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Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of a Particular Social Group

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REJECTING THE CHILDREN OF VIOLENCE: WHY U.S. ASYLUM LAW SHOULD RETURN TO THE ACOSTA DEFINITION OF “A PARTICULAR SOCIAL GROUP”

RACHEL GONZALEZ SETTLAGE*

ABSTRACT

In recent years, in reaction to increasing numbers of children arriving at the U.S. border fleeing gangs in Central America, the Board of Immigration Appeals (BIA) and U.S. courts have improperly narrowed the definition of “a particular social group,” one of the protected grounds for asylum. Instead of relying on the widely accepted and longstanding immutable characteristics formulation set out in Matter of Acosta, the BIA inexplicably added new requirements of social distinction and particularity. These new requirements are devastating to the asylum claims of children fleeing forced recruitment from gangs in Central America. In most of these cases, the BIA and the courts have found these children are not members of a particular social group deserving protection in the form of asylum. This narrower definition of a particular social group will also affect children to whom the U.S. and international community is much more sympathetic, such as child soldiers. This article argues that U.S. asylum law should return to the Acosta formulation of a particular social group, and that the social distinction and particularity requirements should only be an alternative formulation of a particular social group, not additional requirements.

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TABLE OF CONTENTS

INTRODUCTION	289
I. U.S. ASYLUM LAW AND THE PROTECTED GROUND OF MEMBERSHIP IN A PARTICULAR SOCIAL GROUP	294
A. <i>The BIA’s Seminal Definition of a “Particular Social Group” in Matter of Acosta: Widely Accepted for More Than Two Decades</i>	297
1. <i>Acosta is Widely Accepted in the Federal Courts</i>	298
2. <i>The UNHCR’s Definition of a “Particular Social Group,” Incorporates the Acosta Standard, as Does the Law in Many Other Countries</i>	300
B. <i>The BIA Improperly Limited the Definition of “Particular Social Group” by Adding “Particularity” and “Social Visibility” Requirements</i>	302
1. <i>The BIA’s New Requirements Led to a Circuit Split, with the Seventh and the Third Circuit Rejecting the New Requirements</i>	303
2. <i>The UNHCR, Scholars, and Immigration Advocates Reject the New BIA Requirements</i>	305
C. <i>The BIA Attempts to Clarify the “Social Visibility” and “Particularity” Requirements: Matter of M-E-V-G- and Matter of W-G-R-</i>	306
D. <i>“Particularity” and “Social Distinction” Requirements Are Unacceptable Additions to the Particular Social Group Definition</i>	309
II. SIMILAR EXPERIENCES BUT DIFFERING NARRATIVES: BACKGROUND ON CHILD SOLDIERS AND CHILDREN IN GANGS	314
A. <i>Child Soldiers</i>	315
B. <i>Children in Gangs in Central America</i>	318
C. <i>The Disparate Narratives of Children Fleeing Forced Recruitment</i>	322
III. THE NEGATIVE IMPACT OF THE INTERPRETATION OF “PARTICULAR SOCIAL GROUP” UNDER U.S. ASYLUM LAW FOR CHILDREN TARGETED FOR FORCED RECRUITMENT	324

A.	<i>Children as a Particular Social Group in U.S. Asylum Law</i>	325
1.	<i>Age and Immutability</i>	326
2.	<i>Children as a Particular Social Group: Too Broad</i>	327
B.	<i>Children Targeted for Forced Recruitment as a Particular Social Group</i>	328
1.	<i>Children Targeted for Forced Recruitment under the Acosta Standard: Underdeveloped Case Law</i>	329
2.	<i>It is Nearly Impossible for Children Targeted for Forced Recruitment to Meet the New Standard that Includes “Particularity” and “Social Distinction”</i>	331
3.	<i>Acosta Is the Standard That Should Be Used to Evaluate Forced Recruitment Claims</i>	333
C.	<i>Former Child Soldiers or Former Gang Members Recognized as Particular Social Groups in Some Circuits</i>	335
IV.	CONCLUDING REMARKS	337

INTRODUCTION

There are thousands of child soldiers in more than twenty countries around the world.¹ Many of these children are forcibly recruited to be soldiers in government or rebel armed forces. During recruitment and after children become soldiers, the armed forces subject these children to horrific abuses to manipulate and control them.² Ishmael Beah was twelve years old when rebels attacked his village in Sierra Leone, killing his family. He was able to escape with other boys and wandered from village to village until the Sierra Leone army found him and forced him to join the military or be turned out into rebel territory. The military taught him to use a gun, put him on the front lines of the civil war, and gave him drugs, including marijuana and a mixture of cocaine and gunpowder, to control him. He was lucky; the military eventually turned him over to a UNICEF rehabilitation center.³

1. See Press Release, United Nations Children’s Rights & Emergency Relief Org. (UNICEF), *More brutal and intense conflicts leave children increasingly at risk of recruitment*, U.N. Press Release (Feb. 12, 2015) [hereinafter UNICEF Press Release].

2. See *infra* Section III.A.

3. ISHMAEL BEAH, *A LONG WAY GONE, MEMOIRS OF A BOY SOLDIER* (2008).

There are also thousands of children forcibly recruited into gang membership in countries throughout Central America.⁴ As with child soldiers, gangs subject these children to terrible abuses both during recruitment and once they become gang members.⁵ When Jose Urbina-Mejia was fourteen years old, the 18th Street gang in Honduras informed him at a school party that he must join their gang, and that night forced him to join by beating him. Gang members told him that he would be killed if he did not do as he was told. He was forced to accompany other gang members as they robbed and sometimes beat people. A gang leader taught him to use a gun for protection from the rival gang, MS-13, a member of which once shot Jose in the foot. During his asylum hearing in the United States, Jose testified that he regretted his activities in the gang but was afraid “that he would be killed if he did not participate.”⁶

Some of the children fleeing gangs or armed forces, like Jose, are able to escape and make their way to the United States, where they ask for protection in the form of asylum.⁷ In order to qualify for asylum in the United States, a child must demonstrate that he meets the definition of a refugee.⁸ The child must prove that he has a well-founded fear of persecution in his home country on account of his race, religion, nationality, political opinion or membership in a particular social group.⁹ Thus, it is not enough that the child fears persecution if returned to his home country; the persecution feared by the child must also be on account of a protected ground.¹⁰ In most cases involving the forced recruitment of a child, the only basis upon which a child can claim a well-founded fear of persecution is his membership in a particular social group.¹¹ Thus, meeting the definition of a particular social group is a critical threshold issue in the asylum claims of children fleeing forced recruitment.

The Board of Immigration Appeals (BIA),¹² in *Matter of Acosta*, defined a particular social group as a “group of persons[,] all of whom share a

4. See, e.g., CLARE RIBANDO SEELKE, CONG. RESEARCH SERV. GANGS IN CENTRAL AMERICA 6 (2014); ELIZABETH KENNEDY, AM. IMMGR. COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 2 (2014).

5. See *infra* Section III.B.

6. *Urbina-Mejia v. Holder*, 597 F.3d 360, 362-63 (6th Cir. 2010).

7. The United States is obligated under the UN Refugee Convention to provide protection to those who face persecution in their home countries. *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter *1951 Convention*]; *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter *1967 Protocol*] (together the UN Refugee Convention).

8. 8 C.F.R. § 208.13(b)(1) (2004); 8 U.S.C.A. § 1101(a)(42)(A) (2014).

9. *Id.*

10. *Id.*

11. See *infra* Section III.B.

12. The Board of Immigration Appeals (BIA) is the highest administrative appellate body in the Executive Office for Immigration Review in the Department of Justice. U.S. DEP'T OF JUSTICE, *Board of Immigration Appeals*, <http://www.justice.gov/eoir/biainfo.htm> (last visited Aug. 19, 2014).

common, immutable characteristic.”¹³ This standard served as the governing definition of a particular social group for several decades. However, case law regarding children fleeing forced recruitment as a particular social group was greatly underdeveloped under the *Acosta* formulation.¹⁴ This changed in the late 2000s when the BIA and courts faced an increasing number of gang-based asylum claims.¹⁵ In the context of these gang-based cases, the BIA improperly narrowed the definition of a particular social group.¹⁶ Now, a proposed social group must be composed not only of individuals who share a common immutable characteristic but the group must also be both “particular” and “socially distinct.”¹⁷

The new standard has been devastating to the asylum claims of children who are targeted for forced recruitment. Under the new standard, the BIA and most of the circuit courts have found that these children are not members of a particular social group. The reasoning is that the social groups proposed in these cases—groups that often combine the characteristics of age, gender, country of origin, or some other feature—fail either the “social distinction” or “particularity” requirements.¹⁸ By declining to recognize in most cases that a protected ground exists for children fearing recruitment by armed forces or gang membership, the BIA and the courts have made it extremely difficult, if not impossible, for these children to qualify for asylum. As a result, these children face being returned to their home countries and the horrors of forced recruitment.

To understand why the law has developed in this way, it is helpful to look at the narrative pertaining to children fleeing gangs in Central America, where most gang-related asylum claims originate.¹⁹ The media often portrays children fleeing gangs, whether former gang members or not, as economic migrants at best.²⁰ At worst, these children face accusations of being violent juvenile delinquents who are complicit in their recruitment and pose a danger

13. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

14. *See infra* Section IV.B.1.

15. *See* UNITED NATIONS HIGH COMM’R FOR REFUGEES, DIV. OF INT’L PROT., GUIDANCE NOTE ON REFUGEE CLAIMS RELATED TO VICTIMS OF ORGANIZED GANGS 1 (March 2010) [hereinafter UNHCR GUIDANCE ON GANGS].

16. *See* *Matter of C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 231 (B.I.A. 2014).

17. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 227, 231.

18. *See infra* Section IV.B.2.

19. *See* U.S. CUSTOMS & BORDER PROT., *Southwest Border Unaccompanied Alien Children Statistics Fiscal Year 2016*, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last visited Dec. 2, 2015) [hereinafter *Southwest Border Unaccompanied Children Statistics*].

20. *See, e.g.*, Brianna Lee, *Are Central American Children Crossing US Border Refugees Or Economic Migrants?*, INT’L BUS. TIMES (July 10, 2014), <http://www.ibtimes.com/are-central-american-children-crossing-us-border-refugees-or-economic-migrants-1623782>; Stephanie L. Canizales, *Unaccompanied Migrant Children: A Humanitarian Crisis at the U.S. Border and Beyond*, 2 CTR. FOR POVERTY RES. POL’Y BRIEF 4, available at http://poverty.ucdavis.edu/sites/main/files/file-attachments/canizales_migrant_youth_brief.pdf (last visited Oct. 2, 2015).

to American society.²¹ The multitude of children coming to the United States fleeing gang violence in the last several decades, and particularly in the last five years, has compounded this negative rhetoric.²² It was against this backdrop of child migration from Central America, a “flood” so to speak,²³ that the BIA narrowed the legal definition of a “particular social group” in the context of gang-related claims.²⁴ The BIA justified the narrowing of the definition of particular social group by citing to case law and to guidelines from the United Nations High Commissioner for Refugees (UNHCR).²⁵ However, the fear of increasing numbers of children fleeing gang violence in Central America seeking asylum in the United States improperly influenced the BIA. Furthermore, the BIA incorrectly interpreted the UNHCR guidelines, and the new requirements for a particular social group diverge from internationally recognized norms of protection.

The narrowing of the definition of particular social group impacts not just children fleeing Central American gangs, but other groups of children as well, including those fleeing forced recruitment as child soldiers. This is true despite the fact that child soldiers, or those seeking to avoid becoming a child soldier, have engendered sympathy and compassion from people around the world.²⁶ The child soldier narrative differs dramatically from the child gang

21. See, e.g., Ashley Collman and Ryan Parry, *Known gang members among thousands of illegal immigrant children storming the U.S. border and officials are now trying to silence officers from talking to the media*, DAILYMAIL.COM, (June 14, 2014), <http://www.dailymail.co.uk/news/article-2657695/known-gang-members-thousands-illegal-immigrant-children-storming-u-s-border-government-trying-silence-officers-talking-media.html#ixzz3oskx0YkB>; Judson Phillips, *President Obama opens U.S. borders: Children, criminals, terrorists welcome*, CMTY'S. DIGITAL NEWS (June 20, 2014), <http://www.commdiginews.com/politics-2/president-obama-opens-u-s-borders-children-criminals-terrorists-welcome-19911/>.

22. Estimates put the number of unaccompanied children who arrived from these countries in fiscal year 2014 (Oct. 2013 to Sept. 2014) at nearly 70,000, up from approximately 16,000 in 2011. *Southwest Border Unaccompanied Children Statistics*, supra note 19; see also Muzaffar Chishti & Faye Hipsman, *Unaccompanied Minors Crisis Has Receded from Headlines But Major Issues Remain*, MIGRATION POL'Y INST. (Sept. 25, 2014), www.migrationpolicy.org/article/unaccompanied-minors-crisis-has-receded-headlines-major-issues-remain [hereinafter Chishti, *Unaccompanied Minors*]; see also Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGR. BRIEFINGS 1, 3 & n.23 (Oct. 2012); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132-33 (2007).

23. Carrie Kahn, *A Flood Of Kids, On Their Own, Hope to Hop a Train to a New Life*, NAT'L PUB. RADIO (June 10, 2014), <http://www.npr.org/sections/parallels/2014/06/10/320645461/a-flood-of-kids-on-their-own-hope-to-hop-a-train-to-a-new-life>; John Burnett, *From a Stream to a Flood: Migrant Kids Overwhelm U.S. Border Agents*, NAT'L PUB. RADIO (June 20, 2014), <http://www.npr.org/2014/06/20/323657817/from-a-stream-to-a-flood-migrant-kids-overwhelm-u-s-border-agents>; Reuters, *Obama To Ask Congress For \$2B to Deal With Flood of Immigrant Children on Border*, NEWSWEEK (June 29, 2014), <http://www.newsweek.com/obama-ask-congress-2-b-deal-flood-immigrant-children-border-256605>.

24. See *infra* Section IV.B.2.

25. See *Matter of C-A-*, supra note 16.

26. Timothy Webster, *Babes with Arms: International Law and Child Soldiers*, 39 GEO. WASH. INT'L L. REV. 227, 227 (2007) (“Barely a crime thirty years ago, the ban on recruiting children took root in the 1990s and has since blossomed into over a dozen indictments in contemporary international criminal courts . . . the age of impunity has finally passed for those who use and recruit child soldiers.”).

member narrative. It is one of an innocent child abducted from his home and subjected to horrific treatment before having a gun placed in his hands and being coerced to shoot.²⁷ Ishmael Beah had his story made into a book that was sold at the cash registers of Starbucks coffee shops around the United States.²⁸

Interest in and compassion for child soldiers has resulted in much scholarship,²⁹ and much advocacy aimed at finding means to protect former child soldiers and children at risk of becoming child soldiers.³⁰ Scholars who have addressed the issue of asylum and child soldiers have focused particularly on overcoming persecutor and related bars to asylum for those children who were engaged in combat or military situations.³¹ However, these efforts miss the point, for even if a child fleeing forced soldier recruitment can overcome such bars, it will be of little consequence if he cannot meet the threshold issue of establishing that he was persecuted on the basis of a protected characteristic. When the BIA, in the context of gang-based claims, improperly narrowed the definition of a particular social group, it did so in a way that negatively impacts the asylum claims of all children fleeing forced recruitment, including child soldiers and gang members alike.

U.S. asylum law should return to the *Acosta* formulation of a particular social group and the social distinction and particularity requirements should only be an alternative formulation of a particular social group, not additional requirements. The *Acosta* formulation provides a clear yet flexible standard for determining what constitutes a particular social group, a standard that is

27. Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 *FORDHAM INT'L L.J.* 415, 423-24 (2008) (describing child soldiers' journey from their home and childhood to participation in warfare).

28. BEAH, *supra* note 3; see also *Riveting True Story of Hope and Redemption "A Long Way Gone" is Next Starbucks Featured Book*, STARBUCKS NEWSROOM, news.starbucks.com/news/riveting-true-story-of-hope-and-redemption-a-long-way-gone-is-next-starbucks (last visited Mar. 3, 2015).

29. See, e.g., Tiefenbrun, *supra* note 27; Luz E. Nagle, *Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict*, 19 *CARDOZO J. INT'L & COMP. L.* 1 (2011); Matthew Happold, *Excluding Children From Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 *AM. U. INT'L L. REV.* 1131 (2002).

30. See, e.g., OFFICE OF SPECIAL REPRESENTATIVE OF THE SEC'Y-GEN. FOR CHILDREN AND ARMED CONFLICT, *Children, Not Soldiers*, <https://childrenandarmedconflict.un.org/children-not-soldiers> (last visited Jan. 12, 2015); HUMAN RIGHTS WATCH, *Child Soldiers*, <https://www.hrw.org/topic/childrens-rights/child-soldiers> (last visited Mar. 11, 2015); CHILD SOLDIERS INT'L, <http://www.child-soldiers.org/> (last visited Mar. 11, 2015); INVISIBLE CHILDREN, invisiblechildren.com (last visited Mar. 11, 2015). Even Congress has sought ways to help child soldiers. For example, in 2007, during a Congressional hearing on child soldiers in which a recurring theme of the testimony was the bars to asylum in the United States for child soldiers, Senator Tom Coburn proposed a special immigration track for child soldiers seeking asylum. *Casualties of War: Child soldiers and the Law: Hearing Before the Subcomm. on Human Rights and the Law on the S. Comm on the Judiciary*, 110th Cong. 23 (2007).

31. See, e.g., Elizabeth A. Rossi, A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protections, 31 *Berkeley J. Int'l L.* 392 (2013); Bryan Lonagan, *Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum After Negusie v. Holder*, 31 *B.C. THIRD WORLD L.J.* 71 (2011); Kathryn White, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 *VAND. J. TRANSNAT'L L.* 191 (2010); RAO G. KRISHNAYYA, CTR. FOR VICTIM & HUMAN RIGHTS, *NO WAY OUT: REPRESENTING CHILD SOLDIERS IN ASYLUM CASES AND ALTERNATIVE SOLUTIONS TO THE STRICT LIABILITY EXCLUSION UNDER THE "PERSECUTION OF OTHERS" CLAUSE* (2009).

consistent with international law. Under the *Acosta* definition of a particular social group, there was room for developing successful social groups in asylum claims involving the forced recruitment of children. In contrast, the BIA's new requirements of "particularity" and "social distinction" leave little room to develop successful social group claims for these children. By refusing to recognize that children targeted for forced recruitment, whether by gangs or by armed forces, are members of a particular social group, the BIA and the courts are abandoning targeted children to persecution and torture.

Part II of this article provides a background on U.S. asylum law, in particular the evolution of the definition of a particular social group. In Part II, I will argue the BIA improperly narrowed the definition of a particular social group by introducing the requirements of "social distinction" and "particularity." I will also argue that U.S. asylum law should return to the *Acosta* definition of a particular social group, and that the social distinction and particularity requirements should only be an alternative formulation of a particular social group, not additional requirements. Part III of this article provides a background on the global problem of child soldiers and children in gangs, highlighting the similarities between the two groups, as well as the disparate narrative they face. This section will lay the groundwork for exploring how the negative narrative that surrounds children fleeing gangs improperly affected a change in U.S. asylum law that will also negatively impact child soldiers, a group to whom the U.S. community is much more sympathetic. Part IV of this article examines particular social group analysis with regard to children who fear recruitment as child soldiers or gang members under both the *Acosta* standard and the new requirements. I will argue that under the *Acosta* standard, which is the standard that should be used in particular social group analysis, claims from children fleeing forced recruitment are cognizable in certain circumstances.

I. U.S. ASYLUM LAW AND THE PROTECTED GROUND OF MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Asylum and refugee law is, at its core, international law.³² The United States ratified the United Nations (UN) Refugee Convention in 1968,³³ thus indicating consent to be bound by the Convention's provisions.³⁴ The most

32. James C. Simeon, *Introduction: Searching for ways to enhance the UNHCR's capacity to supervise international refugee law in THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW 4-5* (James C. Simeon, ed., 2013) [hereinafter UNHCR & SUPERVISION OF INT'L REFUGEE LAW].

33. The UN Refugee Convention defines a refugee and sets out the rights of refugees and the responsibilities of State parties to refugees. *1951 Convention*, *supra* note 7; *1967 Protocol*, *supra* note 7; UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (last visited Mar. 6, 2016), available at <http://www.unhcr.org/3b73b0d63.html> (as of Apr. 1, 2011).

34. UN Refugee Convention, *supra* note 7; see also UNITED NATIONS HIGH COMM'R FOR REFUGEES, *Convention and Protocol Relating to the Status of Refugees*, Introductory Note at 2 (2010),

fundamental obligation that arises under the UN Refugee Convention is the duty of non-refoulement: or the prohibition on returning a refugee to a country where his or her life or freedom would be threatened.³⁵ The UN Refugee Convention does not outline a procedure for deciding whether or not an individual is a refugee or deserves asylum. Rather, the courts and agencies of each state party to the Convention interpret and administer their obligations under the Convention through the development of domestic asylum laws and procedures.³⁶ Nevertheless, when interpreting the provisions of domestic asylum law, state party adjudicators are obligated to do so in a manner that is consistent with the UN Refugee Convention.³⁷

The United States codified the provisions of the UN Refugee Convention in the Refugee Act of 1980.³⁸ In order to obtain asylum in the United States, the asylum seeker must meet the definition of a refugee.³⁹ The primary requirement is that the asylum seeker has a well-founded fear of persecution if he returns to his home country.⁴⁰ It is not enough that someone simply

<http://www.unhcr.org/3b66c2aa10.html>; U.N., Dag Hammarskjöld Library, *What is the difference between signing, ratification and accession of UN treaties?*, <http://ask.un.org/faq/14594> (last visited Aug. 13, 2015).

35. *1951 Convention*, *supra* note 7, at art. 33(1) (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”).

36. James C. Simeon, *A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration*, 22 INT’L J. REFUGEE L. 72, 76-77 (2010) (noting that the UNHCR promulgated a Handbook on Procedures and Criteria for Determining Refugee Status to serve as a guide for State parties; however, the Handbook has no binding authority).

37. See Brief for The United Nations High Commissioner for Refugees as Amici Curiae Supporting Petitioner, *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2012) available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Henriquez-Rivas%20UNHCR%20Brief.pdf> (“The Refugee Act thus serves to bring the United States into compliance with its international obligations under the *1967 Protocol*, and through this Protocol the *1951 Convention*, and should be interpreted and applied in a manner consistent with those instruments.”) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains.”)) [hereinafter UNHCR Brief Henriquez-Rivas].

38. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration & Nationality Act §§ 101(a)(42), 208 [hereinafter INA]; 8 U.S.C. §§ 1101, 1158 (2012); 8 C.F.R. § 208.14.

39. The United States defines a refugee as “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). This definition is adapted from the UN Refugee Convention with only minor changes. See *1951 Convention*, *supra* note 7, at art. 1(2); *1967 Protocol*, *supra* note 7, at art. 1(2). Even if an asylum seeker meets the refugee definition, she still has the “burden of establishing that the favorable exercise of discretion is warranted.” *Matter of Pula*, 19 I. & N. Dec. 467, 474 (B.I.A. 1987).

40. 8 C.F.R. § 208.13(b) (2014). The INA does not define persecution, and there is no generally agreed upon definition of persecution. REGINA GERMAIN, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 33-34 (Am. Immig. Lawyers Ass’n 2010) (citing the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*). The BIA defined persecution as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I. & N. Dec. at 222. The BIA further noted that the “harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief

experienced past persecution or has a well-founded fear of future persecution in his home country. The perpetrator of the past or feared future persecution must be a government agent or a non-governmental actor that the government is unwilling or unable to control.⁴¹ In addition, the persecution must be perpetrated “on account of” a protected ground.⁴² The five protected grounds are race, religion, nationality, political opinion, or membership in a particular social group.⁴³ The asylum seeker must demonstrate that at least one central reason for his persecutor’s motivation is one of these five protected grounds.⁴⁴ This nexus requirement requires that an individual face a particularized threat.⁴⁵ Being a random target of violence and harm, even violence or harm that rises to the level of persecution, is not sufficient if the applicant cannot show that the harm was inflicted on account of one of the five grounds.⁴⁶ Although closely connected, the analysis of whether the applicant possesses a protected characteristic is a separate analysis from the nexus analysis.⁴⁷

Children seeking protection from forced recruitment by armed forces or gangs must demonstrate that they meet the definition of a refugee. While such children must meet each element of the refugee definition, they must first demonstrate the existence of a protected ground. In most asylum cases involving the forced recruitment of a child, the claim is based on the child’s membership in a particular social group.⁴⁸ Thus, the definition under U.S. asylum law of a particular social group is a crucial threshold issue in

or characteristic a persecutor sought to overcome.” *Id.* at 222. However, in a later decision, *Matter of Kasinga*, the BIA modified this definition to hold that a “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.” *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). Many federal circuit court decisions also attempt to define “persecution.” *See, e.g.*, *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (outlining the hallmarks of persecution as “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture.”).

41. *See* RACHEL GONZALEZ SETTLAGE, ELIZABETH ANNE CAMPBELL & VERONICA TOBAR THRONSON, IMMIGRATION RELIEF: LEGAL ASSISTANCE FOR NONCITIZEN CRIME VICTIMS 91 (Am. Bar Ass’n Book Publishing 2014) (“Persons or groups that governments have been found to be unable or unwilling to control have included rival clans, rebel groups, gangs, abusive partners, or tribes who perform female genital mutilation.”); *see also* *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *Matter of H-*, 21 I. & N. Dec. 337, 345 (B.I.A. 1996); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

42. 8 C.F.R. § 208.13(b)(1) (2014).

43. *Id.*

44. INA § 208(b)(1)(B)(i) as amended by Section 101(a) of the Real ID Act, Pub. L. No. 109-13, 119 Stat. 302; *see also* SETTLAGE ET AL., *supra* note 41, at 91.

45. *Kotasz v. INS*, 31 F.3d 847, 851-52 (9th Cir. 1994); *Castellano-Chacon v. INS*, 341 F.3d 533, 551-52 (6th Cir. 2003).

46. Courts in the United States have generally held that simply fleeing civil strife is not enough to meet the nexus requirement. *Hallman v. INS*, 879 F.2d 1244, 1247 (5th Cir. 1989) (“[A]sylum is not available to every victim of civil strife, but is restricted to those persecuted for a particular reason.”). But the existence of civil strife does not preclude a finding of particularized persecution. *See Ahmed v. Keisler*, 504 F.3d 1183, 1194-95, 1195 n.9 (9th Cir. 2007) (“[E]ven though generalized violence as a result of civil strife does not necessarily qualify as persecution, neither does civil strife eliminate the possibility of persecution.”).

47. *See* Frydman & Desai, *supra* note 22, at 3, 15, n.21 (citing *Ayala v. Holder*, 640 F.3d 1095, 1096-98 (9th Cir. 2011)); *see also* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 231 (B.I.A. 2014).

48. *See infra* Section IV; *see also* Frydman & Desai, *supra* note 22, at 23-24.

establishing eligibility for asylum for children fleeing forced recruitment.⁴⁹

For more than two decades, a “particular social group” was defined as a “group of persons, all of whom share a common, immutable characteristic,” as set forth in the BIA case, *Matter of Acosta*.⁵⁰ The *Acosta* standard was widely accepted both in the United States and internationally.⁵¹ However, in the face of an increasing number of gang-based asylum claims,⁵² the BIA improperly narrowed the definition of a particular social group in a way that diverges from internationally recognized norms of protection. Today, a proposed social group must not only be composed of individuals who share a common immutable characteristic, but the group must also meet both “particularity” and “social distinction” requirements.⁵³ As will be discussed in Section IV, these new requirements make it almost impossible for children fleeing forced recruitment to qualify for asylum in the United States.

A. *The BIA’s Seminal Definition of a “Particular Social Group” in Matter of Acosta: Widely Accepted for More Than Two Decades*

The Immigration and Nationality Act (INA) does not define “membership in a particular social group,” leaving the definition to be developed in case law. The BIA, as the highest administrative appellate body in the Executive Office for Immigration Review in the Department of Justice, reviews appeals of decisions made by immigration judges and DHS district directors.⁵⁴ BIA decisions are binding unless overturned by the Attorney General or a federal court.⁵⁵ Thus, an analysis of case law on the interpretation of particular social group must start with the BIA.

In 1985, in the seminal case *Matter of Acosta*, the BIA defined membership in a particular social group as membership in a “group of persons[,] all of whom share a common, immutable characteristic.”⁵⁶ In reaching this conclusion, the BIA relied on the principle of *ejusdem generis*, which means “of the same kind.”⁵⁷ The BIA noted that the other four protected grounds—race, religion, nationality, and political opinion—also describe “an immutable characteristic.”⁵⁸ Accordingly, the BIA noted that the shared characteristic of

49. See Frydman & Desai, *supra* note 22, at 21 (“Few federal courts have analyzed nexus in the context of social group claims as those claims are generally denied on the basis of a failure to prove particularity and visibility.”).

50. *Matter of Acosta*, 19 I. & N. Dec. at 233.

51. UNHCR Brief Henriquez-Rivas, *supra* note 37, at 14.

52. See UNHCR GUIDANCE ON GANGS, *supra* note 15, at 1.

53. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 232.

54. U.S. DEP’T OF JUSTICE, *Board of Immigration Appeals*, <http://www.justice.gov/eoir/biainfo.htm> (last visited Aug. 19, 2014).

55. *Id.*

56. *Matter of Acosta*, 19 I. & N. Dec. at 233 (In *Acosta*, the BIA found that membership in a taxi collective did not constitute membership in a particular social group because that membership was not immutable since the taxi drivers could change their careers or leave the collective).

57. *Id.*

58. *Id.*

a particular social group must be one “that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.”⁵⁹ The BIA explained that the shared characteristic “might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership[.]”⁶⁰

1. *Acosta* is Widely Accepted in the Federal Courts

Under the deferential *Chevron* standard, the BIA’s statutory interpretation of the INA generally governs when a statute is silent or ambiguous with respect to a specific question, as it is with regards to the definition of a particular social group.⁶¹ However, it is up to the federal courts of appeal to ask whether the agency’s interpretation is based on a permissible construction of the statute, in other words, if it is based on a reasonable policy choice.⁶²

Following *Acosta*, nearly all circuits adopted the BIA’s formulation described above.⁶³ The Second Circuit was the sole legal outlier to not adopt the *Acosta* standard, using instead a “voluntary associational relationship” standard,⁶⁴ but with an additional requirement that the social group be “recognizable and discrete.”⁶⁵ Thus, with the exception of the Second Circuit, the *Acosta* immutable characteristic definition was widely recognized in the United States for more than twenty years.⁶⁶

The *Acosta* standard is not without its critics. Some scholars argued that a particular social group should be defined much more broadly than as defined

59. *Id.* at 233-34; see also Tim S. Braimah, *Defining a Particular Social Group Based on the Meaning of Non-Discrimination in International Human Rights Law: Utilizing the Definition in Deciding Refugee Claims Based on Sexual Orientation*, 15 GLOBAL J. OF HUMAN-SOCIAL SCIENCE: C SOC’Y & CULTURE 2, 25 (2015) (noting that two of the convention grounds are things that one cannot change, and the other two are so fundamental to identity that one should not be required to change them).

60. *Matter of Acosta*, 19 I. & N. Dec. at 233-34.

61. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-45 (1984).

62. *Id.* The federal courts of appeal have played an active role in interpreting the INA, in some cases overturning BIA decisions. See GERMAIN, *supra* note 40, at 17-18.

63. See Frydman & Desai, *supra* note 22, at 2-6.

64. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). The “voluntary associational relationship” standard, initially developed by the Ninth Circuit, defined a social group as “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.” See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). However, in 2000, the Ninth Circuit shifted its position and adopted the *Acosta* formulation as an alternative. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000).

65. *Gomez v. INS*, 947 F.2d at 664 (noting that the members of a social group must “possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor-or in the eyes of the outside world in general”); see also *Saleh v. U.S. Dep’t of Justice*, 962 F.2d 234, 240 (2d Cir. 1992).

66. See Ashley Huebner & Lisa Koop, *New BIA Decisions Undermine U.S. Obligations To Protect Asylum Seekers*, NAT’L IMMIGRANT JUSTICE CTR. (Feb. 18, 2014), available at <https://www.immigrantjustice.org/litigation/blog/new-bia-decisions-undermine-us-obligations-protect-asylum-seekers#.VsoqqfkrLBQ>.

by *Acosta*.⁶⁷ Several scholars argued that social perception or societal attitude should play a role in determining what constituted a particular social group, not just the immutable or fundamental characteristic test.⁶⁸ Others have argued that the definition of a particular social group must not be too broad, or it risks undermining the purpose and intent of the UN Refugee Convention.⁶⁹

There is good reason why the *Acosta* definition of a “particular social group” was so widely accepted for so long. The *Acosta* standard provides a clear and distinct method to analyze particular social group claims, a method that is both flexible but delineated.⁷⁰ Thus, it provides a formulation to define a particular social group neither too broadly nor too narrowly. Scholars have noted that the *Acosta* standard is “a standard that is capable of principled evolution but not so vague as to admit persons without a serious basis for claims to international protection.”⁷¹ The Eleventh Circuit in *Castillo-Arias* elaborated that, “*Acosta* strikes an acceptable balance between (1) rendering ‘particular social group’ a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering ‘particular social group’ a nullity by making its requirements too stringent or too specific.”⁷²

67. See Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 60 (1983) (stating that “[m]embership in virtually any group should be sufficient.”); see Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739, 795 (1989) (arguing for a “broad, literal interpretation of ‘social group.’”).

68. See GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 30 (Oxford University Press 1983); see generally Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in A Particular Social Group*, 26 CORNELL INT’L L.J. 505 (1993).

69. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group.”* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 215 (Erika Fuller, Volker Turk & Frances Nicholson, eds., 2003) (“An overly broad interpretation is resisted for several reasons. First, it is stated that the Convention was not intended to provide protection to all victims of persecution—only to those who come within one of the five Convention grounds Secondly, as a matter of legal logic, the social group cannot be read so broadly that it renders the other Convention grounds superfluous. Thirdly, it is argued that an overly broad definition of ‘particular social group’ would undermine the balance between protection and limited State obligations implicit in the Convention.”); see also JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS*, 157-59 (Cambridge University Press, 1991).

70. See Fatma Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” & its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 53-54 (2008); Anthony R. Enriquez, *Assuming Responsibility for Who You Are: The Right to Choose “Immutable” Identity Characteristics*, 88 N.Y.U. L. REV. 373, 389 (2013); see generally Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims*, 52 DEPAUL L. REV. 777 (2003).

71. JAMES C. HATHAWAY AND MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS*, 427 (Cambridge University Press, 2014) at 427.

72. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006).

2. *The UNHCR's Definition of a "Particular Social Group," Incorporates the Acosta Standard, as Does the Law in Many Other Countries*

The UN Refugee Convention created the Office of the United Nations High Commissioner for Refugees (UNHCR) to supervise the implementation of the Convention by State parties.⁷³ However, the UNHCR has no direct enforcement mechanism.⁷⁴ The UNHCR can only issue non-binding general recommendations and guidelines, although these are meant to serve as legal guidance for governments and judiciaries.⁷⁵

In 2002, the UNHCR issued "Guidelines on Membership of a Particular Social Group" and outlined an approach that incorporated the *Acosta* standard.⁷⁶ In the Guidelines, the UNHCR laid out a two-step analysis for defining particular social groups, incorporating both a "protected characteristic" approach and, as an alternative, a "social perception" approach.⁷⁷ The "protected characteristics" approach, also known as an "immutability approach," defines a particular social group as a group of persons sharing a common characteristic that is "innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."⁷⁸ The "social perception" test holds that if a group is recognized as a group in the society from which the asylum seeker fled, it may also be a particular social group.⁷⁹ However, the UNHCR explained that the "social perception" definition of a particular social group was only an alternative test.⁸⁰ If the common characteristic defining the group was immutable, unchangeable, or fundamental, no further analysis need be done.⁸¹

73. 1951 Convention, *supra* note 7, at art. 35; *see also* UNHCR & SUPERVISION OF INT'L REFUGEE LAW, *supra* note 32, at 21-22.

74. *See* UNHCR & SUPERVISION OF INT'L REFUGEE LAW, *supra* note 32, at 5.

75. *See* Statute of the Office of the U.N. High Comm'r for Refugees, G.A. Res. 428 (V) (Dec. 14, 1950); 1951 Convention, *supra* note 7, at art. 35; UNHCR Brief Henriquez-Rivas, *supra* note 37, at 10-11; *see also* U.N. High Comm'r for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A(2) the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HRC/GIP/02/02 (May 7, 2002) [hereinafter UNHCR, *Guidelines on Membership of a Particular Social Group*].

76. UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 75, at para. 10 (noting that state parties to the UN Refugee Convention had developed differing interpretations of a particular social group and that those interpretations should be reconciled).

77. *Id.* at para. 11-13.

78. *Id.* at para. 11. "[T]he 'protected characteristics' approach (sometimes referred to as an 'immutability' approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status) A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it." *Id.* at para 6.

79. *Id.* at para. 13.

80. *Id.*

81. *See id.*

The UNHCR's incorporation of the *Acosta* formulation into its own definition is just one indication of the international acceptance of that formulation. Common law countries with well-developed case law on asylum, including New Zealand, Canada, and the United Kingdom, have also adopted the *Acosta* immutability standard.⁸² Australia has adopted the UNHCR's approach, defining a particular social group as one whose members share common characteristics, or alternatively, are socially perceptible.⁸³ In contrast, however, the Council of the European Union has defined a particular social group as one that meets both the protected characteristic and social perception tests.⁸⁴ Nevertheless, the Council has noted that member states have the power to use a test more favorable to the protection seeker, and while most European states have underdeveloped refugee case law, only Germany has clearly adopted this dual requirement judicially.⁸⁵

While neither the UNHCR Guidelines nor decisions by foreign countries are binding on the United States, such decisions and guidelines are helpful in understanding whether U.S. interpretations are in accordance with the meaning and purpose of the UN Refugee Convention.⁸⁶ The widespread international acceptance of the *Acosta* immutable characteristics standard provides further support for maintaining this formulation without additional changes for particular social groups in the United States.

82. See Rossi, *supra* note 31, at 418 (citing *Ward v. Att'y Gen. of Can.*, [1993] 2 S.C.R. 689 (Can.); *Re GJ* [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995) (N.Z.), available at <http://www.unhcr.org/refworld/docid/3ae6b6938.html>; *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm>); see also Marouf, *supra* note 70, at 55-57.

83. *S v. Minister for Immigration and Multicultural Affairs* [2004] 206 ALR 242, ¶ 16 (Austl.); see also Benjamin Casper et al., *Matter of M-E-V-G- and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group,"* IMMIGR. BRIEFINGS 1, no. 14-06, 8 (June 2014).

84. Council Directive 2004/83/EC, art. 10, 2004 O.J. (L304/12), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>; Council Directive 2011/95/EU, art. 10, 2011 (L337/9), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>. The UNHCR has criticized the European Union for this language requiring a cumulative test, rather than an alternative test. See UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, 8 (2009), available at <http://www.unhcr.org/4c5037f99.pdf>.

85. Council Directive 2011, *supra* note 84 at Preamble, para 14, 2011; see also MICHELLE FOSTER, UNHCR DIV. OF INT'L PROT., THE 'GROUND WITH THE LEAST CLARITY': A COMPARATIVE STUDY OF JURISPRUDENTIAL DEVELOPMENTS RELATING TO 'MEMBERSHIP OF A PARTICULAR SOCIAL GROUP' 16, 24-27 (2012), available at <http://www.unhcr.org/4f7d8d189.pdf>; see also Brief of Fatma Marouf, Thomas & Mack Legal Clinic, Univ. of Nevada, Las Vegas, as Amici Curiae Supporting Petitioner, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, at 22 (9th Cir. 2012) [hereinafter Marouf Brief Henriquez-Rivas].

86. See Marouf, *supra* note 70, at 57; 1951 Convention, *supra* note 7, at art. 35; UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 75.

B. *The BIA Improperly Limited the Definition of “Particular Social Group” by Adding “Particularity” and “Social Visibility” Requirements*

Despite the widespread and longstanding acceptance of the *Acosta* definition of a particular social group in U.S. and international law, in 2006, the BIA laid out an additional requirement for a particular social group: “social visibility.”⁸⁷ In *Matter of C-A-*, the BIA held that “noncriminal government informants” could not constitute a particular social group because the very nature of the conduct at issue was secretive and kept out of the public eye, thus failing to satisfy a requirement of “social visibility.”⁸⁸ In reaching its decision, the BIA relied on the Second Circuit’s determination that a social group must be “externally distinguishable.”⁸⁹ The BIA also referenced the UNHCR Guidelines on Membership of a Particular Social Group,⁹⁰ interpreting the Guidelines to confirm “visibility” as an important factor in the determination of refugee status.⁹¹ In a case that followed, *Matter of A-M-E- and J-G-U-*, the BIA referenced both “social visibility” and “particularity” when analyzing whether or not a particular social group existed.⁹²

In 2008, in *Matter of S-E-G-*, a case that addressed particular social group membership based on resistance to gang recruitment, the BIA formally imposed the two new distinct requirements of “social visibility” and “particularity” for a proposed social group.⁹³ As to the particularity requirement, the BIA described the test as “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”⁹⁴ The BIA defined social visibility in *Matter of S-E-G-* to require that “the shared characteristics of the group should generally be recognizable by others in the community[.]”⁹⁵

The BIA, at the time it issued its decision in *Matter of S-E-G-*, gave no indication why it was adding two new requirements to the definition of a

87. *Matter of C-A-*, *supra* note 16, at 959.

88. *Id.* at 951, 960.

89. *Id.* at 956; *see also* *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

90. UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 75.

91. *Matter of C-A-*, *supra* note 16, at 951, 960; *see also* Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5, 11 (2010).

92. *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69, 74-76 (B.I.A. 2007) (holding that “affluent Guatemalans” fails as a particular social group under the social visibility and particularity requirements).

93. *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008) (holding that “Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” was not a particular social group); *see also* *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008) (holding that “young persons who are perceived to be affiliated with gangs” are not a particular social group).

94. *Matter of S-E-G-*, 24 I. & N. Dec. at 584.

95. *Id.* at 586.

particular social group.⁹⁶ In a later decision, the BIA explained that the *Acosta* definition had led to “confusion and a lack of consistency.”⁹⁷ The BIA claimed that it added the new requirements in order “to provide clarification and address the evolving nature of the claims presented by asylum applicants.”⁹⁸

1. *The BIA’s New Requirements Led to a Circuit Split, with the Seventh and the Third Circuit Rejecting the New Requirements*

In the wake of *Matter of C-A-* and *Matter of S-E-G-*, the circuits split as to whether to accord *Chevron* deference to the requirements of “particularity” and “social visibility.” Most circuits followed the BIA interpretation, with the First,⁹⁹ Second,¹⁰⁰ Fifth,¹⁰¹ Sixth,¹⁰² Eighth,¹⁰³ and Eleventh¹⁰⁴ Circuits explicitly accepting the BIA’s additional requirements. Other circuits, including the Fourth,¹⁰⁵ Ninth,¹⁰⁶ and

96. *Matter of C-A-*, 23 I. & N. Dec. at 960; *Matter of E-A-G-*, 24 I. & N. Dec. at 591; *Matter of S-E-G-*, 24 I. & N. Dec. at 579, 584.

97. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 231-32 (B.I.A. 2014). (“At the time we issued *Matter of Acosta* . . . relatively few particular social group claims had been presented to the Board . . . Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes.”).

98. *Id.* at 232.

99. *Scatambuli v. Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009) (rejecting the proposed particular social group of “noncriminal government informants” and reasoning that the BIA permissibly elaborated on the pre-existing definition of a “particular social group”); *see also* *Tay-Chan v. Holder*, 699 F.3d 107 (1st Cir. 2012); *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010).

100. *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007) (holding that the BIA’s interpretation of particular social group in *Matter of Acosta* and *Matter of C-A-* is “reasonable and merits our deference under *Chevron*”); *see also* *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).

101. *Orellana-Monson v. Holder*, 685 F.3d 511, 520 (5th Cir. 2012) (“[W]e stand with the majority of our sister circuits by deciding that the BIA’s interpretation of the term “particular social group” is entitled *Chevron* deference.”).

102. *Umana-Ramos v. Holder*, 724 F.3d 667, 671-72 (6th Cir. 2013) (“The BIA’s definition of “particular social group” warrants deference . . . and thus “[w]e defer to the *reasonable* boundaries that the Board creates with respect to the phrase.”) (citing *Solis-Gonzalez v. Holder*, 523 Fed. Appx. 320, 321, (6th Cir. 2013)).

103. *Gaitan-Gamez v. Holder*, 671 F.3d 678, 681-82 (8th Cir. 2012) (“As a result, this court cannot find that the social visibility and particularity requirements articulated in *Matter of S-E-G-* are arbitrary or capricious . . .”); *see also* *Constanza v. Holder*, 647 F.3d 749, 753-54 (8th Cir. 2011); *Ortiz-Puentes v. Holder*, 662 F.3d 481 (8th Cir. 2011).

104. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) (finding that non-criminal drug informants were not a “particular social group,” under the “social visibility” requirement).

105. *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2011) (The Court applied the new requirements but noted that it has “not yet decided whether such requirements comports with the INA.”).

106. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (The Court never describes “social visibility” and “particularity” as requirements but does state that the BIA clarified that a group must have both in order to constitute a particular social group); *see also* *Ramos-Lopez v. Holder*, 563 F.3d 855, 858-62 (9th Cir. 2009) (finding that “young Honduran men who have been recruited by MS-13 but refuse to join” is a group that is both too large and not visible to Honduran society); *but see*

Tenth¹⁰⁷ either signaled a qualified acceptance of the new BIA requirements or applied the new factors without specifically ruling on them.

The Seventh and Third Circuits, on the other hand, explicitly or implicitly refused to apply *Chevron* deference to the BIA's new requirements, holding that they were inconsistent with *Matter of Acosta* and numerous previous decisions.¹⁰⁸ In 2009, in *Gatimi v. Holder*, the Seventh Circuit rejected the BIA's "social visibility" test.¹⁰⁹ The Seventh Circuit specifically found that that the BIA's additional requirement of "social visibility" was inconsistent with the BIA's previous decisions, citing to cases in which the BIA found "particular social groups" to be cognizable without consideration to "social visibility."¹¹⁰ The Seventh Circuit also found the new requirement to be unreasonable, explaining that persecuted groups often seek to "avoid being socially visible."¹¹¹ As a result of its holding that the BIA's ruling was both inconsistent with previous decisions and unreasonable, the Seventh Circuit held that the "social visibility" requirement was not entitled to deference.¹¹²

In 2011, the Third Circuit explicitly agreed with the Seventh Circuit and refused to apply *Chevron* deference to both BIA requirements of "social visibility" and "particularity."¹¹³ In *Valdiviezo-Galdamez v. Attorney General of the United States*, the Third Circuit held that the new requirements were inconsistent with the BIA's previous decisions and that they were an "unreasonable addition" to the particular social group definition.¹¹⁴ Regarding the "social visibility" requirement, the Third Circuit argued that for

Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013) (The Ninth Circuit specified that "social visibility" was only consistent with BIA precedent so long as it did not mean "on-sight" visibility. "Absent a requirement of on-sight visibility, "social visibility" as detailed in C-A- is consistent with BIA precedent prior to C-A-").

107. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 650, 652 (10th Cir. 2012) (The Tenth Circuit noted that the BIA's social visibility requirement was inconsistent with the UNHCR's definition in which social visibility was to be used as an alternative test, but held that this inconsistency did not make the BIA's test *per se* unreasonable.).

108. *See Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009); *Valdiviezo-Galdamez v. U.S. Att'y Gen.*, 663 F.3d 582, 606 (3d Cir. 2011).

109. *Gatimi v. Holder*, 578 F.3d at 613-16 (Gatimi and his family were defectors of the Mungiki group, a political and religious violent group in Kenya. The BIA held that defectors of the Mungiki group did not constitute a particular social group because they lacked "social visibility").

110. *Id.* (citing *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (young women of a tribe that practices female genital mutilation but who have not been subjected to it); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (homosexuals); *In re Fuentes*, 19 I. & N. Dec. at 662 (former members of the national police); *In re Acosta*, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985) (former military leaders or land owners)).

111. *Gatimi v. Holder*, 578 F.3d at 615-16 (The Court argued that if "social visibility" was required in *Gatimi's* case, "[t]he only way, in the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'").

112. *Id.* ("[W]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate.") (citing *AT & T Inc. v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006); *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002)).

113. *Valdiviezo-Galdamez*, 663 F.3d at 606-07.

114. *Id.* at 604.

groups previously recognized as particular social groups, the new social visibility requirement would provide an insurmountable obstacle for members of those groups if they were to apply for asylum today.¹¹⁵ The Third Circuit also criticized the “particularity” requirement. The court argued that “particularity” and “social visibility” were merely “different articulations of the same concept” and thus, “particularity” was also inconsistent with prior BIA decisions and unreasonable.¹¹⁶

2. *The UNHCR, Scholars, and Immigration Advocates Reject the New BIA Requirements*

In response to BIA’s narrowing of the definition of particular social group, the UNHCR submitted an amicus brief to the Third Circuit in *Valdiviezo-Galdamez* for guidance on relevant international standards.¹¹⁷ In its amicus brief, the UNHCR argued that the BIA relied upon an “incorrect” interpretation of the UNHCR Guidelines on Membership of a Particular Social Group when adding “social visibility” and “particularity” to the definition of a particular social group.¹¹⁸ The UNHCR reiterated that the analysis of a particular social group was a two-step analysis.¹¹⁹ Only if the proposed group is found not to share an immutable or fundamental characteristic, should further “social perception” analysis be done to determine “whether the group is nonetheless perceived as a cognizable group in that society.”¹²⁰ In an amicus brief to the Ninth Circuit in *Henriquez-Rivas v. Holder*, the UNHCR put the BIA’s error in stark terms noting that “[i]nexplicably, and without justification, the Board has turned this disjunctive into a conjunctive. Put differently, the Board has turned “*Acosta or*” into “*Acosta and*.”¹²¹

The UNHCR further criticized the BIA’s formulation of both “social visibility” and “particularity.” According to the UNHCR, whether a group is perceived as a group in society requires that members share “a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large.”¹²² It does not

115. *Id.*

116. *Id.* at 608 (“We are hard pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility.’ Indeed, they appear to be different articulations of the same concept[.]”).

117. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae Supporting Petitioner, *Valdiviezo-Galdamez v. U.S. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011), available at <http://www.unhcr.org/refworld/docid/49ef25102.html> [hereinafter UNHCR Brief *Valdiviezo-Galdamez*]; see also UNHCR Brief *Henriquez-Rivas*, *supra* note 37.

118. UNHCR Brief *Valdiviezo-Galdamez*, *supra* note 117, at 3-4 (“S-E-G- and the line of decisions the Board relied on in the instant case inaccurately cite the *UNHCR Social Group Guidelines* in support of the ‘social visibility’ requirement. This interpretation of the UNHCR Guidelines is incorrect.”).

119. *Id.* at 4; see also UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 75.

120. UNHCR Brief *Valdiviezo-Galdamez*, *supra* note 117, at 10.

121. UNHCR Brief *Henriquez-Rivas*, *supra* note 37, at 17.

122. UNHCR Brief *Valdiviezo-Galdamez*, *supra* note 117, at 11.

require that this group be visible to the “naked eye in a literal sense of the term.”¹²³ In regards to the BIA’s requirement of “particularity,” the UNHCR argued that the size of a particular social group is not a “relevant criterion” for the determination of a particular social group.¹²⁴ Notably, the UNHCR stated that the BIA’s addition of the new requirements for defining a particular social group is inconsistent with the “purpose and intent of the 1951 Convention and the 1967 Protocol.”¹²⁵

Scholars and immigration advocates also strongly criticized the BIA’s requirements as set forth in *Matter of S-E-G*.¹²⁶ Critics echoed the UNHCR’s clarification of its formulation for a particular social group and affirmed the error made by the BIA in interpreting the UNHCR Guidelines.¹²⁷ Scholars also faulted the BIA for conflating the analysis of a particular social group with nexus,¹²⁸ and for failing to define either particularity or social visibility clearly.¹²⁹ Finally, many criticized the BIA’s requirement of social visibility, arguing that if it meant ocular visibility, this requirement was inconsistent with previous cases.¹³⁰

C. *The BIA Attempts to Clarify the “Social Visibility” and “Particularity” Requirements: Matter of M-E-V-G- and Matter of W-G-R-*

In the face of criticism from scholars, immigration activists, the Seventh and Third Circuits, and the UNHCR, the BIA issued two precedential decisions in February of 2014 clarifying the requirements for establishing a

123. *Id.*

124. *Id.* at 15.

125. *Id.* at 3; *see also* UNHCR Brief Henriquez-Rivas, *supra* note 37, at 4.

126. *See* Casper, *supra* note 83, at 1; *see, e.g.*, Letter from Deborah Anker, et al. (on behalf of seventy-two immigration law professors and instructors), Clinical Professor of Law, Director, Harvard Immigration & Refugee Clinical Program, Harvard Law School, as Amici Curiae Supporting Respondents for Certification of Matter of S-E-G-, to Eric H. Holder, Att’y Gen. (Jan. 27, 2010), available at http://www.ilcm.org/litigation/AG_certification_amicus_law_professors.PDF; [HEREINAFTER ANKER AMICI LETTER]; BENJAMIN CASPER, REGINA GERMAIN, AND ILANA GREENSTEIN, THE CONVOLUTION OF PARTICULAR SOCIAL GROUP LAW: FROM THE CLARITY OF ACOSTA TO THE CONFUSION OF S-E-G-, AM. IMMIGR. LAWYERS ASS’N (2010), available at https://www.ilcm.org/documents/litigation/AILA_Advisory_Social_Group-new.pdf [hereinafter THE CONVOLUTION OF PSG LAW]; Marouf, *supra* note 70; Frydman & Desai, *supra* note 22; Marouf Brief Henriquez-Rivas, *supra* note 85; Letter from NAT’L IMMIGRANT JUSTICE CTR., et al. (on behalf of seventeen HRL organizations and practitioners), as Amici Curiae Supporting Respondents for Certification of Matter of S-E-G-, to Eric H. Holder, Att’y Gen. 2 (Jan 27, 2010), available at http://www.ilcm.org/litigation/AG_certification_amicus_NIJC.pdf; Brief for NAT’L IMMIGRANT JUSTICE CTR., as Amici Curiae in Support of Petitioner, Henriquez-Rivas vs. Holder, 707 F.3d 1081 (9th Cir. 2012), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/HENRIQUEZ%20NIJC%20amicus%20Final.pdf> [hereinafter NAT’L IMMIGRANT JUSTICE CTR. Amici Curiae Brief].

127. *See, e.g.*, THE CONVOLUTION OF PSG LAW, *supra* note 126, at 568.

128. *See, e.g.*, Anker Amici Letter, *supra* note 126, at 4; Frydman & Desai, *supra* note 22, at 3.

129. *See, e.g.*, Frydman & Desai, *supra* note 22, at 3; THE CONVOLUTION OF PSG LAW, *supra* note 126, at 568-69.

130. *See* NAT’L IMMIGRANT JUSTICE CTR. Amici Brief, *supra* note 126, at 2; Anker Amici Brief, *supra* note 126, at 3; THE CONVOLUTION OF PSG LAW, *supra* note 126, at 565-69; Rossi, *supra* note 31, at 417-20.

particular social group.¹³¹ In *Matter of M-E-V-G-* and *Matter of W-G-R-*, the BIA claimed it was addressing confusion resulting from the *Acosta* definition;¹³² however, it did not analyze the immutable characteristic standard in these companion cases.¹³³ Instead, the BIA attempted to refine what it meant by “social visibility” and “particularity,” and formalized a three-part test for establishing a particular social group.¹³⁴ The BIA’s new test requires that a particular social group be “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”¹³⁵

In *Matter of M-E-V-G-*, the BIA clarified that the social visibility factor does not require “literal” or “ocular” visibility.¹³⁶ The BIA stated that social visibility instead means “social distinction” or whether the group is recognized as a distinct entity within the society from which the asylum applicant is fleeing.¹³⁷ The BIA also explained that society, not the persecutor, must hold the perception that the social group exists.¹³⁸ However, the BIA did not ultimately decide whether or not the proposed social group of “Honduran youth who had been actively recruited by gangs but who have refused to join because they opposed the gangs” was cognizable, and instead remanded the case for analysis in light of its clarification.¹³⁹

The BIA addressed particularity in *Matter of M-E-V-G-*, holding that a particular social group “must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”¹⁴⁰ In addition, “[t]he group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”¹⁴¹

In *Matter of W-G-R-*, the BIA held that “particularity” chiefly addresses the question of delineation, or as earlier court decisions described it, the need to put ‘outer limits’ on the definition of ‘particular social group.’”¹⁴² The proposed social group, “former members of the Mara18 gang in El Salvador who have renounced their gang membership,” lacked particularity because it

131. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014).

132. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 231-32.

133. See Casper, *supra* note 83, at 18.

134. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 227.

135. *Id.* at 238.

136. *Id.* at 228 (“The term was never meant to be read literally. The renamed requirement ‘social distinction’ clarifies that social visibility does not mean ‘ocular’ visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be “ocularly” visible to others in society.”).

137. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227; see also *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014) (The BIA stated that, “[s]ocial distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group.”).

138. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242 (Social distinction is “determined by the perception of the society in questions, rather than by the perception of the persecutor.”).

139. *Id.* at 228, 253.

140. *Id.* at 239 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (2007)).

141. *Id.* at 240.

142. *Matter of W-G-R-*, 26 I. & N. Dec. at 214.

was “too diffuse, as well as being too broad and subjective.”¹⁴³ As with “social distinction,” particularity must also take into account the societal context where the claim arises.¹⁴⁴

In both *M-E-V-G-* and *W-G-R-*, the BIA acknowledged that there was overlap between particularity and social distinction, specifically because both must take account of the societal context of the claim in question.¹⁴⁵ However, the BIA argued that the “social distinction” and “particularity” requirements emphasize a different aspect of a particular social group.¹⁴⁶

Five circuit courts have weighed in on the BIA’s clarified “particularity” and “social distinction” requirements. The Second Circuit gave express deference to the new clarified requirements,¹⁴⁷ and the Fourth Circuit incorporated the clarified requirements in its analysis of a particular social group.¹⁴⁸ The First and the Tenth Circuits, having previously adopted the “social visibility” and “particularity” requirements, discussed the clarifications but argued that they do not necessitate a change in the analysis of whether a particular social group is cognizable.¹⁴⁹ The Ninth Circuit discussed the clarifications but expressly left open the question of whether the BIA’s requirements of “social distinction” and “particularity” constitute a reasonable interpretation of a particular social group.¹⁵⁰

143. *Id.* at 221.

144. *Id.* at 214 (“The definition of a particular social group is not addressed in isolation, but rather in the context of the society out of which the claim for asylum arises. In assessing a claim, it may be necessary to take into account the social and cultural context of the alien’s country of citizenship or nationality.”).

145. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240-41; *Matter of W-G-R-*, 26 I. & N. Dec. at 214.

146. *Matter of W-G-R-*, 26 I. & N. Dec. at 214.

147. *Paloka v. Holder*, 762 F.3d 191, 196 and 199 (2d Cir. 2014) (In remanding the case to consider whether “young Albanian women” or “young Albanian women between the ages of 15 and 25” qualify as a particular social group, the court stated that it gives *Chevron* deference to the BIA’s requirements of social distinction and particularity as clarified in *Matter of M-E-V-G-* and *Matter of W-G-R-*).

148. *Oliva v. Lynch*, 807 F.3d 53, 58 and 62 (4th Cir., 2015) (The Court laid out the new requirements for a particular social group, but remanded the case to the BIA to determine if the proposed social groups of “Salvadorans who are former members of MS-13 and who left the gang, without its permission, for moral and religious reasons,” or “Salvadorans who were recruited to be members of MS-13 as children and who left the gang as minors, without its permission, for moral and religious reasons,” were cognizable in light of unconsidered evidence.).

149. *Paiz-Morales v. Lynch*, 795 F.3d 238, 243 (1st Cir. 2015) (The Court declined to remand the case based on *M-E-V-G-* stating that “the change in terminology did not depart from the BIA’s prior interpretation, but merely clarified that literal ocular visibility “is not, and never has been, a prerequisite for a viable particular social group.”); *Rodas-Orellana*, 780 F.3d 982, 991 and 998 (10th Cir. 2015) (In finding that “El Salvadoran males threatened and actively recruited by gangs, who resist joining because they oppose the gangs” was not socially distinct and therefore not a particular social group, the court held that “*Matter of M-E-V-G-* and *Matter of W-G-R-* do not alter this analysis.”).

150. *Pirir-Boc v. Holder*, 750 F.3d 1077, 1085 (9th Cir. 2014). (“Here, once again, we leave open the question of whether the BIA’s construction of “particular social group” is reasonable. First, we have not been asked to do so. Second, and more important, as is clear from *W-G-R-* and *M-E-V-G-*, the term is in flux, and it is premature to determine precisely how the rule will be implemented.”).

D. “Particularity” and “Social Distinction” Requirements Are Unacceptable Additions to the Particular Social Group Definition

In *Matter of M-E-V-G-* and *Matter of W-G-R-*, the BIA claimed that “particularity” and “social distinction” are not new requirements, rather they are simply a clarification of the *Acosta* immutability test.¹⁵¹ The BIA claimed that it merely “clarified the definition of the term [particular social group] to give it more ‘concrete meaning through a process of case-by-case adjudication.’”¹⁵² As support for this claim, the BIA cited the Fifth Circuit statement that the “particularity” and previous “social visibility” requirements were “not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA’s prior decisions on similar cases.”¹⁵³

On the contrary, the new three-part test for a particular social group is a significant change. In order to demonstrate that one is member of a particular social group, an asylum applicant must provide evidence to meet not just the immutability standard, but the two additional requirements as well. Failure to meet any one of those three elements is fatal to a proposed social group. It is notable that in *Matter of W-G-R-*, the BIA never considered whether or not the proposed social group was composed of persons who share an immutable characteristic.¹⁵⁴ Rather, the BIA simply held that the proposed group failed to meet the “particularity” requirement and that the applicant failed to provide evidence demonstrating “social perception.”¹⁵⁵ Thus, the *Acosta* test was not even considered in the BIA’s decision, being superseded by the “social distinction” and “particularity” requirements.

Practically, having to meet this new three-part test greatly increases the evidentiary burden of an asylum applicant.¹⁵⁶ In *Matter of M-E-V-G-*, the BIA made clear that “a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way.”¹⁵⁷ The BIA states that evidence such as “country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ or ‘other’ in a particular society.”¹⁵⁸ However, the BIA does not explain how these pieces of

151. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237 (“By defining these concepts in *Matter of C-A-* and the cases that followed it, we did not depart from or abrogate the definition of a particular social group that was set forth in *Matter of Acosta*; nor did we adopt a new approach to defining particular social groups under the Act.”); *Matter of W-G-R-*, 26 I. & N. Dec. at 211.

152. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 237.

153. *Id.* at 237 (citing *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012)).

154. *Matter of W-G-R-*, 26 I. & N. Dec. at 208.

155. *Id.*

156. An asylum applicant has the burden of establishing that he meets the definition of a refugee. 8 C.F.R. § 208.13(a)–(b) (2015).

157. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 244.

158. *See id.*

evidence will demonstrate something as intangible as a “societal perception.”¹⁵⁹

These new requirements are unduly burdensome, particularly for *pro se* applicants. Having a lawyer is one of the most important factors in determining an applicant’s success.¹⁶⁰ Not only might it be difficult to obtain necessary evidence, but a *pro se* applicant without knowledge of asylum law will have difficulty articulating a social group that meets the new requirements.¹⁶¹ However, while asylum seekers are allowed to have an attorney to represent them,¹⁶² the government does not provide counsel for asylum seekers, not even for children.¹⁶³ Many asylum seekers cannot afford representation,¹⁶⁴ and *pro bono* immigration legal services are extremely limited.¹⁶⁵

More importantly, the combined requirements of “particularity” and “social distinction” create a potentially unsolvable dilemma. Particularity, as defined by the BIA in *Matter of M-E-V-G-*, suggests hard limits and requires specificity of definition.¹⁶⁶ A group cannot be too broad or too diffuse. However, if a proposed social group has been defined with sufficient particularity, then it would likely be too narrow to meet the requirement of social distinction.¹⁶⁷ For example, in *Matter of W-G-R-*, the BIA held that the proposed group of “former gang members” needed to be defined with more specificity.

[W]hen a former association is the immutable characteristic that defines a proposed group, the group will often need to be further defined with

159. See Marouf, *supra* note 70, at 71-78.

160. See Jaya Ramji-Nogales, Andrew Schoenholtz, & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (noting that represented asylum seekers were granted asylum 45.6 percent of the time, while those without representation were granted asylum only 16.3 percent of the time).

161. See NAT’L IMMIGRANT JUSTICE CTR., *Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R-* 5 (Feb. 2014) [hereinafter NIJC, *Particular Social Group Practice Advisory*]; see also NAT’L IMMIGRANT JUSTICE CTR. Amici Curiae Brief, *supra* note 126, at 15-16 (describing the asylum application form which asks an applicant to name the protected ground on which their application is based, but in the case of the ground of membership in a particular social group, does not ask the applicant to define the group nor give any guidance on what qualifies as a particular social group).

162. INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A).

163. *Id.*

164. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIG. REV., OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, *FY 2014 Statistics Year Book F1* (Mar. 2015), available at <http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf> (“Many individuals who appear before EOIR [immigration courts] are indigent and cannot afford a private attorney”).

165. See Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008).

166. See generally *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).

167. See Linda Kelly, *The New Particulars of Asylum’s “Particular Social Group,”* 36 WHITTIER L. REV. 219, 232 (2015); see also NIJC, *Particular Social Group Practice Advisory*, *supra* note 161, at 5 (“Thus, the particularity requirement, as defined in *M-E-V-G-* and *W-G-R-*, effectively precludes the use of common parlance labels to describe a PSG, even as the social distinction test requires that a PSG be limited by parameters a society would recognize.”).

respect to the duration or strength of the members' active participation in the activity and the recency of their active participation if it is to qualify as a particular social group under the Act.¹⁶⁸

If the proposed group in *Matter of W-G-R* had been defined with this degree of particularity, it is unlikely that the Respondent would have been able to find sufficient evidence to demonstrate social distinction. For example, former gang members who were leaders within the last two years would not necessarily be socially distinguishable from former gang members who were only members five years ago. This is a dilemma that many applicants now face when attempting to articulate their particular social group under the new requirements.

Finally, the BIA's articulation of the "particularity" requirement is problematic because it implies that the size of a group should be considered when determining particularity.¹⁶⁹ In *Matter of S-E-G*, the BIA states that the size of a proposed group may be an important factor in a social group analysis,¹⁷⁰ and holds that one reason for the failure of the proposed groups in that case was that they made up "a potentially large and diffuse segment of society[.]"¹⁷¹ In *Matter of M-E-V-G*, the BIA held that "the 'particularity' requirement relates to the group's boundaries or . . . the need to put 'outer limits' on the definition of a 'particular social group.'"¹⁷²

The UNHCR has criticized the BIA's formulation of "particularity," arguing that the size of a particular social group is not a "relevant criterion" for the determination of a particular social group.¹⁷³ Several circuit courts have also stated that the size or breadth of a particular group should not preclude the court from finding the group to be cognizable.¹⁷⁴ Indeed, the INA does not require that a particular social group be limited by size, and a size limitation is improper. If the BIA is truly applying the *ejusdem generis*

168. *Matter of W-G-R*, 26 I. & N. Dec. 208, 221-22 (B.I.A. 2014).

169. See Kelly, *supra* note 167, at 233 ("Despite the BIA's protestations to the contrary, 'particularity' remains a means of arbitrarily restricting the size of a 'particular social group.'").

170. *Matter of S-E-G*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) ("While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently 'particular[.]'").

171. *Id.* at 585.

172. *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 238-39 (B.I.A. 2014) (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)) ("The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.").

173. UNHCR Brief Valdiviezo-Galdamez, *supra* note 117, at 15; see also UNHCR Brief Henriquez-Rivas, *supra* note 37, at 21 ("[I]t is a well-established principle that 'the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.'").

174. See Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010) (noting that "the size and breadth of a group alone does not preclude a group from qualifying as such a social group."); Cece v. Holder, 733 F.3d 662, 673-74 (7th Cir. 2013) (noting that "the breadth of category has never been a per se bar to protected status.").

principle to the formulation of a particular social group,¹⁷⁵ then size or breadth limitations, explicit or otherwise, on a particular social group fail that principle. No “outer limits” on size or breadth are required for the other protected grounds.¹⁷⁶ A member of a persecuted religious group or political party could still have a basis for an asylum claim even if the members of the religious group or political party were a majority in the country.

One of the often-cited justifications for limiting the definition of particular social groups is the floodgates argument: the argument that when a particular social group is defined too broadly, it will result in a flood of new asylum seekers to the United States.¹⁷⁷ Asylum claims arising from our neighbors to the south have historically awakened a fear of a rising flood of asylum seekers.¹⁷⁸ As will be explored in Section IV, the BIA narrowed the definition of “particular social group,” incorporating the new “social distinction” and “particularity” requirements, in the context of gang-based claims, most likely in order to limit the success of such claims.¹⁷⁹

This reaction is inappropriate for several reasons. First, the argument that allowing for a broad definition of a particular social group will result in a flood of new asylum seekers is specious because there are other requirements in place that limit successful claims. Even if an asylum applicant is found to be a member of a particular social group, she still faces the difficult challenge of demonstrating that she has a well-founded fear of returning to her home country and that there is a nexus between her persecution and her particular social group.¹⁸⁰ Children targeted for recruitment by gangs or armed forces, even if they can demonstrate that they are members of a cognizable social group, will still have to prove that they were persecuted on account of their membership in that group. For example, if an armed force or a gang forcibly recruits individuals without discrimination simply to fill their ranks, then a

175. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

176. See UNHCR Brief Henriquez-Rivas, *supra* note 37, at 22.

177. See, e.g., DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 487 (7th ed. 2014); Rossi, *supra* note 31, at 423-28 (2013); CTR. FOR GENDER & REFUGEE STUDIES ET AL., *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* 22 (2014) [hereinafter *A TREACHEROUS JOURNEY*]; Frydman & Desai, *supra* note 22, at 3 n.23.

178. Frydman & Desai, *supra* note 22, at 28; Musalo, *supra* note 22, at 132-33; Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and its Application to Those Fleeing Drug Violence in Mexico*, 27 *GEO. IMMIGR. L.J.* 135, 139 (2012) (“Specifically, many adjudicators likely fear that favorable asylum decisions will provoke a torrent of Mexican asylum seekers at U.S. ports of entry, clogging the asylum system and leading to fraudulent claims.”).

179. See *infra* Section IV.B.; see also Casper, *supra* note 83, at 21; Rossi, *supra* note 31, at 423 (“What, exactly, is preventing the courts or Congress from amending the asylum laws—in particular, clarifying the meaning of “particular social group” and creating defenses to the overbroad exclusionary bars—so that former child soldiers can access asylum protection in the United States? The answer likely is twofold: the government fears, first, that liberalizing the definition of ‘particular social group’ will open the so-called floodgates of applicants from South America with gang-related claims, and, second, that weakening the exclusionary bars might lead to the admission of people who are a danger to national security.”).

180. See Matthew D. Muller, Deborah E. Anker & Lory Diana Rosenberg, *Escobar v. Gonzalez: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Claims*, 10 *U.C. DAVIS J. JUV. L. & POL’Y* 243, 248-49.

claim from a child fleeing that forced recruitment may fail because of a lack of nexus.¹⁸¹

In addition, an asylum seeker who qualifies as a refugee may still be denied asylum if certain statutory bars are applicable.¹⁸² These bars include participation by the asylum seeker in the persecution of others, the commission by the asylum seeker of a serious nonpolitical crime outside of the United States prior to arrival, giving material support to a terrorist organization, or convincing reasons to believe the asylum seeker poses a threat to national security.¹⁸³ Children that were forced to become child soldiers or gang members may well be barred from asylum depending on what crimes or acts they may have perpetrated.

Historically, the floodgate concern has proven to be unfounded in previous cases where it was argued. For example, the floodgates argument was made when the BIA found in *In Re Kasinga* that “young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice” were members of a particular social group.¹⁸⁴ Yet, this decision has not led to a marked increase in FGM-related cases.¹⁸⁵ The floodgates argument was raised again when the courts were considering whether or not to acknowledge domestic violence as a potential basis for asylum.¹⁸⁶ However, now that domestic violence can be the basis of a successful asylum claim,¹⁸⁷ there has not been a dramatic increase in the number of women seeking asylum in the United States.¹⁸⁸

181. See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (“[I]t is important to distinguish between the inquiry into whether a group is a ‘particular social group’ and the question whether a person is persecuted ‘on account of’ membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus.”). A discussion of nexus as it applies to children fleeing forced recruitment is outside the scope of this paper, but for an excellent discussion of nexus issues see Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377 (2014); Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465 (2015).

182. INA § 208(b)(2); 8 U.S.C. § 1158(b)(2) (2014).

183. *Id.*

184. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

185. See Muller et al., *supra* note 180, at 248 (citing U.S. Citizenship and Immigr. Serve’s., *Questions and Answers on the R-A-Rule* (Dec. 7, 2000), available at http://cgis.uchastings.edu/sites/default/files/RA_Rule_USCIS_12_07_2000.pdf).

186. See Musalo, *supra* note 22, at 132-33.

187. See *Matter of R-A-*, 24 I. & N. Dec 629 (B.I.A. 2008); *Y.V.Z. v. U.S. Att’y Gen.*, 492 Fed. Appx. 291 (3d Cir. 2012); see also U.S. CITIZEN & IMMGR. SERV’S, ASYLUM OFFICER BASIC TRAINING, FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS 15 (Mar. 2009), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/AOBT%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>.

188. Musalo, *supra* note 22, at 132-33 (after explicitly noting that there was no “appreciable increase in the number of claims based on FGM” after the *Kasinga* decision, the INS stated that “it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum”); see also U.S. Dep’t of Homeland Sec. Supplemental Brief in *Matter of L-R-* 13 n.10 (April 2009) available at http://cgis.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf (stating that there has not been a notable increase in asylum claims on the basis of domestic violence).

Finally, neither the BIA nor the immigration courts should be interpreting immigration law so as to manage the flow of incoming asylum seekers for political purposes.¹⁸⁹ Courts should not be making broad policy decisions outside of Congressional action.¹⁹⁰ Nor should courts be interpreting the law in a manner that diverges from internationally recognized norms of protection.¹⁹¹ The BIA misconstrued the UNHCR Guidelines on Membership in a Particular Social Group and impermissibly narrowed the definition of a social group.¹⁹² As a result, U.S. law regarding particular social group claims diverges from internationally recognized norms of protection.

II. SIMILAR EXPERIENCES BUT DIFFERING NARRATIVES: BACKGROUND ON CHILD SOLDIERS AND CHILDREN IN GANGS

The new definition of a particular social group was developed in the context of gang-related claims and has been devastating to claims from children fleeing gangs in Central America, as will be discussed fully in Section IV. If the new definition of particular social group is applied consistently, it will also be devastating to the claims of children in similar circumstances, including children fleeing forced recruitment as child soldiers. While the new definition was most likely intended to limit claims from individuals fleeing gangs in Central America, its potential negative effect upon other children fleeing forced recruitment was likely an unintended consequence. This is because children fleeing gangs in Central America and children fleeing armed forces are viewed through dramatically different narrative lenses. Children fleeing gangs face suspicion and hostility in the United States,¹⁹³ yet there is significant concern for and advocacy on behalf of child soldiers both in the United States and internationally.¹⁹⁴

These differing narratives exist even though the experiences of children who are forcibly recruited as child soldiers and the experiences of children

189. See Harville, *supra* note 178, at 183 (“An adjudicator seeking to use floodgates concerns to deny asylum relief will not find legal justification within the pages of the immigration statute. In fact, if an immigration judge were to deny relief explicitly based on floodgates concerns, the decision would almost certainly be overturned as an unconstitutional violation of due process and equal protection.”).

190. See Muller et al., *supra* note 180, at 248 n.18 (citing Petition for Rehearing En Banc 12, Escobar v. Gonzales, 417 F.3d 363 (3d Cir. 2005) (“if Congress concludes that the current law grants asylum to too many persons, it is free to modify that law, but it is not this Court’s function to make such policy determinations.”)).

191. See Harville, *supra* note 178, at 183-84 (“[O]ne would be extremely hard-pressed to argue that the history and spirit of refugee law supports asylum denials based on floodgates concerns.”).

192. UNHCR Brief Valdiviezo-Galdamez, *supra* note 117. See also Hathaway and Foster, *supra* note 71 at 432. (“The notion that both tests must be met is impossible to justify by reference to the rules of treaty interpretation; indeed, there has been no attempt to explain the principled bases on which such an approach could be supported.”)

193. Rick Moran, *Huge majority of Americans want the illegal alien kids to go home*, AMERICAN THINKER (July 28, 2014); A TREACHEROUS JOURNEY, *supra* note 177, at 62.

194. ROMEO DALLAIRE, *THEY FIGHT LIKE SOLDIERS, THEY DIE LIKE CHILDREN: THE GLOBAL QUEST TO ERADICATE THE USE OF CHILD SOLDIERS* (Walker & Co. 2010).

recruited by gangs in Central America are virtually indistinguishable. Children forcibly recruited by gangs share many of the same characteristics as children recruited by armed forces to be child soldiers. Gangs and armed forces recruit children because of the vulnerabilities of age that make the children easily manipulated and controlled.¹⁹⁵ If children resist recruitment, members of the gangs or armed forces threaten the children with harm or death.¹⁹⁶ Once recruited, leaders in the groups subject the children to the same horrific abuses and treatment.¹⁹⁷ It is difficult or impossible for child soldiers or child gang members to leave their groups, and if they try to leave, they face the same threats of severe harm and death.¹⁹⁸ If they do manage to escape, they face a negative social stigma, as well as exile and punishment from their families, neighbors, and governments.¹⁹⁹

A comparison of the experiences of both groups of children demonstrates the speciousness of the different narratives. It also serves as a powerful demonstration of the problem with interpreting asylum standards so as to limit the cognizability of specific claims. The negative impact of the new definition of a particular social group will not be limited to those fleeing gangs in Central America, but will also negatively impact other groups of children that otherwise engender worldwide sympathy and support.

A. *Child Soldiers*

Human rights groups estimate that there are hundreds of thousands of boys and girls under the age of eighteen serving in armed conflicts in almost every region of the world.²⁰⁰ However, very few children fleeing forced recruitment as child soldiers make it to the United States to apply for asylum.²⁰¹ Many of the countries in which children are used as soldiers are countries

195. See, e.g., Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 *BERKELEY LA RAZA L.J.* 109, 153 (2013); Melissa James, *Fleeing the Maras: Child Gang Member Seeking Refugee Status in the United States*, 25 *CHILD. LEGAL RTS. J.* 1, 6 (2005); MICHAEL WESSELLS, *CHILD SOLDIERS* 35-36 (Harvard University Press 2006).

196. See, e.g., LAURA PEDRAZA FARINA, *SPRING MILLER & JAMES L. CAVALLARO, NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR* 72-73 (Harvard University Press 2010); Nina Bernstein, *Taking the War Out of a Child Soldier*, *N.Y. TIMES* (May 13, 2007), <http://www.nytimes.com/2007/05/13/nyregion/13soldier.html>.

197. See, e.g., FARINA, *supra* note 196, at 75-77; WESSELLS, *supra* note 195, at 60-62.

198. See, e.g., UNHCR GUIDANCE ON GANGS, *supra* note 15, at ¶ 7; Nagle, *supra* note 29, at 15.

199. See, e.g., Uchimiya, *supra* note 195, at 130-31; P.W. SINGER, *CHILDREN AT WAR* 200-01 (Pantheon Books 2005).

200. There are no exact statistics available, but figures have ranged from 250,000 to 500,000 children engaged in armed conflict throughout the world. See Franklyn Bai Kargbo, *International Peacekeeping and Child Soldiers: Problems of Security and Rebuilding*, 37 *CORNELL INT'L L.J.* 485, 487 (2004); see also *Facts about Child Soldiers*, *HUM. RTS. WATCH* (Dec. 3, 2008), <https://www.hrw.org/news/2008/12/03/facts-about-child-soldiers>.

201. See Rossi, *supra* note 31, at 405 (noting that the number of unaccompanied children seeking asylum in the United States from countries known to have child soldiers was less than 100 for the period from 2008 to 2009); see also Bernstein, *supra* note 196; see also Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 28, *Negusie V. Mukasey*, 129 S. Ct. 1159 (2009), 2008 WL 2597010 (June 23, 2008).

from which the United States is inaccessible except by boat or plane.²⁰² Child soldiers without sponsors are unlikely to have the resources to travel to the United States,²⁰³ or the ability to obtain proper travel documents.²⁰⁴

UNICEF defines a child soldier as “any child—boy or girl—under 18 years of age, who is part of any kind of regular or irregular armed force or armed group in any capacity, but not limited to: cooks, porters, messengers, and anyone accompanying such groups other than family members.”²⁰⁵ Child soldiers also include “girls and boys recruited for forced sexual purposes and/or forced marriage.”²⁰⁶ Groups that target children for forced recruitment include: governments, paramilitaries, other forces linked to governments, and non-state armed groups such as rebel forces.²⁰⁷

Most child soldiers are between the ages of thirteen and eighteen; however, armed forces are increasingly recruiting children aged twelve and under, including children as young as seven.²⁰⁸ Groups that target children for recruitment do so precisely because they are children, not simply to fill their ranks.²⁰⁹ Children have unique emotional and physical vulnerabilities that make them easy to control and manipulate, and thus make them more obedient.²¹⁰ Furthermore, children are inherently reckless, which makes

202. UNICEF Press Release, *supra* note 1 (According to the United Nations and UNICEF, “thousands of boys and girls are associated with armed forces and armed groups in conflicts in over 20 countries around the world[.]” including Afghanistan, Syria and Iraq, the Central African Republic, the Democratic Republic of Congo, and South Sudan).

203. See Nicholas Van Hear, Working Paper No. 6, “*I Went as Far as My Money Would Take Me: Conflict, Forced Migration and Class*” 12, CTR. ON MIGRATION, POL’Y & SOC’Y (2004) (discussing the part class plays on migration patterns).

204. Nonimmigrant visas may be authorized for specific purposes, but these do not include seeking protection. According to a report issued by DHS and the U.S. Department of State, “it can be much more difficult for applicants who are unemployed or marginally employed to show that they intend to return to their country after visiting the United States.” HUMAN SMUGGLING AND TRAFFICKING CENTER, DEPARTMENT OF HOMELAND SECURITY OFFICE OF INTELLIGENCE AND ANALYSIS & DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, A PRIMER ON VISA AND VISAS FRAUD 7 (2008), available at <http://www.ilw.com/immigdaily/news/2008,0708-visafraud.pdf>.

205. *Children and Armed Conflict*, UNICEF, http://www.unicef.org/emergencies/index_childsoldiers.html (last visited Mar. 13, 2016). However, the United States has defined child soldiers as “children under age 15 in some countries [who] are forcibly recruited by regular or irregular armies to participate directly in military conflicts.” Jeff Weiss, Acting Dir., OFFICE OF INT’L AFFAIRS, IMMIGRATION AND NATURALIZATION SERVICE, Memorandum, *Guidelines for Children’s Asylum Claims* 1 (Dec. 10, 1998), available at <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>.

206. *Children and Armed Conflict*, *supra* note 205.

207. See generally COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS: GLOBAL REPORT 2008, available at http://www.child-soldiers.org/global_report_reader.php?id=97 [hereinafter CHILD SOLDIERS GLOBAL REPORT 2008].

208. WESSELLS, *supra* note 195, at 7-8 (noting that the average age of child soldiers in Uganda in 2004 was under thirteen, that boys under age twelve were specifically targeted during the conflicts in Liberia and Sierra Leone, and that armed groups recruited children as young as seven in the Democratic Republic of Congo); see also Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT’L L. 323, 325 (2007) (noting that in Colombia, rebel groups forcibly recruit children as young as eight).

209. SINGER, *supra* note 199, at 58; WESSELLS, *supra* note 195, at 37-40; Uchimiya, *supra* note 195, at 153.

210. *Facts about Child Soldiers*, *supra* note 200; see also WESSELLS *supra* note 195, at 35-36 (noting that “[y]oung children are controllable through terror and brutality” and that “[c]hildren’s

them malleable in high-danger situations.²¹¹ Certain physical features of children, such as small hands and small size, make them useful for activities such as planting or clearing landmines.²¹² Technological developments in weaponry, particularly lightweight automatic weapons, mean that children can more easily carry and use arms.²¹³ Child soldiers may serve as laborers, guards, spies, scouts, porters, runners, “wives,” or soldiers, including in combat and on the front line.²¹⁴

Some children voluntarily choose to join government or rebel forces, often because of social or economic pressure.²¹⁵ For many other children, there is no question that armed forces forcibly and often violently recruit them to serve.²¹⁶ Orphaned children, who are prevalent in war-torn areas or areas hard hit by AIDS, are particularly susceptible to forced recruitment.²¹⁷ The methods used to recruit children are horrific. Children are abducted,²¹⁸ beaten and subjected to bodily harm,²¹⁹ and threatened with death or harm to their family members if they do not join.²²⁰

Once recruited, especially if forcibly recruited, armed forces subject child soldiers to appalling abuses including physical violence such as beatings and torture.²²¹ Leaders in these armed groups target some children, particularly girls, for sexual abuse and rape.²²² The introduction of drugs, sometimes under duress, and the resulting addiction is often used as a means of control.²²³ Armed groups regularly threaten the children with further harm

pliability derives in part from their early level of psychological development and limited life experience.”); SINGER, *supra* note 199, at 29, 58.

211. See Lonegan, *supra* note 31, at 92 (citing studies about the underdevelopment of certain areas in children’s brains responsible for making judgments, controlling impulses, or planning effectively).

212. See SARAH MUSCROFT, CHILDREN’S RIGHTS: REALITY OR RHETORIC? 53 (International Save the Children Alliance 1999).

213. See Nagle, *supra* note 29, at 14-15; see also IRIN News, *Too small to be Fighting in Anyone’s War* (Dec. 1, 2003), available at <http://www.africafiles.org/article.asp?ID=3684>.

214. *Facts about Child Soldiers*, *supra* note 200; see also *Too Small to be Fighting in Anyone’s War*, *supra* note 213.

215. For some children, joining the ranks of an armed force may appear to be their only form of survival. This, combined with their infancy, begs the question of whether children truly can ever freely choose to become soldiers. See Tiefenbrun, *supra* note 27, at 426-27 (noting that “voluntary recruitment is often coupled with hidden forms of coercion.”); see also WESSELLS, *supra* note 195, at 32-33.

216. *Facts about Child Soldiers*, *supra* note 200; see also CHILD SOLDIERS GLOBAL REPORT 2008, *supra* note 207, at 14.

217. See SINGER, *supra* note 199, at 42-43 (Pantheon Books 2005).

218. Tiefenbrun, *supra* note 27, at 419-21.

219. See Bernstein, *supra* note 196 (When a rebel group came to take Salifou Yankene and his brother as a new recruit, one rebel chopped off Salifou’s brother’s hand with a machete when his mother tried to protect him.)

220. *Id.*; see also Karen Allen, *Bleak Future for Congo’s Child Soldiers*, BBC NEWS (July 25, 2006), <http://news.bbc.co.uk/2/hi/africa/5213996.stm> (When a child refused to join a Congolese militia, a militia member shot him in the head).

221. SINGER, *supra* note 199, at 71; WESSELLS, *supra* note 195, at 60-62.

222. WESSELLS, *supra* note 195, at 86.

223. *Id.* at 76-77.

and death if they do not cooperate or perform well.²²⁴ Children who serve as soldiers also experience the horrors of war.²²⁵ In some cases, the armed groups will coerce a child to kill his or her family members, neighbors, or other children. This not only causes psychological harm but also makes it particularly difficult for the child to ever return home.²²⁶ Whether a child is forcibly recruited or voluntarily joins an armed force, he will find himself coerced into remaining a child soldier.²²⁷ Children who try to escape, if caught, may be beaten, tortured, or killed.²²⁸

Children who are able to escape from situations of forced recruitment often face new forms of persecution. Their families and their communities may ostracize or exile them.²²⁹ If the child was forced to join a rebel group, the government may view the child with suspicion and detain or punish him.²³⁰ For example, the Ugandan Government often subjects former child soldiers to punishment and torture, including being held in pits.²³¹ The Ugandan government also uses former child soldiers to clear minefields.²³² In Burundi, the Government has beaten and detained children as young as age nine for suspected collaboration with rebels.²³³

B. *Children in Gangs in Central America*

In contrast to the small numbers of child soldiers coming to the United States, in the last two decades, there has been an increasing number of children fleeing gang violence in Central American countries traveling to the United States.²³⁴ In the last five years, there has been an exponential growth in the number of children, in particular unaccompanied children, arriving at the U.S.-Mexico border seeking entry to the United States. This growth reached a high of nearly 70,000 children in fiscal year 2014.²³⁵ While the

224. SINGER, *supra* note 199, at 71-72; WESSELLS, *supra* note 195, at 61-62.

225. WESSELLS, *supra* note 195, at 74-76.

226. *Id.* at 59; *Facts about Child Soldiers*, *supra* note 200; SINGER, *supra* note 199, at 74.

227. WESSELLS, *supra* note 195, at 33.

228. Nagle, *supra* note 29, at 15.

229. *Id.* at 16; SINGER, *supra* note 199, at 200-01.

230. Child Soldiers Global Report 2008, *supra* note 207, at 18.

231. *Lukwago v. Ashcroft*, 329 F.3d 157, 165 (3d Cir. 2003) (citing Special Advisory Opinion from U.S. Department of State to the Third Circuit).

232. *Id.*

233. CHILD SOLDIERS GLOBAL REPORT 2008, *supra* note 207, at 18.

234. See generally USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT (2006), available at http://pdf.usaid.gov/pdf_docs/Pnadtg834.pdf.

235. FY 2014 runs from October 2013 to September 2014. U.S. CONFERENCE OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 2 (2013), <http://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf> [hereinafter MISSION TO CENTRAL AMERICA]; see also Chishti, *Unaccompanied*, *supra* note 22; Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POLICY INSTITUTE (June 13, 2014), <http://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> [hereinafter Chishti, *Dramatic Surge*]; A TREACHEROUS JOURNEY, *supra* note 177; Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Number of Latino children caught trying to enter U.S. nearly doubles in less than a year* (June 10, 2014), <http://www.pewresearch.org/>

numbers of such children entering the United States has decreased since 2014, there is still a significant number of children making the dangerous journey to the United States.²³⁶ The vast majority of these children are coming from Guatemala, El Salvador, and Honduras.²³⁷ While there is widespread generalized violence in these countries, many of these children face a particularized threat of forced recruitment by the gangs there.²³⁸

There are many gangs operating in Central America, the most prominent of which are the Mara Salvatruchas (also known as MS or the Maras).²³⁹ The Maras have two main branches, MS-18 and MS-13, and operate in El Salvador, Guatemala, and Honduras.²⁴⁰ The Maras have their roots in the United States, having formed in Los Angeles, California, in the 1960s and 1980s respectively.²⁴¹ In 1996, the *Illegal Immigration Reform and Immigrant Responsibility Act* reclassified many crimes as aggravated felonies for the purposes of deportation, resulting in the removal of thousands of MS-18 and MS-13 gang members to Central America.²⁴² Those gang members in turn set up numerous gang cells in the countries they reached.²⁴³

The Central American gangs share many characteristics of rebel or insurgent groups that use child soldiers. Many gangs may start as primarily criminal economic enterprises. However, in order to thrive, the gangs in Central America needed to challenge and usurp political authority.²⁴⁴ The Central American gangs have been highly successful at seizing political

fact-tank/2014/06/10/number-of-latino-children-caught-trying-to-enter-u-s-nearly-doubles-in-less-than-a-year/.

236. *Southwest Border Unaccompanied Children Statistics*, *supra* note 19; Teresa Wiltz, *Unaccompanied Children from Central America, One Year Later: The Immigration Status of Many of these Children Remains in Flux*, STATELINE (Aug. 24, 2015), http://www.huffingtonpost.com/entry/unaccompanied-children-from-central-america-one-year-later_55db88b4e4b04ae497041d10 (noting that many factors have led to the decline in numbers including increased apprehensions by Mexican authorities).

237. MISSION TO CENTRAL AMERICA, *supra* note 235, at 2; USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT, *supra* note 234.

238. MISSION TO CENTRAL AMERICA, *supra* note 235, at 2-3. KENNEDY, *supra* note 4, at 2 (“When asked why they left their home, fifty-nine percent of Salvadoran boys and sixty-one percent of Salvadoran girls list crime, gang threats, or violence as a reason for their emigration. Whereas males most feared assault or death for not joining gangs or interacting with corrupt government officials, females most feared rape or disappearance at the hands of the same groups.”).

239. There are many other gangs, but none as large or well-organized as the Maras. *See* Juan J. Fogelbach, *Gangs, Violence and Victims in El Salvador, Guatemala and Honduras*, 12 SAN DIEGO INT’L L.J. 417, 421-22 (2011); *see also* UNHCR GUIDANCE ON GANGS, *supra* note 15.

240. WOLA, CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 2 (2008), *available at* <http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf>.

241. MS-18 was a gang that formed in the Rampart section of Los Angeles in the 1960s and was primarily composed of Mexican-Americans but grew to incorporate large numbers of young men fleeing the civil wars in Central America in the 1980’s. MS-13 was formed in the early 1980’s in the same Los Angeles neighborhood by young men and boys from El Salvador who were looking for a way to protect themselves from existing gangs at the time. Fogelbach, *supra* note 239, at 420-21.

242. *Id.* at 421.

243. *Id.*

244. *See generally* MAX G. MANWARING, STREET GANGS: THE NEW URBAN INSURGENCY (Strategic Studies Institute 2005), *available at* <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub597.pdf>.

power in localities throughout the region.²⁴⁵ They have also created both economic and political instability in the countries in which they operate.²⁴⁶ For example, the Maras in El Salvador, Guatemala, and Honduras have established a sophisticated, highly organized, and widespread presence.²⁴⁷ In many rural areas, particularly outside of capital cities, gangs are the *de facto* political authority.²⁴⁸ Scholars have described Central American gangs as “third generation gangs.”²⁴⁹ Third generation gangs are “de facto governments, controlling significant territory (competing with the state for power).”²⁵⁰ Governments are increasingly unable to protect citizens from the violence of the gangs.²⁵¹

Some gangs, including the Maras, rely heavily on forced recruitment.²⁵² The gangs target “young people who are poor, homeless and from marginalized segments of society or particular neighborhoods.”²⁵³ Street children are especially vulnerable to forced recruitment.²⁵⁴ Gangs also systematically recruit in schools.²⁵⁵ Some children are recruited to perform crimes for gangs, such as collecting bribes, even if they have not yet passed the initiation rites that make them a full gang member.²⁵⁶ Gangs in El Salvador, Guatemala, and Honduras also specifically target children under the age of twelve.²⁵⁷ One reason for targeting younger children in El Salvador is that children under twelve are mostly immune from prosecution.²⁵⁸ However, in general gangs in Central America target children for recruitment for the same reasons that armed forces do: children have physical and emotional vulner-

245. *Id.* at 3.

246. *Id.*

247. FARINA, *supra* note 196, at 57-67; USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT, *supra* note 234, at Annex 1: El Salvador Profile, 45.

248. MISSION TO CENTRAL AMERICA, *supra* note 235, at 5; John P. Sullivan, *Maras Morphing: Revisiting Third Generation Gangs*, 7 GLOBAL CRIME 487, 494-95 (2006).

249. See generally MANWARING, *supra* note 244, at 3; Deborah Anker & Palmer Lawrence, “Third Generation” Gangs, *Warfare in Central America, and Refugee’s Law’s Political Opinion Ground*, 14-10 IMMIGR. BRIEFINGS 1 (2014).

250. Anker & Lawrence, *supra* note 249 at 1 (noting that “[t]he gangs often use brutal tactics to fight for territorial and political power.”); see also MANWARING, *supra* note 244, at 3 (noting that third generation gangs are “engaged in a highly complex political act—political war.”).

251. MANWARING, *supra* note 244, at 3.

252. UNHCR GUIDANCE ON GANGS, *supra* note 15, at ¶ 7; see also FARINA, *supra* note 196, at 72 (quoting an NGO coordinator who works with youth on the outskirts of San Salvador: “People join gangs because they have to. In the past, youth had the luxury of joining voluntarily.”). As with child soldiers, there may be a false dichotomy between children who are forcibly recruited and those who “voluntarily” join because for many children in Central America, joining a gang may seem to be the only option for survival. See James, *supra* note 195, at 6.

253. UNHCR GUIDANCE ON GANGS, *supra* note 15, at ¶ 7.

254. *Id.* at ¶ 15; see also UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION ¶ 84-85 (June 8, 2006), available at <http://www.unhcr.org/refworld/docid/45377ee30.html>.

255. See Fogelbach, *supra* note 239, at 432; FARINA, *supra* note 196, at 74 (noting that gangs have been targeting increasingly younger children, even as young as eight or nine years old).

256. MISSION TO CENTRAL AMERICA, *supra* note 235, at 15 n.11; FARINA, *supra* note 196, at 73-74.

257. Fogelbach, *supra* note 239, at 431.

258. *Id.*

abilities that make them easier to control.²⁵⁹

It is extremely dangerous to resist recruitment by gangs. Gangs will threaten, physically harm, and even kill individuals who resist or are perceived to resist the gang, as well as those individuals' family members.²⁶⁰ For those forcibly recruited, initiation rituals are "characterized by violent and abhorrent acts, requiring recruits to endure physical and sexual violence as well as to commit serious crimes, including murder."²⁶¹ Gang leaders often beat child gang members and even kill them if they refuse to cooperate as a warning to other gang members.²⁶² Gangs force children to take drugs as a method of control.²⁶³ Female child gang members experience rape and sexual violence.²⁶⁴ Once a child becomes a member of a gang, it is nearly impossible to leave the gang. Gangs also threaten physical harm and death to those who try to leave the gang and to their family members.²⁶⁵

If a child is able to escape a gang, he may face retaliation by the government or by his community. In most Central American countries there is a social stigma against former gang members or those perceived to be former members.²⁶⁶ Central American governments also target those perceived to be affiliated with gangs.²⁶⁷ In Honduras for example, the Govern-

259. James, *supra* note 195, at 6 (2005) (noting that the Maras have complete control over forcibly recruited child gang members).

260. UNHCR GUIDANCE ON GANGS, *supra* note 15, at ¶ 12; *see also* FARINA, *supra* note 196, at 72-73, 89-92; UNHCR, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 26-27 (2014) [CHILDREN ON THE RUN], available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.

261. UNHCR GUIDANCE ON GANGS, *supra* note 15, at ¶ 7; *see also* FARINA, *supra* note 196, at 75-76.

262. *See Roles and Responsibilities of Child Soldiers*, HUM. RTS. WATCH (Feb. 2004), <http://www.hrw.org/reports/2004/liberia0204/6.htm> (describing how children were beaten and abused by older gang members, and forced to witness abuse and killings); WOLA, *supra* note 240.

263. CHILDREN ON THE RUN, *supra* note 260, at 33.

264. *See* Caroline Moser & Alisa Winton, Working Paper No. 171, *Violence in the Central American Region: Towards an Integrated Framework for Violence Reduction* 27, U.K. OVERSEAS DEVELOPMENT INSTITUTE (2002), available at http://www.odi.org.uk/publicationsworking_papers/wp171_a.pdf (noting the use of gang rapes as a part of gang initiations and more generally).

265. UNHCR GUIDANCE ON GANGS, *supra* note 15, at ¶ 7. USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT, *supra* note 234; JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE UNITED STATES 20, 131 (2006), available at http://www.childtrafficking.com/Docs/seek_asylum_alone_us_0108.pdf; Greg Campbell, *Death by Deportation: A Denver Judge Denied a 16-Year-Old's Political Asylum Application—and Sentenced Him to Death*, BOULDER WKLY., May 27, 2004 (detailing the murder of a former MS-13 member after losing his asylum claim and being deported back to Guatemala).

266. SEELKE, *supra* note 4, at 6; *see also* USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT, *supra* note 234, at 48; Thomas Boerman, *Youth Gangs in El Salvador: Unpacking the State Department 2007 Issue Paper*, IMMGR. DAILY, <http://www.ilw.com/articles/2010,1117-boerman.shtm> (last visited Mar. 14, 2016) (noting that former gang members are at risk of abuse from a number of sources other than their own gang).

267. *See, e.g.*, Raphaelae Bail, *Marked Men with No Place to Hide*, CHRISTIAN SCI. MONITOR (Aug. 18, 2004), <http://www.csmonitor.com/2004/0818/p12s01-woam.html> (noting that anti-gang laws in Honduras allow the police to make arrests based simply on gang membership "or even for simply having a tattoo" and that the crime "illicit association" can carry a nine to twelve year jail sentence); *see also* Castellano-Chacon v. INS, 341 F.3d 533, 540 (2003) (citing the U.S. State Department's

ment specifically targets children suspected of being gang members and is responsible for beating and even killing suspected child gang members.²⁶⁸ The media in Central America sensationalizes the gangs, leading to tougher enforcement measures against the gangs.²⁶⁹

C. *The Disparate Narratives of Children Fleeing Forced Recruitment*

Despite the substantively similar experiences of children recruited by gangs or by armed forces, the narratives surrounding these children could not be more different. Child soldiers are portrayed as innocent abductees forced to undergo horrors.²⁷⁰ In contrast, children in gangs are depicted as potential or actual violent juvenile criminals.²⁷¹ The language used to describe these children helps illustrate why the world community looks at child soldiers and gang members so differently, even though the subjective experiences of these children are substantially similar. Inherent in the word “child” in “child soldier” is the implication of a lack of voluntary association with the adult world of armed combat. The term “soldier” in the best case implies an individual who fights for his country, but even in the worst case, still correlates to fighters for a political cause. In contrast, the term “gang” denotes criminality of an economic and violent bent.²⁷² The term “member”

2000 Report on Human Rights Practices in Honduras that “Honduran government officials have been involved in targeting children suspected of being in gangs.”).

268. See *Castellano-Chacon v. INS*, 341 F.3d 533, 540 (2003) (noting the testimony of a country condition expert that “children who are assumed to be in gangs, because of tattoos or for other reasons, are at grave risk of being killed or tortured in Honduras, either by state security forces or vigilante groups that appear to act with impunity. Furthermore, when arrested, children frequently face the use of excessive force by the State, including extra-judicial executions.”).

269. SEELKE, *supra* note 4, at 6; USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT, *supra* note 234, at 48, 71; Fogelbach, *supra* note 239, at 444 (“The [Honduran] government’s massive campaign against gangs and the media’s tendency to over-exaggerate the problem create a misinformed perception that youths in gangs are to blame for the majority of crimes in the country.”).

270. See, e.g., David Pimental, *The Widening Maturity Gap: Trying And Punishing Juveniles As Adults In An Era Of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 97-98 (2013) (“Overwhelmingly, these young offenders inducted into the LRA are viewed as victims: innocent children swept up in political and criminal . . . forces far beyond their ability to reckon or cope.”); see also *Innocence Lost: The child soldiers forced to murder*, INDEPENDENT (Oct. 23, 2011), <http://www.independent.co.uk/news/world/africa/innocence-lost-the-child-soldiers-forced-to-murder-1052026.html> (“[A]s a child soldier Ojok was as much a victim as his victims.”).

271. See, e.g., *Influx of Illegal Alien Minors Energizes Violent U.S. Street Gang MS-13*, JUDICIAL WATCH (Sept. 8, 2015), <http://www.judicialwatch.org/blog/2015/09/influx-of-illegal-alien-minors-energizes-violent-u-s-street-gang-ms-13/> (“[T]he nation’s most violent street gang has been energized by the barrage of illegal immigrant minors who have entered the U.S. through Mexico, confirming a Judicial Watch report last summer that gangs were actively recruiting members at shelters housing the new arrivals.”); *Child Border Surge Includes Mara Salvatrucha Gang Elements*, INVESTORS BUSINESS DAILY (July 9, 2014), <http://news.investors.com/ibd-editorials/070914-708067-border-surge-includes-significant-criminal-element.htm>; see generally Pimental, *supra* note 270, at 97-99 (discussing the disparate treatment of child soldiers and children in U.S. street gangs); Tiefenbrun, *supra* note 27, at 423-24.

272. In Central America, the media sensationalizes the violence and criminality of gangs. Fogelbach, *supra* note 239, at 443-44; WOLA, *supra* note 240.

implies voluntary association with that criminality,²⁷³ and there is no inclusion of age in the term.

The attention and concern of the international community towards children fleeing armed forces and gangs reflects these differing narratives. There are many international and U.S. organizations and projects dedicated to ending the use of child soldiers and to reintegrating child soldiers into society.²⁷⁴ The United Nations has a Special Representative for Children and Armed Conflict who launched a campaign with UNICEF aimed at eradicating the recruitment and use of child soldiers.²⁷⁵ The U.S. Congress held hearings on child soldiers and recommended special forms of immigration relief for former child soldiers.²⁷⁶ There are numerous books written about the experiences of child soldiers.²⁷⁷

In contrast, there is much less support, particularly in the United States, for children fleeing gangs in Central America. It is true that the recent surge of children arriving at the U.S.-Mexico border increased the attention paid to children recruited by gangs in Central America.²⁷⁸ However, in many cases these children face outright hostility from both the U.S. government and society.²⁷⁹ For example, during a Congressional hearing in the summer of

273. See, e.g., James, *supra* note 195, at 1 (“child gang members are often excluded from the human rights regime because the act of joining a gang, unlike being forcibly recruited into armed conflicts, is often viewed as a *voluntary* association with an “enterprise with a sole criminal purpose”) (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76594 (Dec. 7, 2000)); *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007) (ruling that membership in a gang cannot constitute a particular social group for the purposes of asylum and withholding of removal because the court could not “imagine holding that a *voluntary* association . . . is fundamental to human dignity”) (emphasis added).

274. See, e.g., *Child Soldiers*, HUM. RTS. WATCH, <https://www.hrw.org/topic/childrens-rights/child-soldiers> (last visited Mar. 18, 2016); CHILD SOLDIERS INT’L, <http://www.child-soldiers.org/> (last visited Mar. 18, 2016); *Child Soldiers*, INT’L RESCUE COMMITTEE, <http://www.rescue.org/child-soldiers> (last visited Mar. 18, 2016); INVISIBLE CHILDREN, <http://www.invisiblechildren.com> (last visited Mar. 18, 2016); NAT’L IMMIGR. JUSTICE CENTER, <https://www.immigrantjustice.org/> (Mar. 18, 2016).

275. *Children, Not Soldiers*, OFFICE SPECIAL REPRESENTATIVE SECRETARY-GENERAL FOR CHILDREN & ARMED CONFLICT, <https://childrenandarmedconflict.un.org/children-not-soldiers> (last visited Mar. 18, 2016).

276. *Casualties of War: Child soldiers and the Law: Hearing Before the Subcomm. on Human Rights and the Law on the S. Comm. on the Judiciary*, 110th Cong. 23 (2007). *Ending the Use of Child Soldiers: History, Impact and Evolution: Hearing Before the Tom Lantos Human Rights Commission*, 113th Cong. (2014).

277. See, e.g., EMMANUEL JAL & MEGAN LLOYD DAVIES, *WAR CHILD: A CHILD SOLDIER’S STORY* (St. Martin’s Press 2010); FAITH J. H. McDONNELL & GRACE AKALLO, *GIRL SOLDIER: A STORY OF HOPE FOR NORTHERN UGANDA’S CHILDREN* (Chosen Books 2007); PETER EICHSTAEDT, *FIRST KILL YOUR FAMILY: CHILD SOLDIERS OF UGANDA AND THE LORD’S RESISTANCE ARMY* (Lawrence Hill Books 2009); SINGER, *supra* note 199; ALCINDA HONWANA, *CHILD SOLDIERS IN AFRICA: THE ETHNOGRAPHY OF POLITICAL VIOLENCE* (2006); SCOTT GATES & SIMON REICH, *CHILD SOLDIERS IN THE AGE OF FRACTURED STATES: THE SECURITY CONTINUUM* (2010); LEORA KAHN & LUIS MORENO-OCAMPO, *CHILD SOLDIERS* (2008); BEAH, *supra* note 3; DALLAIRE, *supra* note 194.

278. See, e.g., Chishti, *Unaccompanied Minors*, *supra* note 22; Chishti, *Dramatic Surge*, *supra* note 235.

279. See, e.g., Sarah Dutton, Jennifer De Pinto, Anthony Salvanto & Fred Backus, *What do Americans say should happen to child border crossers?*, CBS NEWS (Aug. 7, 2014), <http://www.cbsnews.com/news/more-americans-say-child-border-crossers-should-be-sent-home-asap/>; Rick Moran, *Huge majority of Americans want the illegal alien kids to go home*, AM. THINKER (July 28, 2014),

2014, members of Congress repeatedly asked why the unaccompanied children arriving at the U.S.-Mexico border could not be deported more quickly.²⁸⁰ The Obama administration reacted to the surge of children arriving at the border in the summer of 2014 by placing unaccompanied children in detention, often for longer than was allowed under the law.²⁸¹ Immigration judges heard the cases of unaccompanied children in “rocket dockets,” or fast tracked removal proceedings, without access to lawyers.²⁸² The administration also detained and denied bail to children who were accompanied by family members.²⁸³ The BIA, for its part, improperly narrowed the definition of a particular social group in the context of gang-based cases. However, it did so in a way that negatively impacts asylum claims from all children fleeing forced recruitment, including child soldiers.

III. THE NEGATIVE IMPACT OF THE INTERPRETATION OF “PARTICULAR SOCIAL GROUP” UNDER U.S. ASYLUM LAW FOR CHILDREN TARGETED FOR FORCED RECRUITMENT

Children are among the most vulnerable individuals in any society. As previously discussed, children may share certain characteristics, including age, size, and reduced physical, mental, and emotional capacity, that make them particularly susceptible to recruitment and manipulation by criminal gangs, government or rebel militaries, or others.²⁸⁴ In most cases involving the forced recruitment of a child, the child claims a fear of persecution on account of his membership in a particular social group.²⁸⁵ Race, nationality,

http://www.americanthinker.com/blog/2014/07/huge_majority_of_americans_want_the_illegal_alien_kids_to_go_home.html; A TREACHEROUS JOURNEY, *supra* note 177, at 62 (noting that immigration judges and ICE attorneys are at times hostile to the children at the border).

280. Wendy Feliz, American Immigration Council, Not All Members of Congress Recognize the Nation’s Role in Protecting Unaccompanied Minors., June 24, 2014; *Dangerous Passage: The Growing Problem of Unaccompanied Children Crossing the Border; Hearing Before the House Committee on Homeland Security* (113th Cong. 2014).

281. *See Unaccompanied Children*, WOMEN’S REFUGEE COMMISSION, <https://womensrefugeecommission.org/programs/migrant-rights/unaccompanied-children> (last visited Mar. 18, 2016); *see* KENNEDY, *supra* note 4, at 2 (July 1, 2014); *see also* William Wilberforce Trafficking Victims Protection Reauthorization Act Of 2008, Pub. L. 110–45 (Dec. 23, 2008) (stating that unaccompanied alien children in custody must be transferred to the care of the Secretary of Health and Human Services within seventy-two hours).

282. Jayashri Srikantiah & Lisa Weissman-Ward, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, STAN. L. SCH. (Aug. 15, 2014), <https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications/>.

283. Guillermo Contreras, *Feds start “no bond” policy on detained immigrants*, HOUSTON CHRONICLE (Aug. 27, 2014), <http://www.houstonchronicle.com/news/article/Feds-start-no-bond-policy-on-immigrants-5716913.php>; Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html> (Secretary of Homeland Security Jeh Johnson indicated that the purpose of detention was to deter other mothers and children from making the journey to the U.S.).

284. *See supra* Section III.

285. *See* SEBASTIAN AMAR ET AL., CAPITAL AREA IMMIGRANTS’ RIGHTS (CAIR) COALITION, SEEKING ASYLUM FROM GANG-BASED VIOLENCE IN CENTRAL AMERICA: A RESOURCE MANUAL (Aug. 2007); *see also* Frydman & Desai, *supra* note 22, at 23-24.

or religion are very rarely factors in the forced recruitment of children by gangs or armed forces.²⁸⁶ Political opinion is sometimes advanced as a possible basis for persecution, especially for gang-based cases in which the child resisted recruitment.²⁸⁷ However, due to infancy, it is often difficult for children to demonstrate that they hold a political opinion.²⁸⁸

Under the *Acosta* formulation of a particular social group, there was room for developing successful social groups in asylum claims involving the forced recruitment of children. However, when the BIA narrowed the definition of a particular social group by introducing “particularity” and “social distinction” requirements, the result has been that children fleeing forced recruitment today can rarely demonstrate that they belong to a particular social group.

A. *Children as a Particular Social Group in U.S. Asylum Law*

The experiences of child asylum seekers are unique and do not always clearly fit into prevailing asylum standards. However, the substantive asylum standards for children and adults remain largely the same,²⁸⁹ and consequently, children are disadvantaged in our system.²⁹⁰ This is not to say that children should not have to meet the definition of a refugee. Rather, it is important to understand that while a child’s experiences may differ substantively from an adult’s, such experiences may nevertheless be a basis for asylum. For example, with regard to whether or not a child has been persecuted, the UNHCR has noted that experiences that may not rise to the level of persecution for an adult may constitute persecution for a child.²⁹¹ Several circuit courts have likewise recognized that the harm experienced by

286. See generally AMAR, *supra* note 285; see also Frydman & Desai, *supra* note 22, at 23-24.

287. See Frydman & Desai, *supra* note 22, at 15-20; Meghann Boyle, *Paths to Protection: Ideas, Resources, and Strategies for Presenting Central American Gang-related Asylum Claims*, 07-11 IMMIGR. BRIEFINGS 1, 4-5 (2007); see generally Uchimiya, *supra* note 195, at 145-51.

288. See Deborah Anker, Nancy Kelly, John Willshire Carrera & Sabrineh Ardan, *Mejilla-Romero: A New Era for Child Asylum*, 12-09 IMMIGR. BRIEFINGS 1, 8 (2012) (“The INS Children’s Guidelines explain that, ‘[j]ust as a younger child may have difficulty forming a well-founded fear of persecution, the ability to form a political opinion for which one may be persecuted may be more difficult for a young child to establish.’”) (citing Jeff Weiss, Acting Director, Office of International Affairs, INS, Immigration and Naturalization Service, Guidelines for Children’s Asylum Claims 22 (Dec. 10, 1998)).

289. See Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 97 n.52 (1999); Cruz Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (“In the absence of statutory intent to apply a different standard for a juvenile, and in light of the reasonable interpretation by the INS that the standard as stated takes into consideration the petitioner’s age, we are not at liberty to substitute a different interpretation.”).

290. See BHABHA & SCHMIDT, *supra* note 265, at 123-32; Michael Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL’Y REV. 159, 162 (2000).

291. 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, para. 4 (Dec. 22, 2009).

children may be less than that required of an adult to qualify as persecution.²⁹²

Yet even if a child can demonstrate that the harm or abuse that he experienced rose to the level of persecution, in order to qualify for asylum in the United States, the child must also demonstrate that he was targeted for persecution on the basis of a protected ground, such as membership in a particular social group.²⁹³ However, U.S. asylum law does not, and has never, recognized the characteristic of being a child alone as enough to establish membership in a particular social group.²⁹⁴ Historically, even when the *Acosta* formulation defined a particular social group, groups based primarily on the characteristic of age or youth failed.²⁹⁵ Courts that found that neither youth nor age were sufficient characteristics to establish a particular social group did so for two primary reasons: first, on the basis that age is not immutable, and second, because “youth” as a particular social group is too broad of a category.

1. *Age and Immutability*

The circuit courts have split on whether age is an immutable characteristic. The Third Circuit held in *Lukwago v. Ashcroft* that age was not an immutable characteristic because youth is not innate and because age plays a lesser role in personal identity over time.²⁹⁶ The Third Circuit affirmed this finding in *Escobar v. Gonzales*.²⁹⁷ The Sixth Circuit reached a similar conclusion, holding that “[a]s a category, tattooed youth do not share an innate characteristic”²⁹⁸ However, the Seventh Circuit has reached the opposite conclusion, finding that age is an immutable characteristic.²⁹⁹ In *Cece v. Holder*, the Seventh Circuit held that “young Albanian women who live alone” qualify as a social group because “[n]either their age, gender, nationality, or living situation are alterable.”³⁰⁰

292. *Hernandez-Ortiz v. Gonzales*, 469 F.3d 1042, 1045-46 (9th Cir. 2007) (“Three sister circuits [the Second, Sixth and Seventh] have now vindicated a principle that is surely a matter of common sense: a child’s reaction to injuries to his family is different from an adult’s.”).

293. 8 C.F.R. § 208.13(b)(1) (2014).

294. *See, e.g., Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (“Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”).

295. *Id.*; *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003) (“[U]nlike innate characteristics, such as sex or color, age changes over time, possibly lessening its role in personal identity. Moreover, children as a class represent an extremely large and diverse group[.]”); *Castellano v. Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003) (“Tattooed youth is overbroad and cannot be seen as constituting a collection of people closely affiliated with each other, who share a ‘common, immutable characteristic.’”); *Chavez v. INS*, 723 F.2d 1431, 1433 (9th Cir. 1984) (“[Petitioner’s] status as a ‘young urban male’ is not specific enough for political asylum.”).

296. *Lukwago*, 329 F.3d at 171.

297. *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005) (“Nor is youth alone a sufficient permanent characteristic, disappearing as it does with age.”).

298. *Castellano Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003).

299. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

300. *Id.* at 673.

In contrast to some of the circuit courts, the BIA has acknowledged that age is immutable in certain circumstances. In *Matter of Kasinga*, the BIA found that being a “young women” was an integral part of the applicant’s social group and something that she could not change at the time.³⁰¹ In *Matter of S-E-G*, a gang-based case, the BIA again noted that the “mutability of age” cannot be under one’s control and may serve as the basis for a cognizable claim.³⁰²

Finding that age may be immutable and thus may support a claim for asylum is consistent with both *Acosta* and with the UNHCR Guidelines on Child Asylum Claims.³⁰³ The UNHCR Guidelines advise that with respect to a social group determination, while age changes over time, being a child is immutable at any given point in time.³⁰⁴ Furthermore, being a child is relevant to the identity of the child and to the social visibility of the child in society.³⁰⁵ The BIA’s and UNHCR’s positions on age are important, because establishing the immutability of age is essential to developing a cognizable particular social group for children fleeing forced recruitment.

2. *Children as a Particular Social Group: Too Broad*

Even though the BIA and the Seventh Circuit have found that age is immutable, claims based primarily on the characteristic of age have still failed for being too broad, even under the *Acosta* standard. In *Lukwago v. Ashcroft*, the Third Circuit held that youth as a defining characteristic was too broad to form the basis of a particular social group.³⁰⁶ The Third Circuit noted that “children as a class represent an extremely large and diverse group, and children, even within a single neighborhood, have a wide degree of varying experiences, interests, and traits.”³⁰⁷ The Third Circuit reaffirmed this analysis in *Escobar v. Gonzales*.³⁰⁸

301. *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (finding that “young women of the Tchamba-Kunsuntu tribe who had not had [female genital mutilation], as practiced by that tribe, and who oppose the practice” were a particular social group.).

302. *Matter of S-E-G*, 24 I. & N. Dec. 579, 583-84 (B.I.A. 2008) (“[I]f 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, claim for asylum *may still be cognizable*.”) (emphasis added).

303. UNHCR, 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, ¶ 49, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).

304. *Id.*

305. *Id.*

306. *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003) (In this case, the proposed group was “children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude”).

307. *Id.* at 171-72.

308. *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (holding that one of the reasons “Honduran street children” were not a particular social group was because youth is “far too vague and all encompassing.”).

Other circuits, including the Second³⁰⁹ and the Sixth,³¹⁰ have reached similar conclusions, and the Fifth Circuit has rejected social groups defined wholly or partly by youth.³¹¹ Thus, unless there is a significant additional limiting factor beyond age, for example, a child with a disability,³¹² an abandoned street child,³¹³ a child in a particular family,³¹⁴ a female child living alone,³¹⁵ a female child of a particular clan,³¹⁶ or a female child of a particular tribe with certain physical characteristics³¹⁷ simply sharing the characteristic of being a child has never been enough to establish a particular social group under U.S. asylum law. Therefore, in cases regarding the forced recruitment of children, proposed social groups must consist of characteristics that are more limiting than simply being a child in order to be cognizable.

B. *Children Targeted for Forced Recruitment as a Particular Social Group*

The type of harm that children face when targeted for forcible recruitment by armed forces or gangs easily rises to the level of persecution.³¹⁸ The methods used for forcible recruitment often constitute persecution, as does the treatment children face after being recruited.³¹⁹ However, these children must also demonstrate that they were targeted for persecution because of a protected characteristic.³²⁰ Many groups target children for forced recruitment primarily because they are children.³²¹ However, as previously discussed, simply sharing the characteristic of being a child is not enough to

309. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (holding that a “broadly-based characteristic . . . such as youth” cannot be the basis for a particular social group).

310. *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) (finding that the group “tattooed youth” is too broad).

311. *See Serat-Ajanal v. Gonzalez*, 207 Fed. Appx. 468 (5th Cir. 2006) (finding that gender, nationality and age are too general to be considered a particular social group); *Perez-Molina v. Gonzales*, 193 Fed. Appx 313 (5th Cir. 2006) (finding that “characteristics of youth, nationality, and gender” are overbroad).

312. *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005).

313. *Matter of B-F-O-*, No. 78-677-043, 24 Imm. Rpt. B1-41 (B.I.A. Nov. 6, 2001).

314. *Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (family may constitute a PSG; applicant was a fourteen year old child).

315. *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (finding that “young Albanian women who live alone” is a particular social group).

316. *Mohammed v. Gonzalez*, 400 F.3d 785, 798 (9th Cir. 2005) (finding that “young girls of the Benadiri clan” in a particular social group).

317. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (finding that “young women of the Tchamba-Kunsuntu tribe who had not had [female genital mutilation], as practiced by that tribe, and who oppose the practice” were a particular social group).

318. *See, e.g., Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003). Forced conscription by rebel groups has been found to constitute persecution. *Cifuentes-Villatoro v. Ashcroft*, 71 Fed. App’x 750, 752 (9th Cir. 2003).

319. *See supra* Section III (Forced recruitment can include threats, violent abduction, and the murder of families and friends. Treatment after being forcibly recruited can include beatings, forced use of drugs and alcohol, and sexual assault.).

320. 8 C.F.R. § 208.13(b)(1) (2014).

321. *See supra* Section III.

constitute a particular social group in U.S. asylum law.³²²

Under the *Acosta* standard, the law was greatly underdeveloped in regards to children fleeing forced recruitment. Nevertheless, there was opportunity under *Acosta* for children fleeing forced recruitment to develop successful social group claims. However, as a result of the BIA's new "social distinction" and "particularity" requirements, the BIA and the courts have been unwilling to find that a particular social group exists in most cases involving forced recruitment by gangs, even if the child's particular social group is limited by some other factor, such as geography or resistance to the gang. This trend, found throughout gang-based asylum claims, will also negatively impact the likelihood of success for child soldier claims.

1. *Children Targeted for Forced Recruitment under the Acosta Standard: Underdeveloped Case Law*

Under the *Acosta* standard, case law regarding whether children fleeing forced recruitment could be members of a particular social group was sparse and still developing. Nevertheless, *Acosta* is the standard that should be used to evaluate particular social group claims. Under *Acosta*, some children fleeing forced recruitment could have been able to establish that they were members of a particular social group.

Very few children fleeing forced recruitment as child soldiers make it to the United States to apply for asylum.³²³ As a result, there is almost no case law that looks specifically at whether or not children who are targeted for recruitment as child soldiers can establish that they are members of a particular social group, with the exception of a single Third Circuit case, *Lukwago v. Ashcroft*.³²⁴

Bernard Lukwago was born in Northern Uganda, and when he was fifteen years old, the Lord's Resistance Army, a rebel group, kidnapped Lukwago from his village and forced him to become a child soldier.³²⁵ Lukwago asserted that he was a member of a particular social group "of children from Northern Uganda who are abducted and enslaved by the [Lord's Resistance Army (LRA)] and oppose their involuntary servitude."³²⁶ The Third Circuit held that this was not a cognizable social group for establishing asylum.³²⁷

322. See *supra* Section IV.A.

323. See Rossi, *supra* note 31, at 405; see also Bernstein, *supra* note 196; Brief for Human Rights First et al. as Amici Curiae Supporting Petitioner at 28, *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

324. *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003).

325. *Id.* at 164 (The rebels shot Lukwago's parents when they abducted him and took him to an LRA camp, where they forced him to perform manual labor. The rebels also forced Lukwago to fight with them on the front line against the Ugandan government, and forced him to help kill his friend Joseph who was too weak to continue working. Rebel leaders threatened and beat Lukwago if he did not perform well and threatened to kill Lukwago if he tried to escape.).

326. *Id.* at 171.

327. *Id.* at 173.

While in agreement that Lukwago was persecuted by the LRA,³²⁸ the Third Circuit held that a social group must “exist independently of the persecution suffered by the applicant for asylum,” and must “have existed before the persecution.”³²⁹ The Court also found that a social group defined primarily by age failed because of the mutability of age,³³⁰ and because “children” as a group was too large.³³¹ However, the court failed to analyze whether “children from Northern Uganda” as a particular social group was too broad.

Unlike cases involving the forced recruitment of child soldiers, there is a wealth of case law on gang recruitment. However, prior to *Matter of C-A-*, there were almost no published cases from either the BIA or circuit courts decided under the *Acosta* standard that specifically addressed whether children targeted for gang recruitment were a particular social group. Most of the published gang-based cases prior to *Matter of C-A-* were decided on other issues.³³² Other than unpublished decisions by immigration judges,³³³ only the Third Circuit has published a decision considering the cognizability of a particular social group in the context of gang recruitment cases under the *Acosta* standard.³³⁴ In *Escobar v. Gonzales*, the Third Circuit considered whether “Honduran Street children” subject to abusive recruitment tactics from gangs constituted a particular social group.³³⁵ The court held that Escobar’s social group was comprised of the characteristics of “poverty, homelessness, and youth,” but that those characteristics were “far too vague and all encompassing to be characteristics that set the perimeters

328. *Id.* at 170.

329. *Id.* at 172.

330. *Id.* at 171 (“However, unlike innate characteristics, such as sex or color, age changes over time, possibly lessening its role in personal identity.”).

331. *Id.* at 171-72. (“Moreover, children as a class represent an extremely large and diverse group[.]”) The Third Circuit held that while there is evidence that the LRA targets children, “there was also evidence in the record that the LRA indiscriminately persecutes civilians regardless of age.” *Id.* at 172.

332. *See, e.g.*, *Lopez-Soto v. Ashcroft* 383 F.3d 228 (4th Cir. 2004) (recognizing family as a particular social group, but finding no nexus); *Lopez-Monterroso v. Gonzales*, 236 Fed. App’x 207 (7th Cir. 2007) (finding no persecution); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003) (considering the case of a former gang member, as compared to children targeted for recruitment but not yet members—and finding that the group “tattooed youth” is too broad).

333. For an analysis of some unpublished Immigration Judge Decisions that made successful particular social group claims under the *Acosta* standard, *see Boyle, supra* note 287; *see also* Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 UMPSLR 827, 830, 835-836, 841 (2008).

334. *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005). Some circuit courts issued unpublished, and thus non-precedential, cases on gangs. For example, in *Serat-Ajanel v. Gonzales* and *Perez-Molina v. Gonzales*, the Fifth Circuit found that groups defined as “young Guatemalan males” or “young Salvadoran males” were not particular social groups. *Serat-Ajanel v. Gonzales*, 207 Fed. App’x 468, 469 (5th Cir. 2006) (“The characteristics of youth, nationality, and gender are extremely general. Such a ‘group’ lacks the sort of specific characteristics that distinguish and identify a particular social group.”); *Perez-Molina v. Gonzales*, 193 Fed. App’x 313, 314-15 (5th Cir. 2006) (“The characteristics of youth, nationality, and gender are too generalized and . . . lack particularity and are overbroad.”).

335. *Escobar*, 417 F.3d at 364 (Escobar was a child living on the streets of Honduras, when gangs began abusing him and pressuring him to join them).

for a protected group.”³³⁶

The two Third Circuit cases above, as the only published cases on particular social group claims from children fleeing forced recruitment using the *Acosta* standard, demonstrate that the law was particularly underdeveloped in this area. However, given the BIA’s recognition of the immutability of age, similar claims might have been successful in other circuits. As will be discussed further, if a group of children targeted for recruitment as child soldiers could define themselves with enough specificity to avoid being overbroad, and without defining themselves by their persecution, such claims under the *Acosta* standard could be cognizable.

2. *It is Nearly Impossible for Children Targeted for Forced Recruitment to Meet the New Standard that Includes “Particularity” and “Social Distinction”*

Since *Matter of S-E-G-* was decided in 2008, there have been no published cases looking specifically at whether or not children who are targeted for recruitment as child soldiers can establish that they are members of a particular social group. However, unlike cases involving the forced recruitment of child soldiers, there is a wealth of case law on forcible gang recruitment that adopts the requirements of “social distinction” and “particularity.”³³⁷ In fact, most case law affirming the current definition of a particular social group comes from gang-related cases.³³⁸ The BIA stated that there is no “blanket rejection of all factual scenarios involving gangs” and that “[s]ocial group determinations are made on a case-by-case basis.”³³⁹ However, to date there has not been a single published decision by the BIA or a circuit court granting asylum in a particular social group claim for a child or a young person fleeing gang recruitment.³⁴⁰

In *Matter of S-E-G-*, the BIA addressed particular social group membership based on resistance to gang recruitment.³⁴¹ The respondents in *Matter of*

336. *Id.* at 368.

337. See UNHCR GUIDANCE ON GANGS, *supra* note 15 (noting that “[a]s organized gangs have become increasingly common in various parts of the world, asylum claims connected with their activities have multiplied in regions as far apart as Europe and Central America. During recent years, an increasing number of claims have been made especially in Canada, Mexico, and the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their countries of origin.”).

338. See, e.g., Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and those who Flee their Wrath*, 20 Geo. Immigr. L.J. 407, 418 (2006) (“[T]he immigration courts have been reluctant to extend the ‘membership in a particular social group’ category and, for that matter, the ‘political opinion’ and ‘religion’ categories, to include gang-based asylum claims”); Uchimiya, *supra* note 195, at 139-45 (giving examples of various gang-related cases in which courts have ruled that a gang is not a ‘particular social group’ for purposes of asylum and withholding of removal).

339. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014).

340. See Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government’s Approach to Child Migrants Improving?*, 11-02 IMMIGR. BRIEFINGS 1, 11 n.66 (2011); see also Boyle, *supra* note 287, at 1.

341. *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008).

S-E-G- were a young Salvadoran woman and her two younger brothers who fled El Salvador in 2004 because of violence by the MS-13 gang.³⁴² MS-13 members threatened and beat the brothers for refusing to join their gang, and threatened to rape their sister.³⁴³

The siblings argued that the gangs persecuted them on account of their membership in particular social groups, including “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang values and activities,” as well as their family members.³⁴⁴ The BIA held that the particular social group proposed by respondents failed both the “particularity” and “social visibility” requirements.³⁴⁵ Thus, even though the particular social group was much more limited than age, or even age and geography, the BIA used the new requirements to deny the proposed group.

Most of the circuit courts (the First,³⁴⁶ Second,³⁴⁷ Fourth,³⁴⁸ Fifth,³⁴⁹ Eighth,³⁵⁰ Ninth,³⁵¹ and Eleventh³⁵² Circuits) have explicitly or implicitly

342. *Id.*

343. *Id.* at 580 (MS-13 members warned the brothers that they must join the gang or their bodies would end up in a dumpster. A few months before leaving El Salvador, the siblings learned that MS-13 gang members had shot and killed a young boy in their neighborhood after he refused to join the gang).

344. *Id.* at 581 (The Immigration Judge denied the claim on multiple grounds, including the lack of the required nexus to a protected class).

345. *Id.* at 585, 588 (noting that the proposed social groups “make up a potentially large and diffuse segment of society” and that “it is difficult to conclude that [the proposed groups] as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador.”).

346. *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (holding that the proposed social group of “young women recruited by gang members who resist such recruitment” lacked social visibility and particularity); *see also* *Perez Socop v. Holder*, 407 Fed. App’x 495, 498 (1st Cir. 2011).

347. *Fuentes-Hernandez v. Holder*, 411 Fed. App’x 438, 439 (2d Cir. 2011) (rejecting the proposed social group of “individuals who resisted gang recruitment in El Salvador.”); *see also* *Lemus-Lemus v. Holder*, 343 Fed. App’x 643, 644 (2d Cir. 2009).

348. *Lizama v. Holder*, 629 F.3d 440, 446-47 (4th Cir. 2011) (holding that a group of “young, Americanized, well-off, Salvadoran male deportees with criminal histories who oppose gangs” was not a particular social group because it did not satisfy the requirements of immutability, social visibility, and particularity).

349. *Galdamez v. Holder*, 556 Fed. App’x 348, 519 (5th Cir. 2014) (holding that Galdamez failed to demonstrate that members of his proposed group of “young men who defy forced recruitment by the gangs in El Salvador” share a characteristic that gives them social visibility or that the group can be “defined with sufficient particularity to delimit its membership”).

350. *Gaitan-Gamez v. Holder*, 671 F.3d 678, 681-82 (8th Cir. 2012) (Reasoning that it could not “find that the social visibility and particularity requirements articulated in *Matter of S-E-G-* are arbitrary or capricious,” the Court held that the proposed social group of “young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang” was not a particular social group); *see also* *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011); *Ortiz-Puentes v. Holder*, 662 F.3d 481 (8th Cir. 2011).

351. *Ramos-Lopez v. Holder*, 563 F.3d 855, 860 (9th Cir. 2010) (expressly deferring to the BIA’s “reasonable interpretation” that the proposed group of “young Salvadoran men who have been recruited by gangs, but refuse to join” do not constitute a particular social group).

352. *Turcios-Avila v. U.S. Attorney General*, 362 Fed. App’x 37, 40 (11th Cir. 2010) (rejecting the proposed particular social group of “young men sought for gang recruitment” for lack of particularity, social visibility, and an immutable characteristic such as “sex, color, or kinship ties”).

accorded *Chevron* deference to the BIA's reformulation of the requirements of a particular social group in gang-based cases. These circuits have all issued decisions finding that individuals targeted for recruitment by gangs in El Salvador, Honduras, and Guatemala are not part of a particular social group. None of the circuits granting deference to the BIA's new requirements had previously published decisions considering whether children forcibly recruited by gangs could be a particular social group under the *Acosta* standard; however, they all found that the new requirements necessitated denials of the proposed particular social groups.

Not all of the circuit courts have agreed unconditionally with the BIA's reasoning in gang-related resistance cases. The Tenth Circuit in *Rivera-Barrientos v. Holder* found that the proposed social group of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" was sufficiently particular to be a social group.³⁵³ However, the Tenth Circuit rejected the group for lack of social visibility,³⁵⁴ indicating that under *Acosta*, the claim might have been found meritorious.³⁵⁵

The Third Circuit, the only court to publish decisions rejecting children fleeing forced recruitment as particular social groups under the *Acosta* standard,³⁵⁶ appears to be reconsidering its stance on what constitutes a particular social group. In *Valdiviezo-Galdamez*, the Third Circuit expressly rejected the new requirements of particularity and social distinction.³⁵⁷ In addition, the Third Circuit reasoned that resistance to gang recruitment could be the basis for a particular social group using the *Acosta* standards, and remanded the case to the BIA for reconsideration in light of *Acosta*.³⁵⁸

3. *Acosta Is the Standard That Should Be Used to Evaluate Forced Recruitment Claims*

According to the BIA in *Acosta*, the determination of what constitutes a particular social group is a determination that must be made on a case-by-case basis.³⁵⁹ Under *Acosta*, the proposed social groups must not be overly broad and must be based on characteristics that are immutable.³⁶⁰ In addition, a particular social group cannot be defined by the persecution feared by the

353. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012).

354. *Id.* at 653 (The Court reasoned that although particularity and social visibility were not part of the UNHCR Guidelines on Membership of a Particular Social Group, the BIA's interpretation of a "particular social group" was not unreasonable and thus, *Chevron* deference was proper.)

355. *See also* *Rodas-Orellana v. Holder*, 780 F.3d 982, 991-92 (10th Cir. 2015) (El Salvadorans who had been threatened and actively recruited by gangs, who resisted joining because they opposed gangs, did not constitute a particular social group because it was not "socially distinct.").

356. *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003); *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005).

357. *Valdiviezo-Galdamez v. U.S. Attorney General*, 663 F.3d 582 (3d Cir. 2011).

358. *Id.* at 608-09. *See Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014).

359. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

360. *Id.*

applicant.³⁶¹ There is no all-encompassing definition of a particular social group that would cover all children fleeing forced recruitment. Rather, individual case-by-case formulations of each child's particular social group must be considered based on the particular circumstances of the child. Under the *Acosta* formulation, some children fleeing forced recruitment could have established that they were members of a particular social group.

First and foremost, children facing forced recruitment share the immutable characteristic of age. When a characteristic is immutable, it either cannot be changed or it is so fundamental to a person's identity that that person should not be required to change it.³⁶² Age is not something that a child can change short of growing up, and at the time that a child is targeted for forced recruitment, his age is something over which he has no control.³⁶³ The BIA's recognition that age is immutable and may form the basis for a particular social group is significant. As only the Third and Sixth Circuits have held that age is not immutable, under the *Acosta* standard alone, age-based claims have the potential to be successful in most circuits, thereby increasing the likelihood of finding a cognizable social group for children fleeing forced recruitment.

Regardless of whether age is immutable, a group based on the characteristic of age alone, without additional limiting factors, would be too broad to constitute a particular social group even under *Acosta*. However, in cases of forced recruitment, there are many potential limiting factors that can be combined with age to define a cognizable particular social group under the *Acosta* standard. One such factor is geography: armed groups often target children if they live in areas controlled by the armed groups.³⁶⁴ Depending on the child, the location of their home may be an immutable characteristic. A child may not have the ability to move due to infancy, poverty, or even because of how widespread the force is that is trying to recruit him.

Armed forces also target children based on their gender, another immutable characteristic. Some children are separated from their families, either because they are orphans, street children, or for other reasons, and consequently such children are especially vulnerable to recruitment. Such separation may also be immutable, depending upon the individual case. In countries where the government is unwilling or unable to protect the child from forced recruitment, that lack of protection may also be a limiting characteristic. For children that have resisted gang recruitment, that resistance, especially if

361. Lukwago, 329 F.3d 157; see also UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 75, at para. 11.

362. *Matter of Acosta*, 19 I. & N. Dec. at 233-34.

363. See *supra* Section IV.A.1.

364. See Margaret McCallin, *Understanding the Psychosocial Needs of Refugee Children and Adolescents*, 98, available at http://www.forcedmigration.org/rfgexp/pdfs/1_5.pdf; see also *Facts about Child Soldiers*, *supra* note 200 ("Children are most likely to become child soldiers if they are poor, separated from their families, displaced from their homes, living in a combat zone[,] or have limited access to education.").

based upon conscience, might also be a fundamental characteristic. Thus, there are many possible formulations of a cognizable particular social group under *Acosta* that children targeted for forced recruitment could develop based on their individual circumstances.

In contrast, under the new requirements of “particularity” and “social visibility,” claims from children fleeing forced recruitment have been predominantly unsuccessful, irrespective of whether the proposed social groups for these children have been defined by additional limiting characteristics. It is regrettable that the most recent case in which the BIA affirmed the immutability of age, *Matter of S-E-G-*, was also the case that introduced the new requirements.³⁶⁵ As a result of the new requirements, the United States is precluding children that may otherwise have legitimate asylum claims from obtaining protection.

C. Former Child Soldiers or Former Gang Members Recognized as Particular Social Groups in Some Circuits

A discussion of children fleeing forced recruitment would not be complete without looking at those children who were not able to escape their home countries until after becoming a child soldier or gang member. Former child soldiers or gang members have a greater chance of receiving protection in the United States than those children who escape before being forcibly recruited. Although the BIA has not recognized former child soldiers or former gang members as particular social groups, several circuit courts have done so, even in light of the new “particularity” and “social distinction” requirements.

The BIA has not considered the issue of whether former child soldiers can be members of a particular social group. Prior to the imposition of the requirements of “particularity” and “social distinction,” the Third Circuit in *Lukwago v. Ashcroft* considered whether former child soldiers could be a particular social group. The Third Circuit distinguished between social groups in past persecution claims and those in future persecution claims, holding that the characteristic of being a former child soldier could be the basis for a particular social group claim for the purposes of establishing a well-founded fear of future persecution.³⁶⁶ While the court in *Lukwago* addressed this important threshold issue and established that former child soldiers could constitute a particular social group, no other circuits have considered this question *vis-a-vis* child soldiers.

In contrast, the BIA has vehemently declined to find that former gang members constitute a particular social group on that grounds that groups with

365. *Matter of S-E-G-*, 24 I. & N. Dec. 579.

366. *Lukwago*, 329 F.3d at 174. The Third Circuit referenced the *Acosta* standard in its decision stating 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.’” *Id.* at 178.

a shared criminal past or criminal activity cannot be recognized as particular social groups.³⁶⁷ The BIA has stated that to do so would have public policy implications.³⁶⁸ However, the BIA has also used the requirements of “social distinction” and “particularity” to deny claims from former gang members.³⁶⁹

Several circuits, including the Ninth Circuit³⁷⁰ and the First Circuit³⁷¹ agree with the BIA that former gang members cannot be a particular social group. However, other circuits have taken a decidedly different stance on whether former gang members or child soldiers are a particular social group, even after the BIA imposed the “particularity” and “social distinction” requirements. In *Ramos v. Holder*, the Seventh Circuit held that being a former gang member is an immutable characteristic within the sense of *Acosta*,³⁷² and that former gang members constitute a particular and socially distinct group.³⁷³ The Sixth Circuit joined the Seventh Circuit in recognizing that former gang members can be a part of a particular social group in *Urbina-Mejia v. Holder*.³⁷⁴ The Sixth Circuit reasoned that mistreatment based on “being a former member of a group” is mistreatment on account of a particular social group.³⁷⁵

367. Matter of E-A-G, 24 I. & N. Dec. 591 (B.I.A. 2008) (The BIA held that “young persons who are perceived to be affiliated with gangs” cannot be members of a particular social group because recognizing gangs as particular social groups would be “inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior.”).

368. *Id.* at 596.

369. Matter of W-G-R-, 26 I. & N. Dec. 208, 221-22 (B.I.A. 2014) (The BIA held that a group defined as “former members of the Mara [MS] 18 gang in El Salvador who have renounced their gang membership” does not constitute a particular social group because “it is too diffuse, as well as being too broad and subjective.” The BIA also held that the respondent failed to provide sufficient evidence that the proposed particular social group was “socially distinct.”).

370. *Arteaga v. Mukasey*, 511 F.3d 940, 945-46 (9th Cir. 2007) (The Ninth Circuit rejected a social group of former gang members because the shared past experience included violent criminal acts, holding: “Arteaga’s shared past experience includes violent criminal activity. We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.”).

371. *Cantarero v. Holder*, 734 F.3d 82, 85-87 (1st Cir. 2013) (The First Circuit held that former gang members are not a particular social group, noting that “Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger.”).

372. *Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009) (The Seventh Circuit reasoned that “[b]eing a member of a gang is not a characteristic that a person ‘cannot change, or should not be required to change,’ provided that he can resign without facing persecution for doing so But if he *can’t* resign, his situation is the same as that of a former gang member who faces persecution for having quit”) (emphasis added) (citations omitted).

373. *Id.* at 431. (The Seventh Circuit also addressed “particularity” and concluded that “Ramos was a member of a specific, well-recognized, indeed notorious gang, the former members of which do not constitute a ‘category . . . far too unspecific and amorphous to be called a social group.’”). The Court reaffirmed its finding in *Gatimi v. Holder*, finding that “social visibility” is irrelevant for the determination of the existence of a particular social group. 578 F.3d 611, 615-16 (7th Cir. 2009).

374. *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010). The Sixth Circuit found that both the Immigration Judge and the BIA had erred when holding that “former gang members” were not part of a “particular social group.” *Id.* at 367.

375. *Id.* at 366 (citing to *Velasquez-Velasquez v. INS*, 53 F. App’x 359, 364 (6th Cir. 2002) (holding that being a former soldier constituted an immutable characteristic)).

The latest circuit to hold that former gang members may constitute a particular social group was the Fourth Circuit in *Martinez v. Holder*.³⁷⁶ The Fourth Circuit held that the “proposed particular social group of former MS-13 members from El Salvador is immutable . . . in that the only way that Martinez could change his membership in the group would be to rejoin MS-13.”³⁷⁷ Accordingly, the Court held that the BIA erred when it declined to recognize the particular social group of former members of MS-13 on immutability grounds.³⁷⁸

While recognizing that former gang members or former child soldiers may constitute a particular social group for the purpose of establishing a well-founded fear of future persecution is an important step in some circuits, it is not enough. It does not help the child seeking to avoid the horrors of forced recruitment in the first place.

IV. CONCLUDING REMARKS

In response to a growing number of gang-based claims, the BIA has so narrowly defined a particular social group that it is all but impossible for children at risk of being targeted for forced recruitment by either criminal gangs or armed forces to qualify for asylum. By limiting the definition of a particular social group, children fleeing forced recruitment are, in most cases, unable to demonstrate that they are members of particular social group targeted for persecution. This limitation affects not only children fleeing gangs, but also other groups of children fleeing forced recruitment that otherwise engender worldwide sympathy and support, such as child soldiers.

There are significant efforts being made to find forms of immigration protection for child soldiers beyond just asylum, including a special visa for child soldiers.³⁷⁹ While this would certainly benefit child soldiers and provide a way around the social group definition, such efforts would do little to help children fleeing forced recruitment by gangs in Central America. Given the recent public reaction to the surge of children from Central America, it is unlikely that the political will exists to create such a visa track that could encompass Central American children as well.³⁸⁰ Furthermore, it is unlikely that any special visa track would be comprehensive enough to

376. *Martinez v. Holder*, No. 12-2424, 2014 WL 243293 (4th Cir. Jan. 23, 2014).

377. *Id.* at 906.

378. *Id.* at 912-13 (The Fourth Circuit also looked at the issue of whether the groups whose members had formerly participated in criminal conduct could be disqualified as particular social groups. The court found this to be “untenable as a matter of statutory interpretation and logic,” pointing out that only some criminal activity acts as a bar to asylum.)

379. In 2007 during a Congressional hearing, Senator Tom Coburn proposed a special track or visa for child soldiers seeking asylum. *Casualties of War: Child soldiers and the Law: Hearing Before the Subcomm. on Human Rights and the Law on the S. Comm on the Judiciary*, 111th Cong. 23 (2007) (statement of Sen. Tom Coburn).

380. Rossi, *supra* note 31, at 422-35.

ensure that all children fleeing forced recruitment obtain the protection they deserve.

Unfortunately, the BIA's new requirements of "particularity" and "social distinction" leave little room to develop successful social group claims for children escaping forced recruitment today. As a result, their advocates must rely on creative strategies when presenting asylum claims in the United States.³⁸¹ These strategies include relying on a protected ground other than a particular social group, or tailoring the particular social group as narrowly as possible to survive the particularity and social visibility tests.³⁸² There has been some limited success with these strategies at the immigration judge level,³⁸³ although they have not been successful in a single case published by the BIA or circuits courts.

It is regrettable that asylum law in the United States has developed in this way. The *Acosta* formulation provides a clear yet flexible standard for determining what constitutes a particular social group, consistent with international law. There was no need for the additional requirements of particularity and social visibility, and those additional requirements have only served to unnecessarily constrain and confuse the particular social group analysis. U.S. asylum law should return to the *Acosta* formulation of a particular social group. In the alternative, the United States could implement the UNHCR's formulation, in which "particularity" and "social perception" are an alternative formulation of a particular social group, rather than additional requirements to the *Acosta* standard. Either solution would be consistent with international norms regarding the definition of a particular social group.

The new requirements of particularity and social visibility are particularly devastating to asylum claims from children fleeing forced recruitment. Until asylum laws in the United States are once again consistent with internationally recognized norms, children fleeing forced recruitment from gangs and armed forces will continue to face an enormous challenge in securing protection in the United States. By refusing to recognize that children targeted for recruitment for gang membership or to be child soldiers may constitute a particular social group, we are telling children who flee their home countries prior to being abducted, indoctrinated, tortured, and in many cases forced to perpetrate abuses, that we will not protect them from these horrors.

381. There are many practice pointers on how to present a forced recruitment claim. *See, e.g.*, WOLA, *supra* note 240; NIJC, *Particular Social Group Practice Advisory*, *supra* note 160.

382. *See, e.g.*, WOLA, *supra* note 240; NIJC, *Particular Social Group Practice Advisory*, *supra* note 160.

383. *See* WOLA, *supra* note 240.