 76, 87-91, A/HRC/26/39/Add.2, para. 110(a).

²⁵ See also A/HRC/19/41, paras. 20-39.

extremists, paramilitary groups and extreme nationalists.²⁶ LGBT and gender non-conforming youth are at risk of family and community violence. Lesbians and transgender women are at particular risk because of gender inequality and power relations within families and wider society.²⁷

23. Violence motivated by homophobia and transphobia is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes.²⁸ Violent acts include deep knife cuts, anal rape and genital mutilation, as well as stoning and dismemberment.²⁹

24. United Nations experts have condemned the persistence of impunity for these violations and repeatedly called for investigation, prosecution and punishment, and reparations for victims.³⁰ Reported shortcomings include ineffective police action, failure to register cases, loss of documents, inappropriate classification of acts, including physical assault as a minor offence, and investigations guided by stereotypes and prejudices.³¹

25. In most countries, the absence of effective systems for recording and reporting hate-motivated violence, or “hate crimes”, against LGBT persons masks the true extent of violence. Where they exist, official statistics tend to understate the number of incidents.³² Victims are often reluctant to report their experiences for fear of extortion, breach of confidentiality or reprisals. In addition, prejudicial and inexact categorization of cases results in misidentification, concealment and underreporting.³³ Failure to investigate, prosecute and punish violations when reported also contributes to incomplete assessments of the scale of violence.³⁴

B. Killings

26. Hate-motivated killings of LGBT individuals have been documented in all regions. The Special Rapporteur on extrajudicial, summary or arbitrary executions has noted “grotesque homicides” perpetrated with broad impunity, allegedly at times with the “complicity of investigative authorities” (A/HRC/26/36/Add.1, para. 85). Treaty bodies, special procedures and United Nations agencies continue to express alarm at such killings and related patterns of violence, including the murder of transsexual women in Uruguay³⁵ and of Black lesbian women in South Africa.³⁶ In an assault in Chile, a gay man was beaten and killed by neo-Nazis, who burned him with cigarettes and carved swastikas into his body.³⁷

²⁶ See A/HRC/26/50, paras. 10, 14-15, A/HRC/28/66, para. 11.

²⁷ See A/HRC/26/38/Add.1, para. 19.

²⁸ See A/HRC/20/16, paras. 71-72, and “An Overview of Violence against LGBTI Persons”, annex – press release 153/14, Inter-American Commission on Human Rights (IACHR), 2014, p. 3.

²⁹ See A/HRC/26/36/Add.1, paras. 85-87.

³⁰ See CCPR/C/BOL/CO/3, para. 7, A/HRC/26/36/Add.1, paras. 85-88, CAT/C/GC/3, paras. 8, 32.

³¹ See A/HRC/23/49/Add.4, para. 23, A/HRC/26/36/Add.1, para. 86.

³² See CCPR/C/URY/CO/5, para. 12, A/HRC/20/16, para. 71.

³³ See A/HRC/20/16, paras. 18, 71.

³⁴ See CCPR/C/GTM/CO/3, para. 11, CCPR/C/DOM/CO/5. The IACHR notes a “major underreporting” of acts of violence against lesbians (see footnote 28, p. 4).

³⁵ CCPR/C/URY/CO/5, para. 12.

³⁶ See A/HRC/20/16, paras. 55, 73, CERD/C/GC/34, para. 23.

³⁷ OHCHR, briefing note on Chile, 30 March 2012.

27. Data are patchy but, wherever available, suggest alarmingly high rates of homicidal violence. In Brazil, one of relatively few countries where the Government publishes an annual report on homophobic violence, the authorities documented 310 murders in 2012 in which homophobia or transphobia was a motive.³⁸ The Inter-American Commission on Human Rights reported 594 hate-related killings of LGBT persons in the 25 States members of the Organization of American States between January 2013 and March 2014.³⁹ In its resolution 27/5, the African Commission on Human and Peoples' Rights condemned increasing violence and other human rights violations based on imputed or real sexual orientation or gender identity. The European Parliament (resolution 2013/2183(INI) and the Council of Europe (resolution 1948 (2013) have also regularly expressed their concerns.

28. Reporting from non-governmental organizations underscores the prevalence of fatal violence. The Trans Murder Monitoring project, which collects reports of homicides of transgender persons in all regions, lists 1,612 murders in 62 countries between 2008 and 2014, equivalent to a killing every two days.⁴⁰ The National Coalition of Anti-Violence Programs in the United States of America reported 18 hate violence homicides and 2,001 incidents of anti-LGBT violence in the United States in 2013.⁴¹

29. Terrorist groups may target LGBT persons for punishment, including killings.⁴² In February 2015, photos appeared to show several men, allegedly accused of homosexual acts, being pushed off a tower to their deaths by militants of the so-called Islamic State in Iraq and the Levant (ISIL).⁴³

30. LGBT persons have also been victims of so-called "honour" killings, carried out against those seen by family or community members to have brought shame on a family, often for transgressing gender norms or for sexual behaviour, including actual or assumed homosexual conduct.⁴⁴

C. Other violence, including sexual violence

31. United Nations experts continue to express their alarm at non-lethal violence directed at individuals on the grounds of their sexual orientation or gender identity. Examples include cases of gay men who have been kidnapped, beaten and humiliated, with film clips of their abuse shared on social media,⁴⁵ and of lesbians assaulted and raped because of their sexual orientation.⁴⁶ In the Syrian Arab Republic, there have been reports of rape and torture of men assumed to be gay perpetrated by security agents and by non-State armed groups.⁴⁷ Concerns have also been expressed about the risk to human rights

³⁸ Second report on homophobic violence in Brazil (2012), Department of Human Rights, June 2013 (available at www.sdh.gov.br/noticias/2013/junho/numero-de-denuncias-de-violencia-homofobica-cresceu-166-em-2012-diz-relatorio).

³⁹ IACHR (see footnote 28), p. 1.

⁴⁰ Trans Murder Monitoring results update, November 2014 (available at <http://tgeu.org/tmm/>).

⁴¹ *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, National Coalition of Anti-Violence Programs, New York, 2014 (available at <http://avp.org/resources/avp-resources/315>).

⁴² See CRC/C/IRQ/CO/2-4, paras. 27-28.

⁴³ OHCHR, press briefing notes on ISIL/Iraq, 20 January 2015.

⁴⁴ See A/HRC/23/47/Add.2, para. 49.

⁴⁵ A/HRC/26/50, para. 14.

⁴⁶ See CEDAW/C/GUY/CO/7-8, para. 22, A/HRC/20/16, paras. 55, 71, 73, 76.

⁴⁷ A/HRC/25/65, para. 67-71. Oral update of the Independent International Commission of Inquiry on the Syrian Arab Republic, 18 March 2014.

defenders working to uphold the rights of LGBT persons, some of whom have been subjected to violence, threats and verbal denigration.⁴⁸

32. In the United States, recent government figures show that the number of bias-motivated incidents based on sexual orientation ranks second only to racist incidents among single-bias hate crimes.⁴⁹ A Europe-wide survey of 93,000 LGBT persons conducted in 2013 for the European Union Agency for Fundamental Rights found that a quarter of all respondents had been attacked or threatened with violence in the previous five years.⁵⁰ A survey conducted in 2012 by the non-governmental organization Stonewall in the United Kingdom of Great Britain and Northern Ireland found that one in six LGBT respondents had experienced a hate crime or incident in the previous three years; of those, 75 per cent had not reported the experience to the police.⁵¹

33. Treaty bodies and special procedures continue to express concern at rhetoric used to incite homophobic and transphobic hatred and related violence.⁵² Such language is used by some political and community leaders to promote negative stereotypes, stir up prejudice and harass particular individuals, especially during electoral periods. The High Commissioner has expressed concern at inflammatory rhetoric used in Belarus, the Gambia and Honduras.⁵³ The Committee on the Rights of the Child has criticized statements by the Holy See as contributing to the stigmatization of, and violence against, LGBT adolescents and children raised by same-sex couples,⁵⁴ and about the negative impact of hate speech on LGBT and intersex adults and children in Switzerland.⁵⁵

D. Torture and ill-treatment

34. The Committee against Torture and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment have continued to express concerns at the torture and ill-treatment of LGBT persons in detention by or with the acquiescence of State officials.⁵⁶

35. Reported cases include the arrest, beating and ill-treatment by police in Zimbabwe of 44 members of an LGBT organization.⁵⁷ Sixteen gay and transgender individuals in the United States were allegedly subjected to solitary confinement, torture and ill-treatment, including sexual assault, while in detention in immigration facilities.⁵⁸ A woman was reportedly arrested in Bangladesh for being a lesbian, and subsequently beaten and raped by police while in custody.⁵⁹ In Egypt, four people arrested on the basis of their alleged sexual

⁴⁸ See A/HRC/25/55/Add.3, paras. 433-435, 480-482.

⁴⁹ Uniform Crime Reports, 2013 Hate Crime Statistics, U.S. Department of Justice, 2014 (available at www.fbi.gov/about-us/cjis/ucr/hate-crime/2013).

⁵⁰ *EU LGBT Survey: Results at a Glance*, European Union Agency for Fundamental Rights, 2013, p. 7.

⁵¹ *Homophobic Hate Crime: the Gay British Crime Survey 2013*, Stonewall, 2013, pp. 116-117.

⁵² See CCPR/C/UKR/CO/7, para. 10, A/67/357, para.75; see also European Court of Human Rights, application 1813/07, 9 May /2012.

⁵³ Navi Pillay, "Prejudice fuels the denial of rights for LGBT people", *Jakarta Post*, 30 April 2014. See A/HRC/22/47/Add.1, para. 91.

⁵⁴ CRC/C/VAT/CO/2, para. 25.

⁵⁵ CRC/C/CHE/CO/2-4, para. 24.

⁵⁶ See A/HRC/19/61/Add.4, paras. 168, 172, CAT/C/KGZ/CO/2, para. 19.

⁵⁷ A/HRC/22/53/Add.4, para. 162.

⁵⁸ *Ibid.*, para. 178.

⁵⁹ See CCPR/C/108/D/2149/2012), para. 2.2.

orientation and/or gender identity reportedly faced sexual assault by other inmates while in detention.⁶⁰

36. The Special Rapporteur on violence against women, its causes and consequences has highlighted similar cases, noting that those with a non-heterosexual orientation, or whose gender expression did not fall into exact categories of female and male, were vulnerable to targeted abuse both by staff and by other prisoners. She expressed concern about lesbian women being placed in cells with men if they refused the sexual advances of prison staff. Female prisoners whom guards viewed as “masculine” in appearance were subjected to harassment, physical abuse and “forced feminization”. Transgender prisoners face particularly harsh circumstances. In one case, in Guatemala, a transgender woman was allegedly raped more than 80 times while in detention.⁶¹

37. Some States continue to subject men suspected of homosexual conduct to anal examinations in order to “prove” their homosexuality. Such examinations have been described as “medically worthless” and condemned by the Committee against Torture, the Special Rapporteur on torture and the Working Group on Arbitrary Detention; all have held that the practice contravenes the prohibition on torture and ill-treatment.⁶²

38. Other medical procedures that can, when forced or otherwise involuntary, breach the prohibition on torture and ill-treatment include “conversion” therapy, sterilization, gender reassignment, and unnecessary medical interventions involving intersex children (see paras. 14 above and 52, 53 and 70 below).

E. Positive developments since 2011

39. States have adopted a range of measures with a view to addressing homophobic and transphobic violence, including some highlighted in responses to the note verbale soliciting inputs for the present report. New or strengthened anti-hate crime laws have been enacted in several States, including Albania, Chile, Finland, Georgia, Greece, Honduras, Malta, Montenegro, Portugal and Serbia. Such laws can play an important role in facilitating the prosecution and punishment of perpetrators of hate-motivated violence and in establishing homophobia and transphobia as aggravating factors for the purposes of sentencing.

40. Other notable initiatives include the establishment of specialized hate crime prosecution units (Brazil, Honduras, Mexico, Spain), and an interagency working group on urgent cases (Colombia); improved police training and sensitization (Canada, Denmark, France, Montenegro, Philippines) and new policing guidelines (Spain, United Kingdom); national hotlines to report homophobic incidents (Brazil, Netherlands) and surveys to improve hate-crime data collection (Belgium (Flanders), Canada); a national task force on gender- and sexual orientation-based violence (South Africa); policies and protocols for ensuring the dignity and safety of transgender prisoners (Brazil, Canada); training materials on the rights of LGBT prisoners (Ecuador); and investigations by the human rights commission of allegations of torture and ill-treatment of LGBT and intersex detainees (Nepal).

⁶⁰ A/HRC/27/72, EGY 4/2014.

⁶¹ A/68/340, paras. 58, 59, 63.

⁶² A/HRC/22/53, paras. 76, 79.

V. Discrimination⁶³

41. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly urged States to tackle both direct and indirect discrimination against all persons, including LGBT and intersex persons.⁶⁴ States have an obligation to ensure that laws, policies and programmes executed by State authorities do not discriminate against individuals. They also have an obligation to address discriminatory practices, including by private actors, and to take action to prevent, diminish and eliminate the conditions and attitudes that contribute to substantive or de facto discrimination.

42. Discrimination against LGBT individuals is often exacerbated by other identity factors, such as sex, ethnicity, age and religion, and socioeconomic factors, such as poverty and armed conflict.⁶⁵ The impact of such multiple forms of discrimination may be felt at an individual level and a societal one, as LGBT persons, deprived of access to such basic rights as employment, health, education and housing find themselves in poverty, cut off from economic opportunity.⁶⁶ Studies undertaken in several countries suggest that rates of poverty, homelessness and food insecurity are higher among LGBT individuals than in the wider community.⁶⁷ The World Bank has documented the negative impact of homophobia on economic growth and development.⁶⁸

A. Discriminatory laws

1. Laws criminalizing homosexuality and other laws used to penalize individuals because of sexual orientation or gender identity

43. States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity – including offences not directly related to sexual conduct, such as those pertaining to LGBT v. physical appearance or so-called “public scandal” – are discriminatory and arbitrary.⁶⁹ Since its landmark decision in *Toonen v. Australia* (communication No. 488/1992) in 1994, the Human Rights Committee and other mechanisms have repeatedly urged States to reform laws criminalizing consensual same-sex conduct, and welcomed their repeal.

44. At least 76 States retain laws that are used to criminalize and harass people on the basis of sexual orientation and gender identity or expression, including laws criminalizing

⁶³ See also A/HRC/19/41, paras. 40-47.

⁶⁴ See E/C.12/GC/20, paras. 7-11, CCPR/C/PER/CO/5, para. 8.

⁶⁵ See CRC/C/GC/15, para. 8, A/HRC/20/16, paras. 17, 23-27, A/HRC/26/50, para. 15, CEDAW/C/GC/28, para. 18.

⁶⁶ See A/HRC/27/55, paras. 64-66, E/C.12/PER/CO/2-4, para. 5.

⁶⁷ See Lucas Paoli Itaborahy, *LGBT people living in poverty in Rio de Janeiro* (London, Micro Rainbow, 2014); and Gary J. Gates, “Food Insecurity and SNAP (Food Stamps) Participation in LGBT Communities”, Williams Institute, February 2014.

⁶⁸ M.V. Lee Badgett, “The economic cost of stigma and the exclusion of LGBT People: a case study of India”, World Bank Group, 2014.

⁶⁹ See CCPR/C/BLZ/CO/1, para. 13, CCPR/C/PHL/CO/4, para. 10, CCPR/C/SLV/CO/6, para. 3(c).

consensual, adult same-sex relationships.⁷⁰ Sometimes inherited as colonial-era legislation, these laws typically prohibit certain types of sexual activity or any intimacy between persons of the same sex. Cross-dressing or “imitating the opposite sex” is also sometimes penalized.⁷¹ Wording often refers to vague and undefined concepts, such as “crimes against the order of nature” or “morality”, “debauchery”, “indecent acts” or “grave scandal”.⁷² Penalties include lashings, life imprisonment and the death penalty.

45. Human rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization put on the work of human rights defenders.⁷³ The Special Rapporteur on freedom of religion or belief has noted that these laws may give a pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence.⁷⁴

2. Death penalty

46. In the Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan and Yemen, and in parts of Nigeria and Somalia, the death penalty may be applied in cases of consensual homosexual conduct. Death is also the prescribed punishment for homosexuality in the revised penal code of Brunei, although relevant provisions have yet to take effect.

47. The application of the death penalty in this context represents a grave violation of human rights, including the rights to life, privacy and non-discrimination. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly expressed concern about death sentences for consensual adult sexual conduct.⁷⁵ The Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated that death sentences may only be imposed for the most serious crimes and that offences related to homosexual conduct and sexual relations between consenting adults do not meet that threshold.⁷⁶

3. “Anti-propaganda” laws

48. In the past two years, laws have been enacted or proposed in several States that seek to restrict public discussion of sexual orientation under the guise of “protecting minors” from information on so-called “non-traditional sexual relations”.⁷⁷ These laws, sometimes called “anti-propaganda” laws, are often vaguely worded and arbitrarily restrict the rights to freedom of expression and assembly. They also contribute to ongoing persecution of members of the LGBT community, including young persons who identify or are perceived as LGBT.⁷⁸ The Special procedures mandate holders on human rights defenders, on freedom of opinion and expression and on freedom of peaceful assembly and of association

⁷⁰ Lucas Paoli Itaborahy and Jingshu Zhu, *State-sponsored Homophobia*, International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), Brussels, 2014), p. 21. Mozambique and Palau have decriminalized homosexuality since the publication of the report.

⁷¹ See CCPR/C/KWT/CO/2, para. 30.

⁷² See CCPR/C/PHL/CO/4, para. 10, CCPR/C/ETH/CO/1, para. 12.

⁷³ See A/HRC/26/29, para. 27, CCPR/C/SLE/CO/1, para. 11.

⁷⁴ A/HRC/28/66, para. 42.

⁷⁵ See CCPR/C/YEM/CO/5, para. 13, E/C.12/IRN/CO/2, para. 7.

⁷⁶ See A/67/275, paras. 36-38, A/HRC/27/23, para. 28.

⁷⁷ See CEDAW/C/KGZ/CO/4, para. 9.

⁷⁸ See CCPR/C/106/D/1932/2010, para. 10.8, CCPR/C/LTU/CO/3, para. 8.

have expressed concerns in this context about developments in Kyrgyzstan, Nigeria, the Republic of Moldova, the Russian Federation, Uganda and Ukraine.⁷⁹

49. In some cases, these laws have been accompanied by bans on non-governmental organizations receiving funding from abroad, allegedly in order to curb the influence of “foreign agents”.⁸⁰ Such measures put defenders at risk of arrest, violence and discrimination, and can threaten rights relating to, inter alia, health, education, cultural expression and information.⁸¹

B. Discriminatory practices⁸²

1. Health care

50. Laws criminalizing homosexuality and the discriminatory policies, practices and attitudes of health-care institutions and personnel adversely affect the quality of health services,⁸³ deter individuals from seeking services,⁸⁴ and may lead to the denial of care or to an absence of services that respond to the specific health needs of LGBT and intersex persons.⁸⁵

51. The negative health impact of laws criminalizing homosexuality has been widely acknowledged, including by the World Health Organization (WHO), the United Nations Development Programme (UNDP), the Joint United Nations Programme on HIV/AIDS (UNAIDS), the treaty bodies and the special procedures of the Human Rights Council.⁸⁶ The Global Commission on HIV and the Law found, for instance, that in Caribbean countries with laws that criminalize homosexuality, almost one in four men who have sex with men is HIV positive; the equivalent figure in Caribbean countries with no such laws is one in 15.⁸⁷

52. There is mounting concern about so-called “conversion therapies” intended to “cure” homosexual attraction. Such therapies have been found to be unethical, unscientific and ineffective and, in some instances, tantamount to torture – leading to successful legal challenges and bans in several countries.⁸⁸ In Ecuador, concerns have been raised about

⁷⁹ See A/HRC/23/51, UKR 3/2012; A/HRC/25/74, MDA 4/2013; RUS 3/2013, RUS 4/2013; A/HRC/26/21, NGA 1/2014, UGA 1/2014, UGA 1/2013; A/HRC/27/72, KGZ/1/2014.

⁸⁰ A/HRC/25/74, RUS 3/2013.

⁸¹ See A/66/203, paras. 17-18, A/69/307, paras. 84-89.

⁸² See also A/HRC/19/41, paras. 48-73.

⁸³ See CCPR/C/TUR/CO/1, para. 10, CEDAW/C/NOR/CO/8, paras. 33-34.

⁸⁴ See CCPR/C/JAM/CO/3, paras. 8-9, A/HRC/14/20, paras. 20-23. See also UN Free & Equal factsheet, “Criminalization” (available at www.unfe.org/en/fact-sheets).

⁸⁵ See A/64/272, para. 46.

⁸⁶ See “Secretary-General, in observance message, equates fight against homophobia with struggle to eliminate racism, promote gender equality”, press release, 16 May 2013; E/C.12/JAM/CO/3-4, para. 28; and *Risks, Rights and Health*, Global Commission on HIV and the Law, UNDP, 2012, in particular pp. 44-54.

⁸⁷ *Ibid.*, p. 45.

⁸⁸ See A/HRC/22/53, para. 88; Sharon Bernstein, “Supreme Court won’t intervene in California ban on gay-conversion therapy”, Reuters, 1 July 2014; and Ed Adamczyk, “Beijing court rules gay-conversion clinic treatments illegal”, UPI, 19 December 2014.

“rehabilitation clinics” where lesbians and transgender youths have been forcibly detained with the collusion of family members and subjected to torture, including sexual abuse.⁸⁹

53. Many intersex children, born with atypical sex characteristics, are subjected to medically unnecessary surgery and treatment in an attempt to force their physical appearance to align with binary sex stereotypes. Such procedures are typically irreversible and can cause severe, long-term physical and psychological suffering. Those to have called for an end to the practice include the Committee on the Rights of the Child, the Committee against Torture, the special procedures mandate holders on the right to health and on torture.⁹⁰

54. Transgender persons often face particular difficulties in their access to appropriate health care. Health-care professionals may be insensitive to their needs, lack relevant knowledge and treat transgender persons in a discriminatory manner. Gender reassignment therapy, where available, is often prohibitively expensive. In certain situations, it is coerced.⁹¹

2. Education

55. Many children and adolescents perceived as LGBT or gender non-conforming experience discrimination, harassment and, in some cases, violent abuse both in and outside of school.⁹² Such abuse can force students to skip or drop out of school, and can lead to feelings of isolation and depression, even suicide.

56. High levels of bullying have been recorded in all regions. A European Union study found that 80 per cent of school-age children surveyed heard negative comments or saw negative conduct directed at schoolmates perceived as lesbian, gay, bisexual or transgender.⁹³ A survey conducted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) of students in Thailand found that more than half of LGBT respondents had been bullied in the previous month, and more than 30 per cent had experienced physical abuse.⁹⁴ These findings mirror those of studies conducted in other countries.

57. Limiting or obstructing information related to sexuality or using materials that contain stereotypes and prejudices can contribute to violence and expose young LGBT persons to health risks.⁹⁵ Comprehensive sexuality education is part of the right to education and can be a tool for combating discrimination.

3. Employment

58. In most States, national laws do not provide adequate protection from employment-related discrimination on grounds of sexual orientation and gender identity.⁹⁶ In the absence

⁸⁹ CCPR/C/ECU/CO/5, para. 12. See “IACHR expresses concern about violence and discrimination against LGBTI persons, particularly youth, in the Americas”, press release, 15 August 2013.

⁹⁰ See CRC/C/CHE/CO/2-4, para. 42, CAT/C/DEU/CO/5, para. 20, A/HRC/22/53, para. 88, A/64/272, para. 49.

⁹¹ See A/HRC/25/61, annex II.

⁹² See E/CN.4/2001/52, para. 75, E/CN.4/2006/45, para. 113, CRC/C/RUS/CO/4-5, para. 59.

⁹³ *EU LGBT Survey*, EU Agency for Fundamental Rights (see footnote 50), p. 12.

⁹⁴ “Bullying targeting secondary school students who are or are perceived to be transgender or same-sex attracted”, Mahidol University, Plan International Thailand, UNESCO, 2014, p. 14.

⁹⁵ See CRC/C/RUS/CO/4-5, para. 55, CRC/GC/2003/4, paras. 26, 28; A/65/162, paras. 4, 6, 23, 63, A/68/290, paras. 52, 54.

⁹⁶ ILGA, *State-sponsored Homophobia* (see footnote 70), p. 21.

of such laws, employers may fire or refuse to hire or promote people simply because they are seen as lesbian, gay, bisexual or transgender.⁹⁷ Where laws do exist, they may be poorly applied. Workplace benefits available to heterosexual employees may be denied to their LGBT counterparts. Surveys indicate that discrimination and verbal and other forms of harassment in the workplace are commonplace.⁹⁸

4. Housing

59. LGBT persons may experience discrimination in access to housing as a result of unfair treatment by public and private landlords. Concerns include LGBT individuals and same-sex couples denied leases and evicted from public housing,⁹⁹ harassed by neighbours and forced out of their homes.¹⁰⁰ Many LGBT-identifying adolescents and young adults are thrown out of home by disapproving parents and end up on the streets, resulting in disproportionately high rates of homelessness among this group. A recent survey of 354 homeless support agencies in the United States suggested that some 40 per cent of homeless youth identify as LGBT, with family rejection the leading cause of homelessness among this group.¹⁰¹

5. Freedom of expression, association and assembly

60. United Nations human rights experts continue to highlight discriminatory restrictions on the rights to freedom of expression, association and assembly of LGBT persons and those defending their rights.¹⁰² Concerns include direct censorship, bans on dissemination of information and restrictions on advocacy.¹⁰³

61. LGBT organizations continue to have registration applications rejected, reviews delayed and legal registration revoked on discriminatory grounds.¹⁰⁴ Permission to hold meetings, workshops and cultural events may be denied in an attempt to suppress political and artistic expression.¹⁰⁵ Police officers have raided the offices of LGBT groups, arrested and harassed staff and volunteers, and confiscated materials, sometimes putting the privacy and safety of staff and supporters at risk.¹⁰⁶ The offices of LGBT organizations have been targets of vandalism, burglary and arson,¹⁰⁷ and such incidents are seldom investigated promptly.¹⁰⁸

⁹⁷ See A/69/318, para.17; and “Discrimination at work on the basis of sexual orientation and gender identity: Results of pilot research” (GB.319/LILS/INF/1), International Labour Office, October 2013, pp. 2-3.

⁹⁸ *EU LGBT Survey*, EU Agency for Fundamental Rights (see footnote 50), p.17; April Guasp, “Gay in Britain: Lesbian, Gay and Bisexual People’s Experiences and Expectations of Discrimination”, Stonewall, 2012, pp.3, 19.

⁹⁹ See A/69/274, para. 12.

¹⁰⁰ See A/HRC/19/53, paras. 50, 51, 63.

¹⁰¹ See “Serving Our Youth”, Williams Institute, True Colors Fund and the Palette Fund, 2012, p. 3.

¹⁰² See CCPR/C/GEO/CO/4, para. 8, A/HRC/26/30/Add.2, para. 77.

¹⁰³ See A/HRC/20/22/Add.2, para. 55, A/64/211, paras. 21-27.

¹⁰⁴ See A/69/307, para. 30.

¹⁰⁵ See A/HRC/23/34/Add.1, paras. 101-103.

¹⁰⁶ See A/HRC/22/53/Add.4, para. 162.

¹⁰⁷ A/HRC/25/74, MKD 2/2013; A/HRC/23/51, CRI 2/2012.

¹⁰⁸ See A/69/307, para. 86, A/HRC/22/53/Add. 4, para. 162, A/HRC/25/71, para. 55, A/HRC/26/52, para. 33.

62. Private and State agents target “pride” marches, where LGBT persons and their supporters are sometimes subjected to violence and harassment.¹⁰⁹ In some States, such events are denied police protection or permits, sometimes under guise of threats to public morals or safety, abrogating the State’s duty to uphold freedom of assembly and to protect LGBT persons from violence.¹¹⁰ In the absence of proper police protection, marchers have been physically attacked and harassed by State and non-State actors, including far-right “skinhead” groups.¹¹¹

63. Women defenders and those advocating for gender- and sexuality-related rights are often at particular risk because they are seen as challenging traditional assumptions about the role and status of women in society.¹¹²

6. Asylum and migration

64. Asylum and migration policies in this context vary considerably. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that some 42 States have granted asylum to individuals with a well-founded fear of persecution owing to sexual orientation or gender identity. At international borders, migrants and refugees may be subjected to invasive physical screenings and examinations and denied entry on discriminatory grounds.¹¹³

65. Practices in States granting asylum sometimes fall short of international standards. Officials may be insensitive to the conditions facing LGBT asylum-seekers, and review of applications is sometimes arbitrary and inconsistent.¹¹⁴ In its judgement of 2 December 2014, the Court of Justice of the European Union ordered States to cease use of intrusive questioning and medical tests purportedly designed to reveal applicants’ sexual orientation. Refugees and migrants are sometimes subjected to violence and discrimination while in detention facilities,¹¹⁵ and when resettled, may be housed within communities where they experience additional sexuality- and gender-related risks. The refoulement of asylum seekers fleeing such persecution exposes them to the risk of violence, discrimination, criminalization and the death penalty.¹¹⁶

7. Family and community

66. States’ responsibility to protect individuals from discrimination extends to the family sphere, where rejection and discriminatory treatment of and violence against LGBT and intersex family members can have serious, negative consequences for the enjoyment of human rights. Examples include individuals being physically assaulted, raped, excluded from family homes, disinherited, prevented from going to school, sent to psychiatric institutions, forced to marry, forced to give up custody of their children, punished for activist work and subjected to attacks on personal reputation. In States where homosexuality is criminalized, victims may be reluctant to report violence perpetrated by a

¹⁰⁹ See A/HRC/23/34, paras. 49-50, A/HRC/26/36/Add.2, paras. 43-45.

¹¹⁰ CCPR/C/109/D/1873/2009, para. 9.6, A/HRC/23/49/Add.4, para. 22.

¹¹¹ See A/HRC/10/12/Add.1, paras. 275-280, A/HRC/11/4/Add.1, paras. 289-2294, A/HRC/16/44/Add.1, paras. 1157-1164.

¹¹² See A/HRC/22/47/Add.1, para. 88, and “Study on the situation of women human rights defenders in Africa”, Special Rapporteur on human rights defenders, African Commission on Human and Peoples’ Rights, 2015.

¹¹³ A/69/CRP.1, p. 15.

¹¹⁴ UNHCR, HCR/GIP/12/09 (see footnote 8).

¹¹⁵ See A/HRC/22/53/Add.4, para. 178.

¹¹⁶ See CCPR/C/108/D/2149/2012, para 2.4, CCPR/C/103/D/1833/2008, para. 9.2.

family member for fear of the criminal ramifications of revealing their sexual orientation. Lesbians, bisexual women and transgender persons are often especially at risk owing to gender inequalities and restrictions on autonomy in decision-making about sexuality, reproduction and family life.¹¹⁷

8. Recognition of relationships and related access to State and other benefits

67. While States are not required under international law to recognize same-sex marriage,¹¹⁸ the Committee on Economic, Social and Cultural Rights has called upon States to provide for legal recognition of same-sex couples.¹¹⁹ As at April 2015, 34 States offered same-sex couples either marriage or civil unions, which bestow many of the same benefits and entitlements as marriage.¹²⁰ Wherever States provide benefits such as pension and inheritance entitlements for unmarried heterosexual couples, the same benefits should be available to unmarried homosexual couples.¹²¹

68. Lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can result in same-sex partners being treated unfairly by private actors, including health-care providers and insurance companies. The United Nations Children's Fund (UNICEF), the Committee on the Rights of the Child and the Inter-American Court of Human Rights have expressed concern at discrimination against, and the lack of legal protection of, children of same-sex couples.¹²²

9. Gender recognition and related issues

69. In spite of recent advances in several countries, transgender persons are generally still unable to obtain legal recognition of their preferred gender, including a change in recorded sex and first name on State-issued identity documents. As a result, they face multiple rights challenges, including in employment and housing, applying for bank credit or State benefits, or when travelling abroad.

70. Regulations in States that recognize changes in gender often impose abusive requirements as a precondition of recognition – for example, by requiring that applicants be unmarried and undergo forced sterilization, forced gender reassignment and other medical procedures, in violation of international human rights standards.¹²³

¹¹⁷ See A/68/290, para. 38, A/HRC/20/16/Add.4, para. 20, A/HRC/22/56, para. 70, A/HRC/26/38/Add.1, para. 19.

¹¹⁸ See CCPR/C/75/D/902/1999.

¹¹⁹ E/C.12/BGR/CO/4-5, para.17; E/C.12/SVK/CO/2, para. 10.

¹²⁰ ILGA, *State-sponsored Homophobia* (see footnote 70), pp. 26-28.

¹²¹ See CCPR/C/CHN/HKG/CO/3, para. 23, CCPR/C/78/D/941/2000, para. 10.4, CEDAW/C/SRB/CO/2-3, para. 39(d); also European Court of Human Rights, applications 29381/09 and 32684/09, 7 November 2013, paras. 79-81.

¹²² See CRC/C/GC/15, para.8 and CRC/C/GAM/CO/2-3, paras. 29-30; and “Eliminating discrimination against children and parents based on sexual orientation and/or gender identity”, UNICEF, position paper no.9, 2014, and Inter-American Court of Human Rights, *Atala Riffo and daughters v. Chile*, 24 February 2012.

¹²³ See CCPR/C/IRL/CO/4, para. 7, CCPR/C/UKR/CO/7, para. 10, A/HRC/22/53, para. 88; also “Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement”, OHCHR, UN-Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, 2014.

C. Positive developments since 2011

71. Three States (Mozambique, Palau and Sao Tome and Principe) have decriminalized consensual same-sex conduct, and several others have accepted recommendations to do so. The United Kingdom and several states in Australia have adopted measures to expunge the criminal records of individuals convicted of consensual homosexuality-related offences.

72. Fiji has added an anti-discrimination clause in its Constitution prohibiting discrimination based on sexual orientation, gender identity and gender expression, and Malta has added gender identity to the list of prohibited grounds of discrimination included in its Constitution. Anti-discrimination laws have also been strengthened in several States, including Chile, Cuba, Georgia, the Republic of Moldova, Montenegro, as well as in Australia and Malta, which became the first countries to expressly prohibit discrimination against intersex persons.

73. Legal recognition of same-sex relationships was introduced in at least 12 additional States, either in the form of civil marriage (Brazil, Denmark, France, Luxembourg, New Zealand, United Kingdom, Uruguay) or civil unions (Chile, Croatia, Ireland, Liechtenstein, Malta). Argentina, Denmark and Malta established new laws that allow transgender persons to obtain legal recognition of their gender identity on the basis of self-determination, while Australia (Australian Capital Territory), the Netherlands and Sweden removed abusive sterilization, forced treatment and divorce requirements. Argentina furthermore established access to free gender-affirming treatment for those who wish to receive such treatment. Nepal and Bangladesh created a legal “third gender” category, and new passport policies in Australia and New Zealand allow individuals to choose male, female or indeterminate gender markers. The Supreme Court of India affirmed the right of transgender persons to determine their own gender, and called upon the Government to ensure equal rights for transgender persons, including in access to health care, employment and education. Malta became the first State to prohibit sex-assignment surgery or treatment on intersex minors without their informed consent.

74. Other initiatives include the development of a new judicial protocol to guide adjudication of cases involving human rights violations on grounds of sexual orientation and gender identity (Mexico); implementation of employment-related anti-discrimination protections (Bolivia (Plurinational State of), Botswana); new guidance materials and training for police, teachers and/or other officials (Canada, Colombia, Croatia, Denmark, Montenegro, Norway, Mexico, Serbia, Spain); expansion of anti-bullying programmes and other anti-discrimination measures in schools (Albania, Australia, Brazil, Canada, Taiwan province of China, Ireland, Portugal, Sweden, United Kingdom), and annual reporting on discrimination and violence in schools (Brazil); LGBT suicide prevention programmes (Belgium, Japan, United Kingdom); a human rights-based comprehensive sexuality education curriculum for schools (South Africa); scholarships for transgender persons who enrol in vocational training (Brazil); construction of homeless shelters for LGBT youth (Albania, United States); and no longer requiring external corroboration of sexual orientation or gender identity for LGBT asylum-seekers (Italy, Portugal).

75. National plans of action were developed to tackle discrimination against LGBT persons in Brazil, Canada (Quebec), France, Norway, South Africa and the United Kingdom, and, in Uruguay, a plan to combat the social exclusion of transgender persons. Several States also launched national public education campaigns to counter homophobia and transphobia (Argentina, Australia, Belgium (Flanders), Brazil, Colombia, Cuba, Montenegro, Serbia, South Africa, United Kingdom, Uruguay). Mexico has officially designated 17 May as the National Day against Homophobia.

VI. Conclusions and recommendations

76. The present study is the second on violence and discrimination based on sexual orientation and gender identity requested by the Human Rights Council. While some progress has been made since the first study in 2011, the overall picture remains one of continuing, pervasive, violent abuse, harassment and discrimination affecting LGBT and intersex persons in all regions. These constitute serious human rights violations, often perpetrated with impunity, indicating that current arrangements to protect the human rights of LGBT and intersex persons are inadequate. There is as yet no dedicated human rights mechanism at the international level that has a systematic and comprehensive approach to the human rights situation of LGBT and intersex persons.

77. The recommendations below describe measures to protect individuals from the kinds of human rights violations documented above. They draw from good practices observed in the course of compiling the report and recommendations of United Nations human rights mechanisms.

A. States

78. The High Commissioner recommends that States address violence by:

(a) Enacting hate crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing;

(b) Conducting prompt, thorough investigations of incidents of hate-motivated violence against and torture of LGBT persons, holding perpetrators to account, and providing redress to victims;

(c) Collecting and publishing data on the number and types of incidents, while providing for the security of those reporting;

(d) Prohibiting incitement of hatred and violence on the grounds of sexual orientation and gender identity, and holding to account those responsible for related hate speech;

(e) Training law enforcement personnel and judges in gender-sensitive approaches to addressing violations related to sexual orientation and gender identity;

(f) Ensuring that police and prison officers are trained to protect the safety of LGBT detainees, and holding to account State officials involved or complicit in incidents of violence;

(g) Banning “conversion” therapy, involuntary treatment, forced sterilization and forced genital and anal examinations;

(h) Prohibiting medically unnecessary procedures on intersex children;

(i) Ensuring that no one fleeing persecution on grounds of sexual orientation or gender identity is returned to a territory where his or her life or freedom would be threatened, that asylum laws and policies recognize that persecution on account of sexual orientation or gender identity may be a valid basis for an asylum claim; and eliminating intrusive, inappropriate questioning on asylum applicants’ sexual histories, and sensitizing refugee and asylum personnel.

79. States should address discrimination by:

- (a) Revising criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; ordering an immediate moratorium on related prosecution; and expunging the criminal records of individuals convicted of such offences;
- (b) Repealing so-called “anti-propaganda” and other laws that impose discriminatory restrictions on freedom of expression, association and assembly;
- (c) Ensuring that anti-discrimination legislation includes sexual orientation and gender identity among prohibited grounds, and also protects intersex persons from discrimination;
- (d) Integrating analysis of violations based on sexual orientation and gender identity in national plans of action, thereby ensuring coordination and adequate resourcing of related activities, accountability for perpetrators, and redress for victims;
- (e) Sensitizing health-care workers to the health needs of LGBT and intersex persons, including in the areas of sexual and reproductive health and rights, suicide prevention, HIV/AIDS and trauma counselling;
- (f) Establishing national standards on non-discrimination in education; developing anti-bullying programmes and establishing helplines and other services to support LGBT and gender-non-conforming youth; and providing comprehensive, age-appropriate sexuality education;
- (g) Ensuring that housing policies do not discriminate against tenants based on sexual orientation and gender identity; and establishing shelters for homeless LGBT persons, with specific attention to youth, older persons and those in emergency situations;
- (h) Providing legal recognition to same-sex couples and their children, ensuring that benefits traditionally accorded married partners – including those related to benefits, pensions, and taxation and inheritance – are accorded on a non-discriminatory basis;
- (i) Issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce;
- (j) Supporting public education campaigns to counter homophobic and transphobic attitudes, and addressing negative, stereotypical portrayals of LGBT persons in the media;
- (k) Ensuring that LGBT and intersex persons and organizations are consulted with regard to legislation and policies that have an impact on their rights.

B. National human rights institutions

80. The High Commissioner recommends that national human rights institutions address violence and discrimination against LGBT and intersex persons in the context of their respective mandates to promote and monitor effective implementation of international human rights standards at the national level.

C. Human Rights Council

81. As the intergovernmental body with responsibility for promoting and protecting human rights worldwide, the Human Rights Council should keep itself regularly informed of patterns of violence and discrimination linked to sexual orientation and gender identity, as well as emerging State responses. To this end, OHCHR stands ready to submit further reports upon request, and current special procedures mandate holders should be encouraged to continue to report on related violations within their respective mandates.

cited in Bringas-Rodriguez v. Sessions, No. 13-72686 archived on March 2, 2017

Lesson Plan Overview

Course	Asylum Officer Basic Training Course
Lesson	<i>Guidelines for Children's Asylum Claims</i>
Rev. Date	September 1, 2009
Lesson Description	This lesson introduces, and is based on, the <i>Guidelines for Children's Asylum Claims</i> , issued by the former INS in 1998. Issues addressed include interviewing and procedural considerations when working with child asylum applicants, as well as considerations for the legal analysis of their claims.
Field Performance Objective	Given a request for asylum from a child to adjudicate, the asylum officer will correctly apply the law to determine eligibility for asylum in the United States.
Academy Training Performance Objective	Given written scenarios involving child asylum applicants, the trainee will determine the proper handling of the situation in accordance with all laws, policies, and USCIS guidance and training standards.
Interim (Training) Performance Objectives	<ol style="list-style-type: none"> 1. Summarize the developments in international law that focus on the rights of children and child asylum-seekers. 2. Identify inter-cultural factors that may hinder an interview of a child asylum-seeker. 3. List the steps that an asylum officer can take to ease the task of interviewing a child applicant. 4. List child-sensitive questioning and listening techniques that aid in eliciting information from children. 5. Describe questions to ask concerning a child's care and custody and parental knowledge of or consent to the asylum application, and be familiar with the proper use of such information in the adjudication. 6. Define an unaccompanied minor and legal guardianship for RAPS purposes. 7. Describe how persecution must be analyzed when looking at a claim of a child asylum-seeker. 8. Identify issues of nexus that can complicate the analysis of a child's claim to asylum. 9. Identify factors to consider when evaluating evidence presented by child asylum applicants.
Instructional Methods	Lecture, class discussion, visual aids, practical exercises.
Student Materials / References	Participant Workbooks; <i>UNHCR Handbook</i> ; <i>Matter of S-M-J-</i> , 21 I&N Dec. 722 (BIA 1997); <i>Matter of A-K-</i> , 24 I&N Dec. 275 (BIA 2007); <i>Hernandez-Ortiz v. Gonzales</i> , 496 F.3d 1042 (9th Cir. 2007); <i>Jorge-Tzoc</i>

Participant Workbook

v. *Gonzales*, 435 F.3d 146 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000); *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

Method of Evaluation

Written test

Background Reading

1. Ajdukovic, Marina, and Dean Ajdukovic. "Psychological Well-Being of Refugee Children," *Child Abuse & Neglect* (Vol. 17, 1993) p. 843-854. (attached)
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CRITICAL TASKS**SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001**

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
012	Identify issues of claim.
016	Advise all parties of their roles and responsibilities.
017	Identify all persons present at interview.
019	Request/accept additional evidence.
020	Conduct non-adversarial interview.
021	Determine credibility of applicant and materiality to claim.
024	Determine if applicant is a refugee.
041	Follow all service policies and procedures for special applicants, including minors, VWP, individuals 75 years of age and older, etc.
SS 7	Ability to interpret cross-cultural behavior and respond appropriately.
SS 10	Ability to lead/direct/organize and control the interview process.
SS 13	Ability to analyze complex issues.
SS 15	Ability to work effectively with interpreters.
SS 19	Maintain current working knowledge of relevant laws, regulations, procedures, policies, and country conditions information.

cited in Bringas-Rodriguez v. Sessions, No. 13-72686 archived on March 2, 2017

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Presentation**References****I. INTRODUCTION**

The purpose of this lesson is to familiarize the student with the *Guidelines for Children's Asylum Claims* regarding the adjudication of asylum claims filed by applicants under eighteen years of age. The lesson will cover the international guidance that bears on this issue, the procedural adjustments asylum officers must make when interviewing children, and the legal issues that must be considered when analyzing cases and making asylum determinations.

The majority of the content of this lesson derives from the Immigration and Naturalization Service (INS) memorandum *Guidelines for Children's Asylum Claims*. All asylum officers should be familiar with its content as the memorandum continues to provide valuable guidance when interviewing children. Keeping in mind that any memorandum is static by nature and that changes in regulations and caselaw in the years after a memorandum's issuance may supersede its legal guidance, officers should not rely solely on the sections of the Children's Guidelines on legal analysis when adjudicating a child's claim. The Asylum Division memorandum *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS* provides an additional resource on procedures asylum officers must follow in cases involving minor principal applicants.

During the last twenty years, the topic of child asylum seekers has drawn increasing attention from the international community. Human rights violations against children take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish a minimum age for participation in armed conflicts, children under age eighteen are forcibly recruited by state-sanctioned armies or private militias to participate in military combat in some countries.

The unique vulnerability and circumstances of children and the increasing interest in children requesting asylum demanded that the INS issue guidance relating to young asylum seekers. On Human Rights Day 1998, the INS issued its *Guidelines for Children's Asylum Claims* (or "Children's Guidelines") which address child-sensitive interview procedures and legal analysis of the issues that commonly arise in such cases.

The Children's Guidelines resulted from a collaborative effort of the

See Weiss, Jeff. INS Office of International Affairs. *Guidelines for Children's Asylum Claims*, Memorandum to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) (Washington, DC: 10 December 1998), 30 pp.

See Langlois, Joseph E. USCIS Asylum Division. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 14 August 2007), 9 pp.

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INS and interested US governmental and non-governmental organizations (NGOs), individuals, and the UNHCR. The Women's Commission for Refugee Women and Children was instrumental in the development of the guidance.

II. INTERNATIONAL GUIDANCE

As the issue of children as asylum-seekers has moved only relatively recently into the forefront of immigration law, relevant US caselaw is somewhat scarce. In the absence of caselaw, or when caselaw does not specifically address an issue, international instruments can provide helpful guidance and context on human rights norms.

In addition to the sources cited below, the information in this section of the lesson derives from section I., Background and International Guidance, of the Children's Guidelines.

The following international instruments and documents contain provisions specifically relating to children. They recognize and promote the principle that children's rights are universal human rights.

See lesson, *International Human Rights Law*.

A. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (U.N.) General Assembly on December 10, 1948. The Declaration sets forth a collective understanding of the rights that are fundamental to the dignity and development of every human being. Most relevant to the task before asylum officers are Article 14, which provides for the right to apply for asylum, and Article 25(2), which refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.

Universal Declaration of Human Rights. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

For more on the United Nations and the United Nations High Commissioner for Refugees, see lessons, *Introduction to UNHCR* and *International Human Rights Law*.

B. Convention on the Rights of the Child

Many of the components of international policy regarding refugee children derive from the U.N. *Convention on the Rights of the Child* (CRC). Adopted by the U.N. in November 1989, the CRC codifies standards for the rights of all children, including those who are refugees. Article 3(1) of the CRC provides that "the 'best interests of the child' should be the primary consideration" in all actions involving children. The "best interests of the child" principle holds that the State is ultimately responsible for ensuring that the basic needs of children are met and that the fundamental rights of children are protected. The internationally recognized "best interests of the child" principle is a useful measure for determining appropriate interview procedures for child asylum seekers, but it does not play a role in determining substantive eligibility under the U.S. refugee definition. Additionally, under Article 12(1), children's viewpoints should be considered in an

Convention on the Rights of the Child (CRC). G.A. Res. 44/25, U.N. G.A.O.R., Nov. 20, 1989.
<http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>

CRC, Article 3.

CRC, Article 12.

age and maturity-appropriate manner.

Because the United States has signed but not ratified the CRC, its provisions, including those noted above, provide guidance only and are not binding on adjudicators. However, having signed the CRC, the United States is obliged under international treaty law to refrain from acts that would defeat the object and purpose of the Convention.

On December 23, 2002, the U.S. ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Optional Protocol calls for States Party to prohibit and create criminal penalties for the sale of children, child prostitution, and child pornography.

Additionally, the United States ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on January 23, 2003. Among other things, the Optional Protocol calls for State Parties to ensure that children under eighteen years of age do not take a direct part in hostilities, sets out safeguards for those under eighteen years of age who are voluntarily recruited into their nation's armed forces, and prohibits non-governmental armed groups from recruiting or using persons under eighteen years of age as soldiers. In 2008, the Child Soldiers Accountability Act became U.S. law, providing criminal and immigration penalties for individuals who recruit or use child soldiers.

Vienna Convention on the Law of Treaties, Art. 18(a), signed May 23, 1969, entered into force January 27, 1980.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, U.N. GAOR, May 25, 2000. <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, G.A. Res. 54/263, U.N. GAOR, May 25, 2000. <http://www.ohchr.org/english/law/crc-conflict.htm>; Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See section E on child-specific considerations concerning bars, below, for more detail on the CSAA.

C. UNHCR ExCom Conclusion No. 47

Over the years, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has adopted a number of conclusions concerning refugee children. Safeguarding the wellbeing of refugee children has long been a high priority of UNHCR and the United States. In 1987, the Executive Committee issued its first conclusion devoted exclusively to children – Conclusion No. 47. This Conclusion urged action to address the human rights and needs of children who are refugees and highlighted the particular vulnerability of unaccompanied and disabled refugee children, and highlighted the need for action by UNHCR to protect and assist them. Conclusion

For more on the Executive Committee, see lesson, *Introduction to UNHCR*.

UN High Commissioner for Refugees, *Conclusion on Refugee Children*, 12 Oct. 1987. No. 47 (XXXVIII) - 1987.

No. 47 condemned specific violations of basic human rights, including sexual abuse, trafficking of children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, and arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims.

Conclusion No. 47 also emphasized that all action taken on behalf of refugee children must be guided by the principle of the “best interests of the child.”

See section II.B.
Convention on the Rights of the Child, above.

D. UNHCR ExCom Conclusion No. 59

In Conclusion No. 59 issued in 1989, the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children, particularly in regards to access to education. It also drew special attention to the needs of unaccompanied minors, emphasizing the need to develop legal methods to protect them from irregular adoption and forced recruitment into armed forces.

UN High Commissioner for Refugees, *Conclusion on Refugee Children*, 13 Oct. 1989. No. 59 (XL) - 1989.

E. UNHCR ExCom Conclusion No. 107

The Executive Committee issued Conclusion No. 107 on Children at Risk in 2007. It recognizes that children should be prioritized in receiving refugee protection and assistance. It also calls for UNHCR, Member States, and others to identify children at heightened risk due to risks in the wider protection environment and risks resulting from individual circumstances, and to work to prevent such heightened risks.

UN High Commissioner for Refugees, *Conclusion on Children at Risk*, 5 Oct. 2007. No. 107 (LVIII) – 2007.

F. UNHCR Policies and Guidelines

UNHCR has enacted policies and issued several sets of child-related guidelines in recent years.

1. Senior Adviser for Refugee Children

Reflecting an expanded effort to safeguard the wellbeing of refugee children, in 1992 UNHCR established the position of Senior Coordinator for Refugee Children, now known as the Senior Adviser for Refugee Children. This action was a significant step toward improving UNHCR’s protection of and assistance to minors.

2. Policy on Refugee Children

The UNHCR *Policy on Refugee Children* issued in 1993

UNHCR. *Policy on Refugee Children*,

points out that children's needs are different from adults' due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm. Thus, governmental actions relating to children must be "tailored to the different needs and potentials of refugee children," to avoid the tendency to think of refugees as a uniform group.

EC/SCP/82 (August 6, 1993).

3. Refugee Children: Guidelines on Protection and Care

In 1994 UNHCR issued *Refugee Children: Guidelines on Protection and Care*, incorporating international norms relevant to the protection and care of refugee children. The Guidelines adopt a human rights perspective using the articles in the CRC to set UNHCR's standards. For the survival and development of children, UNHCR endorses a "triangle of rights:" the "best interests" rule, a policy of non-discrimination towards all refugee children, and age-appropriate participation of children in issues affecting their lives.

UNHCR. *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).

4. Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum

UNHCR published in 1997 the *Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum*. The purpose of the Guidelines is threefold:

UNHCR. *Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum* (1997).

- a. to increase awareness of the special needs of unaccompanied children and the rights reflected in the CRC;
- b. to highlight the importance of a comprehensive approach to child refugee issues; and
- c. to stimulate internal discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are met.

The UNHCR Guidelines emphasize that all children are "entitled to access to asylum procedures, regardless of their age," and that the asylum process should be prioritized and expedited for children's cases. UNHCR recommends that adjudicators take into account "circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability." It also notes that children

may face child-specific persecution, such as recruitment of child soldiers, forced labor, trafficking of children for prostitution, and female genital mutilation. Finally, UNHCR recommends that where there is “doubt as to the veracity of the account presented or the nature of the relationship between caregiver and child,... the child should be processed as an unaccompanied child.”

5. UNHCR Guidelines on Determining the Best Interests of the Child

The Best Interests Determination (BID) Guidelines set forth the formal process that UNHCR has established to determine the best interests of refugee children confronted with major decisions regarding their care or durable solutions, such as the possibility of voluntary repatriation, local integration, or resettlement. UNHCR commits to undertake a BID in three contexts: (1) identification of the most durable solution for unaccompanied and separated refugee children; (2) temporary care decisions for unaccompanied and separated refugee children in certain exceptional circumstances; and (3) decisions which may involve separating a child against his or her will from parents.

UNHCR. *Guidelines on Determining the Best Interests of the Child* (May 2008).

G. Canadian Guidelines

On September 30, 1996, the Canadian Immigration and Refugee Board (IRB) issued the groundbreaking guidance *Child Refugee Claimants: Procedural and Evidentiary Issues*, the first document of its kind issued by a country operating a refugee determination system. In its guidelines, the Government of Canada recognizes that refugee claims of children pose a special challenge since they represent a particularly vulnerable group. The Canadian guidelines, acknowledging that children may not be able to articulate their claims to refugee status in the same way as adults, establish special procedures for adjudicating children’s claims. The guidelines also adopt the best interests of the child as the relevant standard for assessing procedures to be followed in a child’s claim. The IRB developed these guidelines after consultation with international, national, local, and legal organizations working with refugee children.

Immigration and Refugee Board, Canada. *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Ottawa: 30 September 1996), 18 pp., hereinafter, *Canadian Guidelines*.

III. CHILD DEVELOPMENT

The needs of child asylum seekers are best understood if the applicant is regarded as a child first and an asylum-seeker second. Child asylum-seekers approach the task before them as children, and not necessarily as individuals with legal matters before a State.

Most of the information in this section is taken from the Lutheran Immigration and Refugee Service (LIRS) publication *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*.

Jacqueline Bhabha and Wendy A. Young. "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," *Interpreter Releases* (Vol. 75, No. 21, 1 June 1998) p. 760.

LIRS. *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (June 1998), 84 pp., hereinafter LIRS.

A. Development

A child's ability to participate in the asylum interview will vary based on a number of factors in the child's development.

1. Factors in development

At each stage in development, numerous factors interact to shape the child's personality and abilities. Factors influencing development are: LIRS, pp. 6-7.

- a. chronological age;
- b. physical and emotional health;
- c. physical, psychological, and emotional development;
- d. societal status and cultural background;
- e. cognitive processes;
- f. educational experience;
- g. language ability; and
- h. experiential and historical background.

2. Factors that accelerate or stunt development

Some children may seem to be much older or much younger than their chronological age. A number of environmental and experiential factors can stunt or accelerate dramatically the development of a child. They

include, but are not limited to:

- a. chaotic social conditions; LIRS, p. 7.
- b. experience with forms of violence;
- c. lack of protection and caring by significant adults;
- d. nutritional deficits;
- e. physical disabilities; and
- f. mental disabilities.

B. Preconceptions

Children will bring to the asylum interview a unique set of preconceived notions that could hinder the officer's attempts to elicit information. Such preconceptions may include the ideas that:

1. All governments are corrupt.

The child may be arriving from a country where he or she has already had extensive interaction with or knowledge of a corrupt government. Such a child may assume that the fraud, abuse of authority, and mistreatment of the citizens he or she witnessed in the country of origin is just as pervasive in the United States. LIRS, p. 35.

2. Others still at home will be harmed.

Especially when a child comes from a country in which informants and their family members are harmed, the child may not understand that the U.S. government has no interest in harming, or doing anything to bring about the harm of, his or her relatives still in the country of origin. LIRS, p. 36.

3. He or she should feel guilty for fleeing.

It is not uncommon for any asylum-seeker to experience "survivor's guilt" for having fled to a country of asylum, especially when family members were left behind. LIRS, p. 36.

4. Others will be privy to the testimony.

Many young people do not understand that in the asylum setting, confidentiality protections generally prevent

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USCIS from sharing information with others, without the applicant's consent. This misconception is most likely to hinder an interview when an applicant feels shame as a result of his or her mistreatment, most commonly in cases of sexual abuse.

Asylum officers must earn the trust of the child applicant in order to dispel these preconceptions and put the applicant at ease.

See section V.B., General Interview Considerations, below.

IV. PROCEDURAL CONSIDERATIONS

The majority of children who appear before an asylum officer do so as a dependent of a parent who has filed an asylum application. The Children's Guidelines apply primarily to children under the age of eighteen who apply for asylum independently by submitting a Form I-589 in their own name, rather than as derivative applicants on their parents' applications. However, for the purposes of derivative determinations, the Guidelines apply to all individuals under the age of twenty-one. While the Guidelines are particularly relevant for children who raise independent asylum claims, the procedural sections may be useful for all cases involving children and young adults. Although young people between the ages of eighteen and twenty-one will be interviewed much in the same manner as adults, asylum officers should bear in mind that an applicant whose claim is based on events that occurred while under the age of eighteen may exhibit a minor's recollection of the past experiences and events.

Except where otherwise cited, the information in this section derives from the Children's Guidelines.

A. Asylum Officers

All asylum officers are trained on child refugee issues in the event that they are called upon to interview a child who seeks asylum. It is in the child's best interests to be interviewed by an official who has specialized training in child refugee issues. To the extent that personnel resources permit, Asylum Offices should attempt to assign asylum officers with relevant background or experience to interview children's cases.

B. Interview Scheduling

Asylum offices should make every effort to schedule siblings' interviews with the same asylum officer and in the same time period, to the extent such cases are identified in advance of the interviews. In cases where siblings are interviewed by different asylum officers, the officers should consult with one another about the claims and, to the extent possible, should be reviewed by the same supervisory asylum officer.

C. USCIS Initial Jurisdiction for Unaccompanied Alien Children's Asylum Cases

With the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Congress gave USCIS initial jurisdiction over any asylum application filed by an unaccompanied alien child. This law took effect on March 23, 2009. As a result, unaccompanied alien children (UACs) filing for asylum who previously would have had their case heard by an immigration judge in the first instance now receive an affirmative interview with an asylum officer. In conducting the interview of someone who appears to be a UAC and who is in removal proceedings, the asylum officer should verify that the applicant was a UAC at the time of filing such that USCIS has jurisdiction over the claim.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457 (Dec. 23, 2008). See Joseph E. Langlois, USCIS Asylum Division. *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, Memorandum. (Mar. 25, 2009). For a definition of "unaccompanied alien child," see section IV.D.2., below.

D. Minor Principal and Unaccompanied Minor Field in RAPS

1. In August 2007, the Asylum Division incorporated a new mechanism in RAPS to capture data on minor principal applicants, both accompanied and unaccompanied. The mechanism allows the Asylum Division to track applicants who are unaccompanied minors and reminds asylum officers that modified procedures are in order when handling a minor principal applicant's claim. The ability to gather information on the adjudication of unaccompanied minors' applications assists the Asylum Division in developing or refining policy with regard to these cases.

Joseph E. Langlois, USCIS Asylum Division. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum (Aug. 14, 2007). See the memo for more details about the commands used in RAPS to capture this data.

2. Definition of Minor Principal, Unaccompanied Minor, and Unaccompanied Alien Child

- a. Minor Principal

A minor principal is a principal applicant who is under eighteen years of age at the time of filing an asylum application.

- b. Unaccompanied Minor

For purposes of making a determination in RAPS as to whether the applicant is an unaccompanied minor, an unaccompanied minor is a child who is under eighteen years of age and who has no parent or legal

See Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (defining the term "unaccompanied

guardian in the U.S. who is available to provide care and physical custody. This definition encompasses separated minors, e.g., those who are separated from their parents or guardians, but who are in the informal care and physical custody of other adults, including family members. Note that a child who entered the U.S. with a parent or other adult guardian but who subsequently left the parent's or guardian's care would be considered an unaccompanied minor.

alien child”).

For purposes of the unaccompanied minor definition, guardianship refers to a formal (legal/judicial) arrangement. If the parent is deceased and there is no legal guardianship arrangement, the child would be considered unaccompanied.

c. Unaccompanied Alien Child

The Homeland Security Act of 2002 defines an unaccompanied alien child (UAC) as a person under 18 years of age, who has no lawful immigration status in the U.S., and who either has no parent or legal guardian in the U.S. or has no parent or legal guardian in the U.S. who is available to provide care and physical custody. Other than defining an unaccompanied alien child as a person who has no lawful immigration status in the U.S., the term “unaccompanied minor” as adopted in the August 2007 Asylum Division memo is the same as the term “unaccompanied alien child.” The definition of a UAC is important, as USCIS has initial jurisdiction over asylum applications filed by UACs, even if the UAC is in removal proceedings.

Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2).

E. Submission of Juvenile Cases to HQASM for Quality Assurance Review

All asylum claims filed by principal applicants under the age of eighteen at the time of filing must be submitted to the Headquarters Asylum Division (HQASM) for quality assurance review before they can be finalized. This requirement applies to minor principal applicants in the purely affirmative asylum context and to UAC minor principal applicants with pending removal proceedings who are before USCIS by virtue of the TVPRA's initial jurisdiction provision.

Joseph E. Langlois, USCIS Asylum Division. *Issuance of Revised Quality Assurance Referral Sheet and Instructions on Submission of Certain Claims for Quality Assurance Review*, Memorandum (Feb. 9, 2007).

F. Determining Capacity to Apply for Asylum

Statutorily, subject to the filing bars, any alien in the U.S., without regard to immigration status, has the right to apply for asylum. Under certain circumstances, however, children may lack the capacity to assert this right to apply for asylum. While there is no age-based restriction to applying for asylum, USCIS need not “process...applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents’ wishes.” In the case involving Elian Gonzalez, the six-year-old Cuban boy who applied for asylum against the wishes of his father in Cuba, INS determined that he did not have the capacity to seek asylum on his own behalf. Important to INS’s decision was the finding that Elian was not at risk of persecution or torture, that Elian’s father had Elian’s best interests in mind, and that the father did not have conflicts of interest that would prevent him from pursuing the child’s best interests. The Eleventh Circuit upheld the INS policy, noting that line-drawing on the basis of age is an adequate approach to determining who may individually file for asylum.

INA § 208(a)(1); 8 C.F.R. § 103.2(a)(2).

Bo Cooper, INS General Counsel *Elian Gonzalez*, Memorandum (Jan. 3, 2000).

Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).

In *Polovchak v. Meese*, a Seventh Circuit case involving a twelve-year-old boy’s grant of asylum counter to his parents’ wishes to return to Russia, the court evaluated the applicant’s capacity to assert his individual rights as part of the court’s procedural due process balancing test: “At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents’ wishes looks very different. The minor’s rights grow more compelling with age, particularly in the factual context of this case.” While the court was not evaluating capacity to apply for asylum, its findings on age and capacity to assert individual rights are nonetheless instructive in the asylum context.

Polovchak v. Meese, 774 F.2d 731, 736-37 (7th Cir. 1985); *see also* 8 CFR § 103.2(a)(2) (providing that a parent or legal guardian may sign an application or petition of a person under the age of fourteen); 8 CFR § 236.3(f) (providing for notice to parent of juvenile’s application for relief).

Federal regulations governing asylum adjudications generally do not permit the disclosure to third parties of information contained in or pertaining to an asylum application without the written consent of the applicant. However, in the case of young children who lack the capacity to make immigration decisions, the Asylum Officer will need to determine who has the legal

8 C.F.R. § 208.6.

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authority to speak for the child. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, notification of the parent or legal guardian will not violate the asylum confidentiality provisions in 8 CFR § 208.6.

When questions of the child's capacity to apply for asylum arise, the Asylum Office should contact HQASM.

See Polovchak, 774 F.2d at 735 (noting “the fundamental importance of the parents’ interest in the residence, nurture and education of a minor child, then twelve or thirteen”).

G. Conflicts between the Child's and Parents' Interests

Where a child applies for asylum without the parents' knowledge and/or consent, many complex issues are raised. When there appears to be a conflict between a child's and the parents' interests concerning the asylum application, the Asylum Office should contact HQASM.

V. INTERVIEW CONSIDERATIONS

Child asylum applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma. The following procedures have been designed with children's behavior and cognitive ability in mind to help asylum officers interact more meaningfully with children during an asylum interview.

Except where otherwise cited, the information in this section derives from the Children's Guidelines.

A. Presence of Trusted Adult at the Interview

It is usually appropriate for a trusted adult to attend an asylum interview with the minor applicant in order to establish the interview conditions most likely to elicit a full story. A child's lack of experience in talking with government officials can make testifying difficult, particularly when discussing traumatic events. A trusted adult is a support person who may help to bridge the gap between the child's culture and the environment of a U.S. asylum interview. The function of the adult is not to interfere with the interview process or to coach the child during the interview, but to serve as a familiar and trusted source of comfort. As appropriate, asylum officers may allow the adult to provide clarification, but asylum officers should ensure that those children able to speak for themselves are given an opportunity to present the claim in their own words.

See UNHCR. Refugee Children: Guidelines on Protection and Care (Geneva: 1994) p. 102; and lesson, *Interviewing Part I: Overview of Nonadversarial Interview*: “Some applicants may request that a relative or friend be present at the interview for ‘moral support.’ There is no prohibition against this and the asylum officer, in his or her discretion, may allow such individual to remain during the interview.”

The policy of allowing a trusted adult to participate in this process does not mean to suggest that the trusted adult serve as a substitute for an attorney or an accredited representative, neither is there a requirement that a trusted adult, attorney, or accredited relative be present at the interview. The child may be accompanied at the interview by both a trusted adult and an

attorney or accredited representative.

When conducting an interview of a child in the presence of another adult, the asylum officer should assess whether the child is comfortable speaking freely in front of the adult. In order to ascertain the child's level of comfort with the adult, asylum officers may initially bring the child into the interview room alone, and ask if the child would like for the accompanying adult to be present. This approach will generally work best with adolescents. Where warranted, asylum officers may additionally ask the child at the end of the interview if he or she has anything to add in private. If at any point during the course of the interview the asylum officer determines that the child is uncomfortable or afraid of the adult, the asylum officer should continue the interview without that person. Given concerns regarding human trafficking, particularly in children, attention to the nature of the relationship between the child and the adult is particularly important.

As appropriate and with the consent of the child, asylum officers are encouraged to interview the trusted adult, if any, in order to confirm his or her relationship to the child, any guardianship arrangement, and the adult's legal authority to speak on behalf of the child. The adult may also have information about parental knowledge of and consent to the asylum application. The trusted adult may also be able to provide information on the child's claim where the child's age at the time of harm or interview prevents him or her from fully detailing events. Where inconsistencies arise between the applicant's and the adult's testimony, an opportunity must be given to the child to reconcile inconsistencies apparent at the interview. Note that it is not a requirement that a witness or trusted adult be present at the interview.

See Joseph E. Langlois, USCIS Asylum Division. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum.

B. Interview Questions Concerning Guardianship and Parental Knowledge and Consent

If a child appears at the asylum interview without a parent or guardian, asylum officers should inquire into the location of the child's parents, and whether the parents are aware of the child's whereabouts and that the child has applied for asylum.

See Joseph E. Langlois, USCIS Asylum Division. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum.

Asylum officers should elicit information about issues of guardianship and parental knowledge of and consent to the application for asylum. The questions of guardianship may be particularly important for unaccompanied minors because whether or not there is a legal guardian informs the asylum officer's decision of whether to categorize the applicant as an

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unaccompanied minor. Additionally, the information elicited by asylum officers is useful to HQASM in informing policy making and in helping HQASM provide guidance on individual cases, as necessary.

Below are questions and issues that asylum officers should take into account when conducting an interview with a minor principal applicant. These questions provide a general framework for exploration of issues of guardianship and parental knowledge and consent. Interview notes should reflect the below-requested information. A minor principal applicant's inability to demonstrate a guardianship arrangement or parental knowledge and consent does not foreclose the adjudication of the application or a grant of asylum; rather, these questions are important to HQASM in reviewing cases, gathering information, and informing our policy on juvenile cases. If there is a concern in regards to parental notification and confidentiality, or a concern for the child's welfare and/or safety, please contact HQASM for further guidance.

1. With whom is the child living in the U.S.?
2. Did anyone accompany the child to the interview?
3. Is there a guardianship arrangement?
4. If there is an adult caregiver but not a legal guardian, what arrangements has the adult made to provide for the child?
5. Is there one or more living parent?
6. Do the parents know that the child is applying for asylum in the U.S.?

C. General Interview Considerations

1. Conducting a non-adversarial interview

Although all interviews with asylum applicants are to be conducted in a non-adversarial manner, it is crucial when interviewing children that the tone of the interview allow the child to testify comfortably and promote a full discussion of the child's past experiences.

8 C.F.R. § 208.9(b).

In many cases, girls and young women may be more comfortable discussing their experiences with female asylum officers, particularly in cases involving rape, sexual

See Phyllis Coven, INS Office of International Affairs. Considerations For Asylum Officers

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abuse, prostitution, and female genital mutilation. To the extent that personnel resources permit, asylum offices should have female asylum officers interview such applicants.

Adjudicating Asylum Claims From Women (Gender Guidelines), Memorandum. May 26, 1995), p. 5.

2. Working with an interpreter

Interpreters play a critical role in ensuring clear communication between the child and asylum officer and the actions of an interpreter can affect the interview as much as those of an asylum officer. As in all interviews, asylum officers should confirm that the child and the interpreter fully understand each other. Asylum officers should also confirm that the child understands the role of the interpreter. This is particularly important in cases where the interpreter does not have the child's best interests at heart, such as when the private interpreter is part of a trafficking ring. In cases where the child appears to be uncomfortable with the interpreter, or where the interpreter does not appear to be interpreting correctly, asylum officers should stop the interview and reschedule with a different interpreter.

See lesson, *Interviewing Part VI: Working with an Interpreter*.

The identity of the interpreter is especially significant when children have been victims of sexual violence. In such situations, children may be very reluctant to share such information if the interpreter is of the opposite gender, especially if he or she is a parent, relative, or family friend. Every effort should be made to make sure that the child applicant is comfortable testifying through the interpreter.

See *Gender Guidelines*, p. 5; and lesson, *Interviewing Part VI: Working with an Interpreter*.

3. Building rapport

The child may be reluctant to talk to strangers due to embarrassment or past emotional trauma. Asylum officers may have to build rapport with the child to elicit the child's claim and to enable the child to recount his or her fears and/or past experiences. Where the child finds the asylum officer friendly and supportive, the child is likely to give fewer false details.

LIRS, p. 45.

Asylum officers must be culturally sensitive to the fact that asylum applicants are testifying in a foreign environment and may have had experiences leading them to distrust persons in authority. A fear of encounters with government officials in countries of origin may carry over to countries of reception. This fear may cause some children to be initially timid or unable to fully tell their story.

UNHCR Handbook, para. 198.

LIRS, p. 38; Nancy W.

Asylum officers may be able to overcome much of a child's timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed, such as general interests, family, pets, hobbies, and sports. Asylum officers may wish to ask family members or the attorney about the child's interests before the interview to ease conversation. This rapport-building phase also permits the asylum officer to assess the child's ability to answer questions.

Perry and Larry L. Teply. "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," *Creighton Law Review* (vol. 18, 1985) pp. 1369-1426, reprinted in Jean Koh Peters. *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (Charlottesville, Virginia: Lexis, 1997), pp. 584-585. (hereafter Perry and Teply).

Once the child appears comfortable, the asylum officer should make a brief opening statement before beginning the formal interview. Asylum officers can explain in very simple terms in the opening statement what will happen during the asylum interview and the roles that the asylum officer, applicant, interpreter, and/or attorney will play. Knowing what to expect will help ease the child applicant's anxiety.

See Annex I of this lesson for an example of an opening statement to be used in interviews of children.

The tone of the opening statement is intended to build trust and to assure the child that the asylum officer will be asking questions to help understand the asylum claim. The statement gives the child permission to tell the asylum officer when the child does not understand a question. Children need to know that it is permissible for them to tell adults when they either do not understand a question or do not know an answer. Children also need to be reassured that embarrassing or traumatic events from the past generally will not be shared, without their prior consent, with others, including family members, friends, or individuals from their home country.

LIRS, pp. 45-46.

4. "Reading" the applicant

During the interview the asylum officer must take the initiative to determine whether the child understands the process and the interview questions. The asylum officer should watch for non-verbal cues, such as puzzled looks, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses. While these behaviors may signal something other than lack of comprehension, they may also signal that a child is confused. In such circumstances, the asylum officer should pause, and if no appropriate response is forthcoming,

See 8 C.F.R. § 208.6 on disclosure to third parties.

LIRS, pp. 46-47.

rephrase the question.

Correspondingly, the asylum officer should expect the child to be attuned to the asylum officer's body language. Children rely on non-verbal cues much more than adults to determine whether they can trust the person. The asylum officer should be careful neither to appear judgmental nor to appear to be talking down to the child.

LIRS, p. 27. Perry and Teply, p. 1380.

5. Explaining how to respond to questions

Children in some cultures are taught to listen to adults but not to speak in their presence. Other children may have spent time in school or other environments where providing answers to questions is expected and responding with "I don't know" is discouraged.

If necessary, an asylum officer may explain to the child how to use the "I don't know" response.

LIRS, p. 50.

Example:

AO: If I ask you the question, 'How many windows are in this building?' and you don't know the answer to that question, you should say, 'I don't know.' Let's practice that. 'How many windows are in this building?'

Child: I don't know.

This approach helps to ensure that the child understands when to provide an "I don't know" response.

6. Reassuring the applicant

If at any time during the course of the interview the child begins to feel uncomfortable or embarrassed, the asylum officer should offer verbal reassurances. The asylum officer may empathize with the child by saying, "I know that it's difficult to talk about this, but it is important for me to hear your story." Additionally, a simple expression of interest (e.g., "I see" or "uh-huh") may be enough for the child to continue.

Perry and Teply, p. 1381, citing John Rich, MD. *Interviewing Children and Adolescents* (London: MacMillan & Co., 1968), p. 37.

The asylum officer may also shift the focus of the questioning to a non-threatening subject until the child regains his or her confidence. Reassurance, empathetic support, carefully framed questions, encouragement, and topic-shifting are crucial techniques for facilitating interviews of children.

7. Taking breaks

Asylum officers should take the initiative in suggesting a brief recess when necessary. Sometimes a child's way of coping with frustration or emotion is "to shut down during the interview, to fall into silence, or respond with a series of 'I don't know' and 'I don't remember' responses." Many children may not take the initiative to request a recess if needed. A young child, for example, may stop answering questions or cry rather than interrupt the asylum officer with a request to go to the bathroom or rest. The responsibility may fall to the asylum officer to monitor the child's needs.

Symposium: Child Abuse, Psychological Research On Children As Witnesses: Practical Implications Forensic Interviews And Courtroom Testimony, 28 PAC. L.J. 3 (1996), p. 70, (hereafter *Symposium*).

8. Concluding the interview

As the interview draws to a close, the asylum officer should return to a discussion of the neutral topics with which the interview began. This approach will help to restore the child's sense of security at the conclusion of the interview. As with all cases, the asylum officer should ask the child if he or she has any final questions, and inform the child of the next steps in the application process.

UNHCR. "Interviewing Children," in *Interviewing Applicants for Refugee Status* (1995), p. 48.

D. Child-Sensitive Questioning and Listening Techniques

Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed. The asylum officer's questions during the interview should be tailored to the child's age, stage of language development, background, and level of sophistication. A child's mental development and maturity are important considerations when determining whether the child has satisfied his or her burden to establish that he or she meets the definition of a refugee. In order to communicate effectively with a child asylum applicant, an asylum officer must ensure that both the officer and the child understand one another.

UNHCR Handbook, para. 214.

The asylum officer should take care to evaluate the child's words from the child's point of view. Most children cannot give adult-like accounts of their experiences and memories, and asylum officers should be conscientious of age-related or culturally-related reasons for a child's choice of words.

Example: The phrase "staying awake late" may indicate after 10 p.m. or later to the asylum officer, while the phrase could mean early evening for a child.

Perry and Teply, p. 1383.

Children’s perceptions of death can cloud their testimony concerning such matters. Children may not know what happened or may feel betrayed by an adult who has died, and some may not understand the permanence of death. Even older children may not fully appreciate the finality of death until months or years after the event.

Example: Instead of saying that a relative died or was killed, a child may state that the individual “went away” or “disappeared,” implying that the individual may return.

Proper questioning and listening techniques will result in a more thorough interview that allows the case assessment to be more complete and accurate. The following techniques should help the asylum officer elicit more thorough information.

1. General rules

Asylum officers should endeavor to:

- a. use short, clear, age-appropriate questions.

Symposium, p. 40.

Example: “What happened?” as opposed to “What event followed the arrest?”

- b. avoid using long or compound questions.

Example: “What time of year did it happen?” and “What time of day did it happen?” as opposed to “What time of year and what time of day did it happen?”

Ann Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* (Washington, DC: ABA Center on Children and the Law, 1994), pp. 95-98 reprinted in Lutheran Immigration and Refugee Service. *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (June 1998), p. 63. (hereafter Walker); and *Symposium*, p. 40.

- c. use one or two syllable words in questions and avoid using three or four syllable words

Example: “Who was the person?” as opposed to “Identify the individual.”

Symposium, p. 40 (note that this technique is generally more important when conducting the interview in English without an interpreter).

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- d. avoid complex verb constructions. *Symposium*, p. 40.
- Example:** “Might it have been the case....?”
- e. ask the child to define or explain a term or phrase in the question posed in order to check the child’s understanding. Walker, reprinted in LIRS, p. 63; *Symposium*, p. 40.
- f. ask the child to define or explain the terms or phrases that he or she uses in answers, then use those terms.
- Example:** If a child says that his father “disappeared,” ask him what he means by “disappeared,” and then use that term in questions involving that event.
- g. use easy words over complex ones. Walker, reprinted in LIRS p. 63.
- Example:** “Show,” “tell me about...,” or “said” instead of “depict,” “describe,” or “indicate.”
- h. tolerate pauses, even if long. Perry and Teply, p. 1380.
- i. ask the child to describe the concrete and observable, not the hypothetical or abstract. *Symposium*, p. 40.
- j. use visualizable, instead of categorical, terms. *Symposium*, p. 40.
- Example:** Use “gun,” not “weapons.”
- k. avoid the use of legalistic terms in questions, such as “persecution.” *Symposium*, p. 40.
- Example:** Ask, “Were you hurt?” instead of “Were you persecuted?”
- Example:** Asylum can be explained as “a way to stay in the U.S. if there are people who hurt or want to hurt [you] back home and [you are] afraid of returning.”
- Christopher Nugent and Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 INTERPRETER RELEASES 1569, 1575 (2001).

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- l. avoid using idioms.

Idioms are phrases that mean something other than what the words actually say. Such phrases could be difficult for both the interpreter and the child applicant to understand.

Example: Ask, “Do you understand?” not “Is this over your head?”

- m. use the active voice, instead of passive, when asking a question. *Symposium, p. 40.*

Example: Ask, “Did the man hit your father?” instead of “Was your father hit by the man?”

- n. avoid front-loading questions. *Symposium, p. 40.*

Front-loading a question places a number of qualifying phrases before asking the crucial part of the question.

Example: “When you were in the house, on Sunday the third, and the man with the gun entered, did the man say...?”

- o. keep each question simple and separate. *LIRS, p. 47.*

Example: The question, “Was your mother killed when you were 12?” should be avoided. The question asks to confirm that the mother was killed and about the child’s age at the same time.

- p. avoid leading questions.

Research reveals that children may be more highly suggestible than adults and are more likely to answer according to what they think the interviewer wants to hear. Leading questions may influence them to respond inaccurately.

LIRS, p. 26, and Perry and Teply, pp. 1393-1396.

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- q. use open-ended questions to encourage narrative responses.

Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background. Try not to interrupt the child in the middle of a narrative response.

LIRS, p. 47.

- r. explain any repetition of questions.

Make clear to the child that he or she should not change or embellish earlier answers. Explain that you are asking repeated questions to make sure you understand the story correctly.

Walker, reprinted in LIRS, p. 64.
Symposium, p. 23.

"Repeated questions are often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired."

Walker, reprinted in LIRS, p. 64.

- s. never coerce a child into answering a question during the interview.

Symposium, p. 41.

Coercion has no place in any asylum interview. For example, an asylum officer should never tell a child that she cannot leave the interview until she answers the asylum officer's questions.

- t. accept that many children will not be immediately forthcoming about events that have caused great pain.

2. Details

Children may not know the specific details or circumstances that led to their departure from their home countries. Children may also have limited knowledge of conditions in the home country, as well as their own vulnerability in that country.

For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults. More probing and creative questions are required.

Canadian Guidelines, p. 8.

Example: The child may not know whether any family members belonged to a political party. The asylum officer should probe further and ask the child whether his or her

parents attended any meetings and when the meetings were held. The asylum officer should also make an inquiry into the location of the meetings, other people who attended the meetings, and whether the people had any problems. The child's knowledge of these matters may support a conclusion regarding the family's political association, despite the fact that the child may not know the details of the association.

3. Measurements of time and distance

Children may try to answer questions regarding measurements of distance or time without the experience to do so with any degree of accuracy. Asylum officers must make an effort to ascertain the child's quantitative reasoning ability.

Example: The asylum officer should determine the child's ability to count before asking how many times something happened.

Symposium, p. 41.

Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates).

Not only is imprecise time and date recollection a common problem for children owing to their cognitive abilities, it can also be a product of their culture. The western mind typically measures time linearly, in terms of successive – and precise – named days, months, and years. Many cultures, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events.

See lesson, *Interviewing Part IV: Inter-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview*.

Example: In response to the question, “When were you hurt?” it may not be uncommon for a child to state, “During harvest season two seasons ago” or “shortly after the hurricane.” These answers may appear vague and may not conform to linear notions of precise time and named dates, but they may be the best and most honest replies the child can offer.

Even in those cultures where time is measured by a calendar, it may not comport to the Gregorian calendar used in the western world.

Example: Many Guatemalan Indians still use the Mayan calendar of 20-day months.

Example: In certain Asian cultures, a baby is considered to be “1” on his or her date of birth thereby causing, to the western mind at least, a 1-year discrepancy between the child’s age and date of birth.

Example: In many Latin cultures, 2 weeks is often “15 days” because the first and last days are counted.

Example: Certain Asian cultures count the first day or year, adding 1 day or year to the time of the event.

4. “I don’t know” responses

In certain cultures, “I don’t know” is used when an individual has no absolute knowledge but has an opinion about the truth of the matter in question.

Example: A child may respond “I don’t know” when asked who killed his or her parents, but upon further inquiry may state that everyone in his or her home village believes that it was government forces. Asylum officers should generally probe further regarding these opinions. The child’s awareness of community opinion may provide information about the issue in question even though the child may initially state “I don’t know.”

E. Credibility Considerations During the Interview

Sensitivity to cultural and personal experiences is required of all asylum officers irrespective of the applicant’s age. This becomes critical when examining testimony presented for credibility. The task of making an appropriate asylum decision when interviewing children, including making a credibility determination, requires that asylum officers be aware of the following issues involving the testimony of children.

See lessons, Interviewing Part IV: Inter-Cultural Communication...; and Credibility.

1. Demeanor

The term “demeanor” refers to how a person handles himself or herself physically – for example, maintaining eye contact, shifts in posture, and hesitations in speech. A child may appear uncooperative for reasons having nothing to do with the reliability of his or her testimony.

Example: Different cultures view expressions of emotion differently. Though an asylum officer raised in the United States might question the credibility of a child who, without crying or expressing emotion, is able to retell how his or her

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parents were killed in front of him, it could be that the child was raised in a culture that deems improper any expression of emotion in front of an authority figure.

2. Trauma

Asylum officers should be careful when interpreting certain emotional reactions or psychiatric symptoms as indicators of credibility. Children who have been subjected to extreme abuse may be psychologically traumatized. Lengthy confinement in refugee camps, repeated relocation, or separation from family can also greatly impact the psychological well-being of children. Children who are separated from their families due to war or other refugee-producing circumstances are placed at even greater psychological risk than those children who remain in the care of parents or relatives.

Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability of an applicant to present testimony. Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation (emotionally separating oneself from an event). A child may appear numb or show emotional passivity when recounting past events of mistreatment. A child may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror by retelling what happened. Inappropriate laughter or long pauses before answering can also be a sign of trauma or embarrassment. These symptoms can be mistaken as indicators of fabrication or insincerity, so it is important for asylum officers to be aware of how trauma can affect an applicant's behavior.

See lesson, Interviewing Part V: Interviewing Survivors: Physical Abuse, Torture, and Trauma-Related Conditions.

3. Age and developmental considerations

In reviewing a child's testimony, the asylum officer should consider the following:

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- a. the child's age and development at the time of the events.
 - b. the child's age and development at the time of the retelling.
 - c. the child's ability to recall facts and communicate them.
4. Other considerations

The asylum officer may encounter gaps or inconsistencies in the child's testimony. The child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances.

See lesson, Credibility; see also Canadian Guidelines, p. 12; Bhabha and Young.

Officers should keep the following in mind:

- a. the impact of the lapse of time between the events and the retelling.

Any individual may have trouble remembering events that took place many years earlier. However, children who may have been very young at the time of an incident will have greater difficulty in recalling such events.

- b. the needs of children with special mental or emotional issues.
- c. the limited knowledge that children may have of the circumstances surrounding events.

Example: A child may not know the political views of his or her family, despite the fact that his parents were among the most visible individuals in the opposition party. When asked follow-up questions, the asylum officer learns that the applicant was seven years old when his parents were assassinated and the relatives who raised him were reluctant to share any information about his parents' activities.

- d. the role of others in preparing children for interview.

Some children may have been coached by a human trafficker or an ill-informed adult to tell a particular story, which the child repeats at the interview in order

not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry, and the asylum officer should undertake a careful and probing examination of the underlying merits of the child's case. Quite often a child does not intend to deceive when making a fabrication or exaggeration; rather the statement may serve another purpose for the child such as to avoid anticipated punishment, to be obedient to the perceived authority figure (perhaps the attorney or the asylum officer), or to please others.

LIRS, p. 51.

Given the above-noted considerations of issues that may arise in children's asylum cases, all efforts should be made during the interview to present the minor applicant with adverse information and to give the applicant an opportunity to provide an explanation. Where adverse information is discovered after the interview, the asylum office should consider scheduling a re-interview in order to give the minor applicant an opportunity to address the issue.

F. Evidence

In evaluating the evidence submitted to support the application of a child seeking asylum, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult. The *UNHCR Handbook* advises that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution. In the concurring opinion to *Matter of S-M-J-*, "the benefit of the doubt" principle in asylum adjudications is described thus:

UNHCR Handbook, para. 219.

...while the burden of proof is borne by the asylum applicant, our law does not include a presumption that an applicant is unbelievable. If as adjudicators we intentionally or subjectively approach an asylum applicant and presume an individual to be a liar rather than a truth teller, we violate not only our duty to be impartial, but we abrogate the statute and regulations which govern our adjudications.

Matter of S-M-J-, 21 I&N Dec. 722, at 739 (BIA 1997) (Rosenberg, L., concurring).

A child, like an adult, may rely solely on testimony to meet his or her burden of proof when that "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." Certain elements of a child's claim, however, such as easily verifiable facts that are central to

INA § 208(b)(1)(B)(ii).

INA § 208(b)(1)(B)(ii); see *Matter of S-M-J-*, 21 I&N

the child's claim, may require corroborating evidence. A child, through his or her advocate or support person, is expected to either produce such documentation or offer a reasonable explanation as to why those documents cannot be obtained. What is reasonable will depend on the child's individual circumstances, including whether or not the child is represented. Additionally, a child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members.

Dec. at 725.

Given the difficulties associated with evaluating a child's claim, asylum officers should carefully review relevant country conditions information. While the onus is on the child, through his or her advocate or support person, to produce relevant supporting material, asylum officers should also supplement the record as necessary to ensure a full analysis of the claim.

See lesson, *Country Conditions Research and the Resource Information Center (RIC)*; *Matter of S-M-J-*, 21 I&N Dec. at 726.

Apart from the child's verbal testimony, the asylum officer may consider other evidence where available, including:

1. Testimony or affidavits from family members or members of the child's community.
2. Evidence from medical personnel, teachers, social workers, community workers, child psychologists, and others who have dealt with the child.

Example: A report from a child psychologist who has interviewed the child may indicate that the child suffers from post-traumatic stress, a conclusion that could support the asylum officer's determination regarding past or future persecution.

3. Documentary evidence of persons similarly situated to the child (or his or her group), physical evidence, and general country conditions information.

VI. LEGAL ANALYSIS OF CLAIMS

A. Introduction

This section will focus on the particular legal issues an asylum officer may encounter when adjudicating the claim of a child who has filed his or her own asylum application. This section does not create new law or alter existing law, nor does it attempt to address all the legal issues that may arise in adjudicating a child's asylum claim. Instead, it identifies particular issues relevant to children that an asylum officer may encounter and places those issues

Except where otherwise cited, the information in this section derives from section III., Legal Analysis of Claims, in the Children's Guidelines.

within the context of United States law and UNHCR guidance.

Unlike the child who is a derivative applicant under the parent's application, the child who has filed a separate asylum application must recount his or her own story, frequently without the support of familiar adults. The child may not even fully understand why or how the events leading to his or her arrival in the United States came about.

In order to be granted asylum in the U.S., the child applicant must establish that he or she meets the definition of a refugee contained in the Immigration and Nationality Act, irrespective of age. The *UNHCR Handbook* equally states, “[t]he same definition of a refugee applies to all individuals, regardless of their age.”

INA §§ 101(a)(42)(A); 208(a)(2); *UNHCR Handbook*, para. 213.

Consequently, the best interests principle, while useful for procedural and interview considerations, does not replace or change the refugee definition in determining substantive eligibility.

While the burden of proof remains on the child to establish his or her claim for asylum, the asylum officer must consider the effects of the applicant's age, maturity, ability to recall events, potentially limited knowledge of events giving rise to the claim, and potentially limited knowledge of the asylum process when assessing the minor applicant's eligibility. The asylum officer should also attempt to gather as much objective evidence as possible to evaluate the child's claim, to compensate for cases where the applicant's subjective fear or accounting of past events is limited. Given the non-adversarial nature of the affirmative asylum adjudication and the special considerations associated with adjudicating a child's claim, a close working relationship with the child's representative and support person may be necessary to ensure that the child's claim is fully explored.

See section V.F., Evidence, for more on the child's burden of proof; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Geneva: February 1997), p. 10.

B. Persecution (Determining Whether the Harm Rises to the Level of “Persecution”)

As in all asylum cases, the asylum officer must assess whether the harm that the child fears or has suffered is serious enough to constitute “persecution” as that term is understood under the relevant domestic and international law.

See lesson, *Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution.*

1. Harm that rises to the level of persecution

Given the “variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to

UNHCR Handbook, para. 52; see also Bhabha and Young, pp. 761-62.

vary.” The harm a child fears or has suffered may still qualify as persecution despite appearing to be relatively less than that necessary for an adult to establish persecution. This is because children, dependent on others for their care, are prone to be more severely and potentially permanently affected by trauma than adults, particularly when their caretaker is harmed.

Several circuit courts have recognized that events that occur when the applicant is a child, particularly when the events cause serious harm to the child’s family, can constitute persecution.

In *Jorge-Tzoc v. Gonzales*, the Court of Appeals for the Second Circuit noted, “Jorge-Tzoc was a child at the time of the massacres and thus necessarily dependent on both his family and his community...This combination of circumstances [displacement - initially internal, resulting economic hardship, and viewing the bullet-ridden body of his cousin] could well constitute persecution to a small child totally dependent on his family and community.”

Jorge-Tzoc’s family and other families were targeted by the Guatemalan army’s campaign against Mayan Indians. When he was seven years old, Jorge-Tzoc’s sister, her husband, and her mother-in-law were fatally shot by Guatemalan soldiers. While Jorge-Tzoc did not witness any murders, he saw many corpses, including the bullet-ridden body of his cousin lying on the ground. The army’s campaign resulted in his father selling their land and the family’s relocation to a one-room home in Quiche where they struggled to survive. When the family returned to the village after a year away, they found that the house was full of bullet holes and the family’s animals were unrecoverable.

The Seventh Circuit held in *Kholyavskiy v. Mukasey* that the adjudicator should have considered the “cumulative significance” of events to the applicant that occurred when he was between the ages of eight and thirteen. The applicant was subjected to regular “discrimination and harassment [that] pervaded his neighborhood” and his school. The harm included being regularly mocked and urinated on by other school children for being Jewish, being forced by his teachers to stand up and identify himself as a Jew on a quarterly basis, and being called slurs and being physically abused in his neighborhood.

See Marina Ajdukovic and Dean Ajdukovic, *Psychological Well-Being of Refugee Children*, 7 CHILD ABUSE AND NEGLECT 843 (1993); Betty Pfefferbaum, *Posttraumatic Stress Disorder in Children: A Review of the Past 10 Years*, J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 36:11, at 1504-05.

Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006).

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

Additionally, the Ninth Circuit held in *Hernandez-Ortiz v. Gonzales*, “[A] child’s reaction to injuries to his family is different from an adult’s. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting...[I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child.”

Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007).

Hernandez-Ortiz involved two Mayan Indian brothers from Guatemala who fled to Mexico in 1982 at the ages of seven and nine due to the Guatemalan army’s arrival in their village, the beating of their father by soldiers in front of their mother, and the flight of their brother who was later killed by the army on suspicion of being a guerilla sympathizer.

In a concurring opinion to *Kahssai v. INS*, Judge Reinhardt of the Ninth Circuit noted that the effects of losing one’s family as a child can constitute serious harm. “The fact that she did not suffer physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution. For example, when a young girl loses her father, mother and brother—sees her family effectively destroyed—she plainly suffers severe emotional and developmental injury.”

Kahssai v. INS, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring opinion).

While age should be taken into account in making the persecution determination, not all harm to a child, including physical mistreatment and detention, constitutes persecution. In *Mei Dan Liu v. Ashcroft*, the Seventh Circuit upheld a finding by the BIA that harm Liu experienced at the age of sixteen did not constitute persecution. Liu, a Chinese national, had been forcibly taken to the Village Committee Office and interrogated by police and pressured to confess involvement in Falun Gong. On two occasions, police and guards pulled her hair, causing her to cry, and pushed her to the ground. She was detained for two days. The police reported Liu’s arrest to her school and she was expelled. One month later, the police searched Liu’s home and questioned her and her mother, pushing her mother to the floor.

Mei Dan Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004); *Santosa v. Mukasey*, 528 F.3d 88, 92 (1st Cir. 2008) (upholding the BIA’s conclusion that Santosa did not establish past persecution in part because he suffered only “isolated bullying” as a child); cf. *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (suggesting that the hardships suffered by fourteen year old applicant, including economic deprivation resulting from fines against her parents, lack of educational

In holding that the evidence did not compel a finding that Liu suffered harm rising to the level of persecution, the court stated, “age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a

well-founded fear of future persecution... There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult. But this is not such a case. Though a minor, Mei Dan was near the age of majority – she was sixteen – at the time the events took place. Whatever slight calibration this may warrant in our analysis is insufficient to transform her experiences with the Chinese authorities from harassment to persecution.”

opportunities, and trauma from witnessing her father’s forcible removal from the home, could be sufficient to constitute past persecution).

2. Types of harm that may befall children

The types of harm that may befall children are varied. In addition to the many forms of persecution adults may suffer, children may be particularly vulnerable to sexual assault, forced marriage, forced prostitution, forced labor, severe parental abuse, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as female genital mutilation (FGM), may constitute persecution. When considering whether a cultural practice will amount to persecution, not only must the adjudicator consider whether the harm is sufficiently serious to rise to the level of persecution, but also whether the applicant subjectively experienced or would experience the procedure as serious harm. For example, if an individual applicant welcomed, or would welcome, FGM as an accepted cultural right, then it is not persecution to that applicant. Existing case law does not definitively address how to determine whether FGM imposed in the past on a young child, who did not have the capacity to welcome or reject the practice, constitutes past persecution. However, since FGM is clearly serious harm objectively, the asylum officer should consider FGM under such circumstances as persecution unless the evidence establishes that the child did not experience it as serious harm. An adult applicant’s testimony about her own subjective experience as a young child should be given significant weight. If, for example, an adult applicant testifies that she underwent FGM as a child but does not consider it to have been serious harm, then it generally would not be considered persecution. Alternatively, an adult applicant’s testimony that she considers the FGM she underwent as a child to be serious harm generally would suffice to establish her subjective experience of persecution.

Bhabha and Young, pp. 760-61.

Fundamental rights of children listed in the CRC that may rise to the level of persecution if violated include the rights to

Convention on the Rights of the Child.

be registered with authorities upon birth and acquire a nationality (Art. 7.1), to remain with one's family (Art. 9.1), to receive an education (Art. 28), and to be protected from economic exploitation (Art. 32). The impact of these harms on the child must be explored in order to determine whether the violations, considered individually or cumulatively, amount to persecution.

3. Identification of the Persecutor – private versus public actors

The claims of child asylum seekers may often involve forms of harm that have not traditionally been associated with government actors. Harms such as child abuse, forced labor, or criminal exploitation of children are often inflicted by non-state actors. Where a nexus to a protected ground can be established, the applicant must demonstrate both that the private persecutor has the requisite motivation to persecute and that the government is unable or unwilling to protect the child from the alleged persecutor.

The fact that a child did not seek protection in his or her country of origin does not necessarily undermine his or her case. The asylum officer must explore what, if any, means the child had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that the asylum officer will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to the child's ability to affirmatively seek protection and government efforts to address criminal activities relating to children.

See Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); *see also* lesson, *Eligibility I: Definition of Past Persecution...*, Section VI.A., *Identifying a Persecutor*.

C. Well-founded Fear of Future Persecution

1. General Considerations

Child-specific issues also arise in determining whether a child has a well-founded fear of persecution. A well-founded fear of persecution involves both subjective and objective elements, meaning that an applicant must have a genuine fear of persecution and that fear must be objectively reasonable. For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. The *UNHCR Handbook* suggests that children under the age of sixteen may lack the maturity to form a well-founded fear of persecution, thus

See lesson, *Eligibility Part II: Well-Founded Fear*.

Matter of Acosta, 19 I&N Dec. 211, 224 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987); *see also* lesson, *Eligibility II: Well-Founded Fear of Persecution*.

UNHCR Handbook, para. 215.

requiring the adjudicator to give more weight to objective factors. “Minors under 16 years of age...may have fear and a will of their own, but these may not have the same significance as in the case of an adult.” All asylum officers must evaluate the ability of a child to provide information “in the light of his [or her] personal, family and cultural background.”

UNHCR Handbook, para. 216.

The Sixth Circuit, in *Abay v. Ashcroft*, acknowledged the Children’s Guidelines’ reference to the *UNHCR Handbook* on the subject of a child’s subjective fear. In *Abay*, the Sixth Circuit court overturned an Immigration Judge’s finding that the nine-year-old applicant expressed only a “general ambiguous fear,” noting that young children may be incapable of articulating fear to the same degree as adults.

Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004).

On the other hand, a child may express a subjective fear without an objective basis. In *Cruz-Diaz v. INS*, the Fourth Circuit noted that the seventeen-year-old petitioner who had entered the U.S. two years prior had a subjective fear of persecution but had not established an objectively reasonable fear with a nexus to one of the protected grounds.

Cruz-Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam).

2. Personal circumstances

Asylum officers should examine the circumstances of the parents and other family members, including their situation in the child’s country of origin.

UNHCR Handbook, para. 218.

a. family as similarly situated

Asylum officers may be able look to the child’s family as individuals similarly situated to the applicant. A well-founded fear of persecution may be supported by mistreatment of a child’s family in the home country. The First Circuit Court of Appeals concluded that evidence of mistreatment of one’s family is probative of a threat to the applicant. Conversely, if the child’s family does not relocate and is not harmed, the likelihood of an objectively reasonable fear may be reduced. The failure to relocate may nonetheless be overcome when it is due to a parent’s conflict of interest rather than a decreased threat to the child. Where there appears to be a conflict of interest between the child and the parents, the asylum officer “will have to come to a decision as to the well-foundedness of the minor’s fear

Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985); see also *UNHCR Handbook*, para. 43; *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998).

Bhabha and Young, at 764.

UNHCR Handbook, para. 219.

on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.”

b. the family’s intentions

If the child was sent abroad by his or her parents or family members, the circumstances of that departure are relevant to the child’s asylum application. “If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution...,” that may suggest that the child has such a fear as well. On the other hand, a family’s actions toward a child – abandonment, neglect, or selling a child into slavery – may support a child’s fear of persecution at the hands of relatives.

UNHCR Handbook, para 218.

c. the child’s arrival

The circumstances of a child’s arrival in the United States may provide clues as to whether the child has a well-founded fear of persecution. If the child arrives in the company of other asylum seekers who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child’s fear is well-founded.

See 8 C.F.R. § 208.13(b)(2); *UNHCR Handbook*, para. 217.

3. Internal Relocation

It is generally not reasonable to expect a child to internally relocate by himself or herself; however, asylum officers should examine whether circumstances show that internal relocation would be reasonable.

Cf. Lepe-Guitron v. INS, 16 F.3d 1021, 1025 (9th Cir. 1994) (finding that petitioner’s 7-year period of lawful unrelinquished domicile, for purposes of a discretionary waiver of deportation, began on the date his parents attained permanent resident status, as he was a child at the time).

D. Nexus to a Protected Characteristic

Regardless of the nature or degree of harm the child fears or has suffered, that harm must be tied to one of the protected grounds contained in the definition of a refugee. Children, like adults, may raise one or more protected grounds as the basis for an asylum claim. The asylum officer must explore all possible grounds for asylum and should take into account the age and relative maturity of the child in assessing the child’s ability to articulate his or her claims.

The Children's Guidelines look briefly at the protected grounds in general and then turn to an analysis of membership in a particular social group, because claims based on this ground are frequently novel and analytically complicated.

1. Burden of proof

The burden falls to the child to establish that he or she belongs, or is perceived to belong, to the protected group on account of which he or she has suffered or fears suffering persecution. Because children may lack, or have limited access to, the necessary documents to establish their identity with respect to one of the protected grounds, the asylum officer may have to rely solely on testimony of the child to establish these elements.

Although the Board has issued several opinions that emphasize an applicant's burden to produce all accessible documents, testimony alone can be sufficient to establish a claim where the applicant credibly testifies that he or she is unable to procure documents. This distinction may be particularly important in analyzing a child's claim, particularly if the child has no legal representation.

See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989). INA § 208(b)(1)(B)(ii); 8 C.F.R. § 208.13(a); *see also* section VI.F. Evidence, below and lesson *Eligibility IV: Burden of Proof and Evidence*.

2. Inability to articulate a nexus to a protected characteristic

Analyzing whether the applicant has established a nexus to a protected characteristic in an asylum claim made by a child may be particularly difficult because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist.

Because more than one factor may motivate a persecutor to inflict harm, an applicant is not required to establish that the persecutor is motivated solely by a desire to overcome the protected characteristic. When the child is unable to identify all relevant motives, a nexus can still be found if the objective circumstances support the child's claim that at least one central reason for the past or future persecution is a protected ground.

Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

3. No requirement for punitive intent

The inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it

as such, sometimes to such a degree of severity that it may constitute persecution. The Board of Immigration Appeals has held that a punitive or malignant intent is not required for harm to constitute persecution on the basis of a protected ground. A persecutor may believe that he or she is helping the applicant by attempting to overcome the protected characteristic.

Matter of Kasinga, 21 I&N 357 (1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

Consequently, it is possible that a child's claimed harm may arise from a culturally accepted practice within his or her community. In such cases, an adjudicator must look carefully at both the degree of harm and whether any of the reasons for inflicting the harm involve a protected ground.

4. Inability to articulate a political opinion

When a child claims persecution or a well-founded fear of persecution on the basis of political opinion, the age and maturity of the child must be taken into account. A young child may have difficulty articulating a political opinion. Because the level of children's political activity varies widely among countries, however, asylum officers should not assume that age alone prevents a child from holding political opinions for which he or she may have been or will be persecuted.

In *Civil v. INS*, the First Circuit affirmed the Board's holding that the young applicant failed to establish a well-founded fear of persecution based on either political opinion or membership in a social group consisting of "Haitian youth who possess pro-Aristide political views." Although the court found sufficient grounds to affirm the underlying decision, it criticized the Immigration Judge's conclusion that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children," noting that the evidence submitted by the petitioner cast serious doubts on the presumption that youth "are unlikely targets of political violence in Haiti."

Civil v. INS, 140 F.3d 52 (1st Cir. 1998).

Similarly, in *Salaam v. INS*, the Ninth Circuit overturned a BIA ruling of adverse credibility where the BIA held it was implausible that the petitioner had been vice president of a branch of an opposition movement at the age of eighteen.

Salaam v. INS, 229 F.3d 1234 (9th Cir. 2000) (per curiam).

It may also be possible for a child's claim to be based on imputed political opinion. The adjudicator should carefully review the family history of the child and should explore as much as possible the child's understanding of his or her family's activities to determine whether the child may face

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996); see *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (evidence that every family

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persecution based on the imputed political beliefs of family members or some other group with which the child is identified.

in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her).

5. Membership in a particular social group

In order to establish eligibility for asylum based on membership in a particular social group, an applicant must establish that the group constitutes a particular social group within the meaning of the refugee definition; that the applicant is a member or is perceived to be a member of that group; and that the persecutor was or will be motivated to target the applicant on account of that membership or perceived membership in the particular social group. There is a two-prong test for evaluating whether a group constitutes a particular social group. First, the group must comprise individuals who share a common, immutable characteristic – such as sex, color, kinship ties, or past experience – that members cannot change or a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it. Second, the group must be recognizable and distinct in the society.

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006); *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

Note: Because caselaw on particular social group continues to evolve, it will not be discussed in this lesson. See lesson, *Nexus*, section VI, *Membership in a Particular Social Group*, including the subsection on *age as a characteristic*.

Issues of social group that are likely to arise in a child's asylum claim include social groups defined by family membership, social groups defined in whole or in part by age, and social groups defined in whole or in part by gender. The question of whether the group with which the child applicant identifies himself or herself can be considered a particular social group for the purpose of asylum eligibility will be analyzed in the same manner as with adults.

E. Child-Specific Considerations Concerning Bars to Applying for or Eligibility for Asylum

1. One-Year Filing Deadline

The TVPRA amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children. As of the TVPRA's effective date of March 23, 2009, when an asylum officer determines that a minor

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). For more details, see lesson, *One-*

principal applicant is unaccompanied, the asylum officer should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply. The one-year filing deadline continues to be applicable for *accompanied* minor principal applicants (those with a parent or legal guardian) and for adult principal applicants. Additionally, as the unaccompanied alien child definition includes the element that the child not have lawful immigration status, the one-year filing deadline must still be analyzed for in-status unaccompanied minors.

Year Filing Deadline.

See section IV.D.2., Definition of Minor Principal, Unaccompanied Minor, and Unaccompanied Alien Child, above.

Accompanied minors and in-status unaccompanied minors may qualify for the extraordinary circumstances exception to the one-year filing deadline based on legal disability. While unaccompanied minors are specifically listed in the regulations as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance for the purposes of the one-year filing deadline, the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations. The same logic underlying the legal disability ground listed in the regulations also is relevant to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

8 C.F.R. § 208.4(a)(5).

As long as an accompanied minor applicant applies for asylum while still a minor (while the legal disability is in effect), the applicant should be found to have filed within a reasonable period of time.

In *Matter of Y-C-*, petitioner, an unaccompanied fifteen year old, attempted to file an asylum application with an Immigration Judge five months after being released from over a year in immigration custody. The Immigration Judge refused to accept the application, but the petitioner successfully filed a second application within one year of being released from custody. The BIA found that the petitioner had established extraordinary circumstances because “he did not, through his own action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline.” Note that this case was decided before the TVPRA’s amendment to the INA to exclude unaccompanied minors from the one-year filing deadline took effect.

Matter of Y-C-, 23 I&N Dec. 286, 288 (BIA 2002).

2. Safe Third Country

As of March 23, 2009, the provision in the INA that allows an individual to be barred from applying for asylum based on a safe third country agreement cannot be applied to an unaccompanied alien child. The Safe Third Country Agreement between the U.S. and Canada, currently the only safe third country agreement between the U.S. and another country, already has an exception for unaccompanied minors. Even if future safe third country agreements are created, INA § 208(a)(2)(E), as created by the TVPRA, does not permit a safe third country agreement to apply to unaccompanied alien children.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). See also INA § 208(a)(2)(A); lesson, *Safe Third Country Threshold Screening*.

3. Firm Resettlement

In interpreting whether a child is firmly resettled under 8 CFR § 208.15, asylum officers should consider that a child's status in a third country will generally be the same as his or her parent's. The BIA has long held that a parent's status is imputed to his or her children. The Ninth Circuit looks to "whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute[s] the parents' status to the minor."

cited in Bringas-Rodriguez v. Sessions, No. 13-72686, archived on March 2, 2017

8 CFR § 208.15; *Matter of Ng*, 12 I&N Dec 411 (BIA 1967) (holding that a minor was firmly resettled in Hong Kong because he was part of a family that resettled in Hong Kong); *Matter of Hung*, 12 I&N Dec. 178 (BIA 1967) (holding that because parents were not firmly resettled in Hong Kong, the minor child also was not firmly resettled there); *Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (holding that the parents' status is attributed to the minor when determining whether the minor has firmly resettled in another country).

4. Serious Nonpolitical Crime

The Child Soldiers Accountability Act of 2008 (CSAA), which was signed into law and became effective on October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA. These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See also Lori Scialabba and Donald Neufeld, USCIS. *Initial Information Concerning the Child Soldiers Accountability Act, Public Law No. 110-340*, Memorandum to

inadmissible and is removable.

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability “shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime,” and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii). The regulations are pending publication. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. Note that the statute does not exempt children from the applicability of this ground.

Field Leadership
(Washington, DC: 31
December 2008).
CSAA, sec. 2(b)-(c).

CSAA, sec. 2(d)(1). *See also* lesson, *Mandatory Bars to Asylum and Discretion*.

VII. DERIVATIVE ASYLUM STATUS FOR CHILDREN

A. Derivative Status versus Independent Status

Under DHS regulations, the child of an asylee is usually afforded the same status as his or her parent as a child accompanying or following to join the principal applicant.

While derivative status is statutorily available to children and spouses, there is no statutory or regulatory right of parents to be eligible for derivative status in the asylum context. The asylum applicant must establish eligibility in his or her own right.

8 C.F.R. § 208.21(a). *See also* *Lepe-Guitron v. INS*, 16 F.3d 1021, 1025 (9th Cir. 1994); *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1998).

Matter of A-K-, 24 I&N Dec. 275 (BIA 2007).

B. Children Who Turn 21 Years of Age Before the Asylum Interview

Under the INA, as amended by the Child Status Protection Act of 2002 (CSPA), on or after August 6, 2002, an unmarried child of a principal applicant granted asylum may receive a derivative grant of asylum so long as the child was under twenty-one years of age at the time of *filing* the asylum application. Therefore, children who turn twenty-one years of age *after* the date of filing, but before the adjudication are still considered eligible for derivative asylum status.

Note that there is no requirement that the child have been included as a dependent on the principal applicant’s asylum application at the time of filing, only that the child be included prior to the adjudication.

INA § 208(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208. *See also* Joseph E. Langlois, Director, Asylum Division, Office of International Affairs. *H.R. 1209 – Child Status Protection Act*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 7 August 2002), 2 pp., plus attachment.

If, however, an individual turned twenty-one prior to August 6,

William Yates, USCIS

2002, he or she is not eligible for continued classification as a child unless the asylum application was pending on August 6, 2002.

Associate Director for Operations. *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum to Regional Directors, et al. (Washington, DC: 17 August 2004), pp.1-2; Michael Petrucelli, BCIS Deputy Director and Chief of Staff. *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum to Overseas District Directors (Washington, DC: 23 July 2003).

C. Children Who Turn 21 Years of Age Before Adjustment

The CSPA also amends INA section 209(b)(3) to allow dependents who are the subjects of pending adjustment petitions who turn twenty-one on or after August 6, 2002, to continue to be classified as children for adjustment purposes (in order not to need to file an independent petition).

INA § 209(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208.

As noted above, if an individual turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless an application was pending with then-INS on August 6, 2002. While the Domestic Operations Directorate of USCIS recently issued revised guidance on the CSPA for family and employment-based petitions, which eliminated the requirement for a pending application on the CSPA effective date, this guidance memo does not apply to applications for children of asylees and refugees. As a result, a dependent who turned twenty-one years of age and whose principal's adjustment petition was adjudicated prior to the enactment of the CSPA lost his or her ability to adjust as a dependent of the principal applicant. While he or she did not lose the asylum status already granted, the former derivative does not gain the ability to adjust to legal permanent resident status as a principal applicant. In such situations, a *nunc pro tunc* (retroactive approval) procedure is permitted, although the need for such an adjudication will become increasingly rare as more time passes.

See William Yates, USCIS Operations. *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum; Michael Petrucelli, BCIS. *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum. See Donald Neufeld, Acting Associate Director, USCIS Domestic Operations. *Revised Guidance for the Child Status Protection Act (CSPA) AFM Update: Chapter 21.2(e)*, Memorandum (Apr. 2008). See USCIS Asylum Division, Affirmative Asylum Procedures Manual; "INS Discusses Adjustment of Status Issues For Children of Asylees," 69 *Interpreter Releases* 847

(1992).

VIII. OTHER IMMIGRATION STATUSES AVAILABLE TO CHILDREN

A. Special Immigrant Juvenile Status

Special Immigrant Juvenile (SIJ) status provides legal permanent residency under certain conditions to unmarried alien children present in the U.S. who are under 21 years of age. First, a juvenile must be declared dependent on a state juvenile court or legally committed to, or placed under the custody of, an agency or department of a state, and the juvenile court must find the child's reunification with one or both of his or her parents not viable "due to abuse, neglect, or abandonment" and must determine that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." Second, the Department of Homeland Security must consent to the grant of SIJ status. In cases where the child is in the custody of Health and Human Services (HHS), the Secretary of HHS must specifically consent to juvenile court jurisdiction to determine the custody status or placement of an alien. Because SIJ status is designed to protect children abandoned, neglected, or abused by their parents or guardians, the child may never sponsor his or her natural or adoptive parents for any family immigration status.

INA § 101(a)(27)(J).

B. Victims of Trafficking or Criminal Activity

The T visa is available to aliens present in the U.S. who have been the victims of a severe form of trafficking in persons, who are physically present in the U.S. on account of such trafficking, and who "would suffer extreme hardship involving unusual and severe harm upon removal." Aliens must comply with governmental requests for assistance in investigation or prosecuting the acts of trafficking, though persons under the age of 18 are exempt from this obligation. After three years of continuous presence from the date of admission as a nonimmigrant, the T visa holder may adjust status.

INA § 101(a)(15)(T)(i).

The U visa is available to aliens who have "suffered substantial physical or mental abuse as a result of having been a victim" of qualifying criminal activity, which violated U.S. law or occurred in the U.S. The person must possess information related to the criminal activity and aid or be likely to aid in the investigation or prosecution of the criminal activity. Where the person is under 16 years of age, a parent, guardian, or next friend may possess information and aid in the investigation or prosecution, in the

INA § 101(a)(15)(U)(i).
See USCIS Adjudicator's Field Manual, chapter 39, for further details.

place of the child under 16. A U visa holder may adjust status after three years of continuous presence from the date of admission as a nonimmigrant.

IX. SUMMARY

A. International Guidance

Considering that the issue of children asylum-seekers is relatively new in U.S. immigration law, asylum officers may have to look to international law for guidance when binding U.S. caselaw does not speak to the relevant issue. International instruments such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and several UNHCR Executive Committee Conclusions and UNHCR published policies provide insight regarding how to handle asylum claims presented by children. Most importantly, these documents highlight the need for particular attention to issues involving refugee minors.

B. Child Development

Asylum officers interviewing children must recognize that a child's stage of development can affect the asylum interview – both in tone and content. Children who are in a younger stage of development may not be able to recall facts or analyze issues as well as more mature children or adults. Furthermore, children's perceptions of the world will not conform to those of most adults and could create an obstacle to a smooth interview.

C. Procedural Considerations

In order to address the unique situation of child asylum-seekers, asylum officers must make adjustments to their interviews and interview style to facilitate the process. Procedural adjustments made at the asylum office include allowing the child to be interviewed by an officer with relevant experience and scheduling the interviews of family members – especially siblings – as close in time as possible.

Other procedural considerations necessary in children's cases include determining whether or not the minor applicant is unaccompanied and answering the unaccompanied minor field in RAPS, sending all juvenile cases to HQASM for quality assurance review, determining a minor's capacity to apply for asylum, and evaluating any conflicts between a minor's and parents' interests in the asylum application.

D. Interviewing Considerations

In order to create a child-friendly atmosphere, asylum officers must attempt to build a rapport with the child, “read” the child applicant for any sign of anxiety, and guide the child through the interview process. Questions should be posed with the child’s mental development and maturity in mind. Whenever possible, officers must accommodate child applicants who would like a trusted adult to be present during the interview. Asylum officers should ask questions concerning the child’s guardianship and parental consent to and knowledge of the asylum application. While these questions usually do not affect substantive eligibility, they are nonetheless important for evaluating the child’s care and custody situation.

Because children are less likely than adults to be able to articulate their claim and obtain supporting documents, asylum officers may be required to consider more sources of information to evaluate the objective merit of the claim. This includes taking testimony from other individuals, looking to documentary evidence of individuals similarly situated to the applicant, and taking into account the amount of information that a child of that age can be expected to know and recall.

Children, as adults, are not required to provide corroborating evidence and may rely solely on their testimony when the testimony is credible. However, children cannot be expected to present testimony with the same degree of consistency or coherency as adults, and asylum officers must consider children’s development levels and emotional states when evaluating their testimony. The lack of supporting documents and inability of a child to articulate clearly a claim to asylum demand that asylum officers thoroughly research conditions in the countries of origin and first asylum when evaluating a child’s case.

E. Legal Analysis

The definition of a refugee contained in the INA applies to all individuals regardless of their age. Although children do not enjoy a lessened standard for asylum eligibility, there are considerations that must be made when analyzing children’s claims. First, the harm that a child suffered or fears may rise to the level of persecution even when the same harm claimed by an adult would not be considered persecution. Second, though the child may be able to express a subjective fear of persecution, he or she might not be able to articulate the objective reasons for that fear. Third, an examination into the circumstances in which a child finds himself or herself – how he or she came to the U.S.,

Participant Workbook

the location of his or her relatives, or the harm that has befallen his or her parents, for example – may reveal facts that support the child’s asylum claim.

A child’s inability to understand all of the circumstances surrounding his or her flight creates difficulty in analyzing the nexus of the harm or fear of harm to a protected ground. Officers must pay close attention to the objective facts surrounding the child’s claim to determine if there is a nexus regardless of the child’s ability to articulate one. Many claims raised by children will be on account of membership in a particular social group. The body of caselaw that discusses the issue of particular social group applies to children just as it does to adults.

Other legal issues that may involve child-specific considerations include the application of some of the bars to asylum. As of March 23, 2009, the one-year filing deadline does not apply to unaccompanied alien children. Minors accompanied by a parent or legal guardian must still comply with the one-year filing deadline, though they may qualify for an extraordinary circumstance exception based on legal disability. Similarly, as of March 23, 2009, any safe third country agreement cannot apply to unaccompanied alien children. In regards to firm resettlement, a parent’s status is generally imputed to the parent. Finally, in regards to the serious nonpolitical crime bar, the Child Soldiers Accountability Act of 2008 set forth that any alien who engaged in the recruitment or use of child soldiers is considered barred for having committed a serious nonpolitical crime.

ANNEX I**SAMPLE OPENING STATEMENT FOR CHILDREN¹**

I am glad that you are here today, and that your friend Mr. (Ms.) [name of support person, if any] is here with you. Do you know what we are going to do today? We are going to talk about why you left [name of country of origin], and why you may not want to go back there. As we talk, you and I both have jobs to do. My job is to understand what happened to you. But I need your help. Your job is to help me to understand by telling me as much as you can remember – even the little things.

I will be asking you some questions today. Some questions will be easy for you to answer. But you may not understand other questions. It is OK if you do not understand a question. Just tell me that you do not understand and I will ask the question differently. But please do not guess at an answer or make an answer up.

If you do not know the answer to the question, that is OK too. Just tell me that you don't know the answer. No one can remember everything. There are no "right" or "wrong" answers to any of my questions.

As we talk today, I will write down what we say because what you tell me is important. Do not get nervous about my taking notes. Later, if I forget what we said, I can look it up.

I understand that you may be nervous or scared to tell me about what happened to you. I will not tell anyone in [name of country of origin] about what you tell me today. Also, none of your friends or family here in the United States will know anything about what you tell me, unless you write a special letter that allows me to share information with them.

Before we start, do you have any questions that you would like to ask me? Or is there anything that you want to tell me? If you think of something while we are talking, let me know. If you have to go to the bathroom or want to stop for a while, also let me know.

¹ The sample Opening Statement is intended for young children, and may be modified for older children, depending on their developmental stage and level of sophistication.



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

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

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

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cited in Bringas-Rodriguez v. Sessions, No. 13-72686 archived on March 2, 2017

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit.*, page 10.

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

⁸ CRC, *General Comment No. 5 (2003): General Measures of Implementation for the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)*, CRC/GC/2003/5, 3 Oct. 2003 (hereafter "CRC, *General Comment No. 5*"), <http://www.unhcr.org/refworld/docid/4538834f11.html>, para. 12.

⁹ CRC, *General Comment No. 6*, para. 18.

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

¹¹ CRC, *General Comment No. 6*, paras. 23–24.

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

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

II. DEFINITIONAL ISSUES

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

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

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

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

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

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

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

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

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

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

III. SUBSTANTIVE ANALYSIS

a) Well-founded fear of persecution

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

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

¹⁹ CRC, Art. 5.

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

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

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

²³ UNHCR, *Handbook*, paras. 54–55.

child.²⁴

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

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

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

²⁵ UNHCR, *Handbook*, paras. 40–43.

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

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

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

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

subject to harassment, violence, forced prostitution or other demeaning work.³⁰

Child-specific rights

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

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

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

Child-related manifestations of persecution

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

³⁰ UNHCR, *Guidelines on Gender-Related Persecution*, *op cit.*, para. 18.

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

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

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

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

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

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

Child-specific forms of persecution

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

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

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

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

³⁷ ExCom, *Conclusion No. 107*, para. (g)(viii).

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

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

child pornography.⁴⁰ Such forms of persecution also encompass violations of survival and development rights as well as severe discrimination of children born outside strict family planning rules⁴¹ and of stateless children as a result of loss of nationality and attendant rights. Some of the most common forms of child-specific persecution arising in the context of asylum claims are outlined in greater detail below.

i. Under-age recruitment

19. There is a growing consensus regarding the ban on the recruitment and use of children below 18 years in armed conflict.⁴² International humanitarian law prohibits the recruitment and participation in the hostilities of children under the age of 15 years whether in international⁴³ or non-international armed conflict.⁴⁴ Article 38 of the CRC reiterates State Parties' obligations under international humanitarian law. The Rome Statute of the International Criminal Court classifies as war crimes the enlistment and use of children under the age of 15 years into the armed forces at a time of armed conflict.⁴⁵ The Special Court for Sierra Leone has concluded that the recruitment of children under the age of 15 years into the armed forces constitutes a crime under general international law.⁴⁶

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

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

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

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

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

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

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

⁴⁶ See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 52–53; UN Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, <http://www.unhcr.org/refworld/docid/3ae6afbf4.html>, para. 17, which recognized the customary character of the prohibition of child recruitment.

⁴⁷ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, <http://www.unhcr.org/refworld/docid/47fdfb180.html>, Arts. 1–2. There are currently 127 States Parties to the Optional Protocol. See also the African Charter, which establishes 18 years as the minimum age for all compulsory recruitment, Arts. 2 and 22.2, and the ILO Convention on the Worst Forms of Child Labour, which includes the forced recruitment of children under the age of 18, Arts. 2 and 3(a) in its definition of worst forms of child labor.

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

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

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

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

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

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

⁴⁹ *Ibid.*, Art. 3.

⁵⁰ *Ibid.*, Art. 4.

⁵¹ CRC, *General Comment, No. 6*, para. 59. See also para. 58.

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

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

ii. Child trafficking and labour

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

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

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

27. The impact of reprisals by members of the trafficking network, social exclusion, ostracism and/or discrimination⁵⁹ against a child victim of trafficking who is returned to his/her home country needs to be assessed in a child-sensitive manner. For example, a girl who has been trafficked for sexual exploitation may end up being rejected by her family and become a social outcast in her community if returned. A boy, who has been sent away by his parents in the hope and expectation that he will study, work abroad and send remittances back to his family likewise may become excluded from his family if they learn that he has been trafficked into forced labour. Such child victims of trafficking may have very limited possibilities of accessing and enjoying their human rights, including survival rights, if returned to their homes.

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

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

⁵⁵ See UNHCR, *Guidelines on Victims of Trafficking*. See also UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, Oct. 2006, http://www.unicef.org/ceecis/0610-UNicef_Victims_Guidelines_en.pdf, which make reference to refugee status for children who have been trafficked.

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

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

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

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

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

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

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

iii. Female genital mutilation

31. All forms of FGM⁶⁴ are considered harmful and violate a range of human rights,⁶⁵ as affirmed by international and national jurisprudence and legal doctrine. Many jurisdictions have recognized that FGM involves the infliction of grave harm amounting to persecution.⁶⁶ As the practice disproportionately affects the girl child,⁶⁷ it can be considered a child-specific form of persecution. For further information about FGM in the context of refugee status determination, see UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation.⁶⁸

iv. Domestic violence against children

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

⁶¹ *Ibid.*, Art. 3(d).

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

⁶³ ILO Minimum Age Convention, Art. 2.

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

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

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

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

⁶⁸ UNHCR, *Guidance Note on FGM*, *op cit*.

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

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

v. Violations of economic, social and cultural rights

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

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

⁶⁹ CRC, Arts. 19, 37.

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

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

⁷² UN study on violence against children, *op. cit.*, para. 40.

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

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

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

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

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

⁷⁸ CRC, Art. 6.2.

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

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

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

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

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

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

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

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

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

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

⁸⁵ UNHCR, *Handbook*, para. 54.

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

b) Agents of persecution

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

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

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

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

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

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

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

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

⁹¹ UNHCR, *Guidelines on Gender-Related Persecution*, para. 11.

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

c) The 1951 Convention grounds

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

Race and nationality or ethnicity

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

Religion

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

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

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

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

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

⁹⁴ *Ibid*, para. 24.

Political opinion

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

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

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

Membership of a particular social group

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

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

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

⁹⁶ UNHCR, *Guidelines on Gender-Related Persecution*, op. cit. para. 26.

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

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

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

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

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

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

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

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

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

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

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

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

d) Internal "flight" or "relocation" alternative

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁹ *Ibid*, para. 7.

¹¹⁰ *Ibid*, para. 15.

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

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

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

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

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

e) The application of exclusion clauses to children

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

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

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

standard of protection”, p. 46.

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

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

¹¹⁷ UNHCR, *Guidelines on Exclusion*, para. 3; UNHCR, *Background Note on Exclusion*, para. 7.

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

¹¹⁹ UNHCR, *Guidelines on Exclusion*, para. 28.

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

States to establish a minimum age for criminal responsibility, but there is no universally recognized age limit.¹²¹ In different jurisdictions, the minimum age ranges from 7 years to higher ages, such as 16 or 18 years, while the Statutes of the Special Court for Sierra Leone¹²² and the International Criminal Court¹²³ set the cut-off age at 15 years and 18 years respectively.

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

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

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

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

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

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

¹²³ ICC Statute, Art. 26.

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

¹²⁵ UNHCR, *Statement on Article 1F*, p. 7.

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

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

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

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

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

IV. PROCEDURAL AND EVIDENTIARY ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁸ CRC, Arts. 13, 17.

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

¹⁴⁰ CRC, *General Comment No. 9*, para. 32.

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

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

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

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

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

¹⁴¹ ExCom, *Conclusion No. 107*, para. (d).

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

¹⁴³ UNHCR, *Handbook*, paras. 196, 219.

¹⁴⁴ *Inter-Agency Guiding Principles*, *op. cit.*, p. 61.

¹⁴⁵ ExCom, *Conclusion No. 107*, para. (g)(ix).

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

parents, siblings or other relatives.¹⁴⁷

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

cited in *Bringas-Rodriguez v. Sessions*, No. 13-72686 archived on March 2, 2017

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



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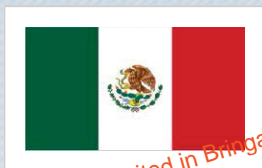
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Population:

123,166,749 (July 2016 est.)

country comparison to the world: [12](#)

Nationality:

noun: Mexican(s)

adjective: Mexican

Ethnic groups:

mestizo (Amerindian-Spanish) 62%, predominantly Amerindian 21%, Amerindian 7%, other 10% (mostly European)

note: Mexico does not collect census data on ethnicity (2012 est.)

Languages:

Spanish only 92.7%, Spanish and indigenous languages 5.7%, indigenous only 0.8%, unspecified 0.8%

note: indigenous languages include various Mayan, Nahuatl, and other regional languages (2005)

Religions:

Roman Catholic 82.7%, Pentecostal 1.6%, Jehovah's Witness 1.4%, other Evangelical Churches 5%, other 1.9%, none 4.7%, unspecified 2.7% (2010 est.)

Age structure:

0-14 years: 27.26% (male 17,167,636/female 16,402,301)

15-24 years: 17.72% (male 11,049,818/female 10,770,843)

25-54 years: 40.69% (male 24,174,900/female 25,938,909)

55-64 years: 7.41% (male 4,187,644/female 4,944,802)

65 years and over: 6.93% (male 3,827,870/female 4,702,026) (2016 est.)

population pyramid:



Dependency ratios:

total dependency ratio: 51.7%

cited in Bringas-Rodriguez v. Sessions, No. 13-72686 archived on March 2, 2017

youth dependency ratio: 41.9%

elderly dependency ratio: 9.8%

potential support ratio: 10.2% (2015 est.)

Median age:

total: 28 years

male: 26.9 years

female: 29.1 years (2016 est.)

country comparison to the world: [133](#)

Population growth rate:

1.15% (2016 est.)

country comparison to the world: [102](#)

Birth rate:

18.5 births/1,000 population (2016 est.)

country comparison to the world: [93](#)

Death rate:

5.3 deaths/1,000 population (2016 est.)

country comparison to the world: [177](#)

Net migration rate:

-1.7 migrant(s)/1,000 population (2016 est.)

country comparison to the world: [155](#)

Population distribution:

most of the population is found in the middle of the country between the states of Jalisco and Veracruz; approximately a quarter of the population lives in and around Mexico City

Urbanization:

urban population: 79.2% of total population (2015)

rate of urbanization: 1.57% annual rate of change (2010-15 est.)

Major urban areas - population:

MEXICO CITY (capital) 20.999 million; Guadalajara 4.843 million; Monterrey 4.513 million; Puebla 2.984 million; Toluca de Lerdo 2.164 million; Tijuana 1.987 million (2015)

Sex ratio:

at birth: 1.05 male(s)/female

0-14 years: 1.05 male(s)/female

15-24 years: 1.03 male(s)/female

25-54 years: 0.93 male(s)/female

55-64 years: 0.85 male(s)/female

65 years and over: 0.82 male(s)/female

total population: 0.96 male(s)/female (2016 est.)

Mother's mean age at first birth:

21.3 (2008 est.)

Maternal mortality rate:

38 deaths/100,000 live births (2015 est.)

cited in *Boncas-Rodriguez v. Sessions*, No. 13-72686 archived on March 2, 2017

country comparison to the world: [108](#)

Infant mortality rate:

total: 11.9 deaths/1,000 live births

male: 13.3 deaths/1,000 live births

female: 10.4 deaths/1,000 live births (2016 est.)

country comparison to the world: [122](#)

Life expectancy at birth:

total population: 75.9 years

male: 73.1 years

female: 78.8 years (2016 est.)

country comparison to the world: [93](#)

Total fertility rate:

2.25 children born/woman (2016 est.)

country comparison to the world: [95](#)

Contraceptive prevalence rate:

72.5% (2009)

Health expenditures:

6.3% of GDP (2014)

country comparison to the world: [108](#)

Physicians density:

2.1 physicians/1,000 population (2011)

Hospital bed density:

1.5 beds/1,000 population (2011)

Drinking water source:

improved:

urban: 97.2% of population

rural: 92.1% of population

total: 96.1% of population

unimproved:

urban: 2.8% of population

rural: 7.9% of population

total: 3.9% of population (2015 est.)

Sanitation facility access:

improved:

urban: 88% of population

rural: 74.5% of population

total: 85.2% of population

unimproved:

urban: 12% of population

cited in Bringas-Rodriguez v. Sessions, No. 13-72686 archived on March 2, 2017

rural: 25.5% of population

total: 14.8% of population (2015 est.)

HIV/AIDS - adult prevalence rate:

0.24% (2015 est.)

country comparison to the world: [95](#)

HIV/AIDS - people living with HIV/AIDS:

198,200 (2015 est.)

country comparison to the world: [30](#)

HIV/AIDS - deaths:

4,000 (2015 est.)

country comparison to the world: [28](#)

Major infectious diseases:

degree of risk: intermediate

food or waterborne diseases: bacterial diarrhea and hepatitis A

vectorborne disease: dengue fever

note: active local transmission of Zika virus by Aedes species mosquitoes has been identified in this country (as of August 2016); it poses an important risk (a large number of cases possible) among US citizens if bitten by an infective mosquito; other less common ways to get Zika are through sex, via blood transfusion, or during pregnancy, in which the pregnant woman passes Zika virus to her fetus (2016)

Obesity - adult prevalence rate:

27.6% (2014)

country comparison to the world: [23](#)

Children under the age of 5 years underweight:

2.8% (2012)

country comparison to the world: [117](#)

Education expenditures:

5.2% of GDP (2012)

country comparison to the world: [72](#)

Literacy:

definition: age 15 and over can read and write

total population: 95.1%

male: 96.2%

female: 94.2% (2012 est.)

School life expectancy (primary to tertiary education):

total: 13 years

male: 13 years

female: 13 years (2014)

Child labor - children ages 5-14:

total number: 1,105,617

percentage: 5% (2009 est.)

Unemployment, youth ages 15-24:

cited in Bringas-Rodriguez v. Sessions, No. 13-72686 archived on March 2, 2017

total: 9.6%

male: 9.2%

female: 10.3% (2014 est.)

country comparison to the world: [104](#)

Government :: MEXICO



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