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THE REFUGEE ACT OF 1980: AN EMPTY PROMISE TO EXPLOITED CHILDREN

INTRODUCTION

After marrying at the tender age of thirteen and being sold by her husband to a prostitution agent a few years later, Maya left her native Nepali village to work as a child prostitute in Bombay, India.¹ Here, Maya suffered from regular beatings and lock-ups at the hands of brothel owners who forced her to serve clients until she contracted HIV and returned home.² In Pakistan, twelve-year-old Iqbal Masih, the international "spokesman" for the crusade against bonded child labor, was shot dead in April, 1995, after telling the world how at the age of four, he had been abandoned by his parents at a carpet factory in return for less than \$20.00.³ During his "employment", Iqbal earned one rupee a day while working in slave-like conditions. In Washington, D.C., Lesly, a fifteen-year-old girl, told members of the United States Senate about the two years she spent sewing Liz Claiborne sweaters in a Honduran factory, working nearly eighty hours a week for less than \$0.40 an hour.⁴

1. Birman Maharajan, *Nepal-India: Rights Group Exposes Trans-Border Sex Slavery*, INT'L PRESS SERV., 1995 WL 10133812 (Aug. 23, 1995).

2. *Id.* Maya worked in debt-bondage so that she would pay all of her earnings to the brothel owner in compensation for "buying" her. *Id.* Health workers suspect that the brothel forced Maya out onto the streets because she tested positive for HIV. *Id.*

3. *Iqbal Gave Slavery a Face*, MONTREAL GAZETTE, Apr. 20, 1995 at B2. Not long after escaping from the carpet factory at the age of ten, Iqbal Masih began his fight to eradicate child labor. *Id.* His efforts resulted in the closure of dozens of Pakistani carpet-weaving factories. *Id.* 13-year-old Craig Kielburger of Canada has taken over Iqbal Masih's crusade against child labor. *60 Minutes: One Child's Labor. Craig Kielburger Takes on the World in Fight to End Child Labor*, (CBS television broadcast, July 21, 1996). Craig founded the group "Free the Children" which works with other international human rights groups to bring the issue of child labor to the world's attention. *Id.* Craig recently missed seven weeks of school in order to travel to various countries such as Pakistan, Thailand, and India. *Id.* During his travels, Craig documented on video tape numerous examples of child labor. *Id.*

4. Mitchell Zuckoff, *Free Trade, Human Rights Clash Over GATT*, BOSTON GLOBE, Oct. 30, 1994, at 77. Lesly Solorzano came to America to plead for the passage of the Child Labor Deterrence Act, proposed by members of Congress, which ultimately failed to pass. *Id.* The purpose of the Child Labor Deterrence Act was to outlaw the importation of all products made by children 15 years old or younger. S. 613, 103d Cong., 1st Sess. (1993).

These types of notorious exploitation commonly exist not only in India, Pakistan, and Latin America, but in various countries around the globe.⁵ To United States citizens, the treatment of these three youths and countless others like them would constitute unimaginable human rights abuses if found in America.⁶ However, despite its vocal support of the international battle against human rights violations, the United States remains strangely reluctant to actively combat these types of abuses in other countries.⁷

Nowhere is this more apparent than in the area of refugee law⁸ where domestic concerns supersede any commitment by the United States government to provide a safe haven to refugees from a country notorious for human rights violations.⁹ Though the United Nations hoped that the adoption of refugee and asylum laws would relieve human suffering arising out of these practices,¹⁰ the Refugee Act, enacted by the United States to comply with the United Nation's desire, grants asylum to *only* those refugees who demonstrate a fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion.¹¹ Consequently, if Maya, Iqbal or Lesly sought asylum in America in an effort to escape from the exploitative practices in

5. See *infra* notes 15-52 and accompanying text for a discussion of child exploitation in various nations throughout the world.

6. See *infra* note 55 and accompanying text for a discussion of U.S. laws denouncing the practices of child prostitution and child labor.

7. Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in *ACLU INTERNATIONAL CIVIL LIBERTIES REPORT 1*, 1 (ACLU ed., 1994). As illustrated by the Haitian interdiction program, it is evident that the United States remains hesitant to grant asylum to refugees fleeing from human rights abuses in their native countries. *Id.* See *infra* notes 65-87 and accompanying text for a discussion of the United States' policy toward international use of child labor.

8. See Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A), 1157-59, 1253(h), 1521-24 (1988) [hereinafter Refugee Act]. The Refugee Act requires that for a granting of asylum, an applicant must prove that he cannot return to his native 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". *Id.* Under the Refugee Act the federal government will deny an application for asylum unless the applicant can demonstrate that he or she fits into one of the specified categories. *Id.* See *infra* notes 92-177 and accompanying text for a discussion of how the federal courts narrowly interpret the Refugee Act.

9. Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 4 (1992). Historically, the United States has ratified few human rights treaties that may produce domestic consequences. *Id.*

10. Todd Stewart Schenk, Note, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee"*, 2 IND. J. GLOBAL LEGAL STUD. 301, 309 (1994).

11. Refugee Act, 8 U.S.C. § 1101(a)(42)(A). The Refugee Act does not recognize the exploitation of children for sex or labor as a category for refugee status. *Id.*

their native countries, the United States would deny their pleas because they do not fit into any of the categories defining "refugee."¹²

This Note examines the Refugee Act of 1980 and demonstrates that, contrary to its purpose, the Act fails to protect children who are victims of intolerable abuse and exploitation. This failure is due in large part to court decisions narrowly interpreting the language of the Refugee Act. Part I discusses the sexual and economic exploitation of children as human rights abuses, focusing on three geographical areas where these activities abound. Part II of this Note details the international policies the United States espouses regarding children's rights and refugee law. Part II also focuses on the Refugee Act as the United States' main legislative response to human rights abuses abroad. Part III analyzes the Refugee Act in terms of its application to requests for asylum by exploited children and shows how the measure fails to protect these children based on prior interpretive decisions. Lastly, Part IV of this Note proposes that the U.S. government adopt and modify domestic and international policies designed to protect children from abuse and insidious exploitation.

I. CHILD EXPLOITATION: A GLOBAL PERSPECTIVE

This Part addresses the sexual and economic exploitation of children by focusing on three regions of the world where these types of human rights abuse commonly occur. Section A focuses on child prostitution in India. Section B describes forced child labor in Pakistan. Finally, Section C addresses the problem of child labor in Latin America. While India, Pakistan and Latin America may be the worst violators, child exploitation occurs globally and is finally recognized as an international dilemma.¹³

12. *Id.*

13. See Roger J.R. Levesque, *Sexual Use, Abuse, and Exploitation of Children: Challenges in Implementing Children's Human Rights*, 60 BROOK. L. REV. 959, 960 (1994) (noting that "sexual mistreatment of children is a global problem increasing in scope," though still largely unnoticed); see also ILENE COHEN & GUY S. GOODWIN-GILL, *CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT* 67 (1994) (documenting that youths are coerced into joining government armed forces in Burma, Guatemala, El Salvador, Ethiopia, the Philippines, or opposition movements, as in Mozambique, Angola, Sri Lanka and Sudan); HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REP., EVENTS OF 1994* 322 (1995) (stating that although international law currently sets 15 years of age as the minimum age at which children can participate in armed conflict, thousands of children as young as eight-years-old are forced to fight in savage conflicts or join rebel groups); HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REP., EVENTS OF 1995*, 338 (1996); Keith C. Epstein, *What if the Label Said 'Child Labor'?*, SAN DIEGO UNION-TRIB., Oct. 3, 1994, at B7 (reporting that a study for the U.S. Department of Labor's Bureau of International Labor Affairs found that in Asia, "children work in dark 'medieval' huts, knotting carpets for hours on end and in Africa, children labor in

A. India: A Market for Child Prostitution

As the world's largest democracy, India enjoys typical democratic safeguards such as a free press and a civilian-controlled military.¹⁴ Yet, as illustrated by the example of Maya in the Introduction to this Note, India fails as a model of human rights norms.¹⁵ As a remnant of its pre-democratic days, Indian human rights violations, particularly against children, continue to form a part of the Indian culture.¹⁶ The sexual mistreatment of children in India is perhaps the most disturbing violation to American onlookers.¹⁷

Girls and boys as young as twelve-years old recruited to Bombay crowd the sexual market in India.¹⁸ As a great supplier for

gold and diamond mines."); Tom Harkin, *No Cheer From Toys Made by Child Labor Imports: 46 Million Children Make Goods for the U.S. Market. How Can Consumers Discourage This Pitiful Commerce?*, L.A. TIMES, Dec. 22, 1994, at 7 (noting that "children under the age of 15 constitute 11% of the work force in some Asian countries and up to 26% in many Latin American countries"); Michael Serrill, *Defiling the Children*, TIME, June 21, 1993, at 52 (discussing child prostitution in Moscow and Thailand and estimating that over one thousand boys and girls of young ages sell themselves in Moscow; 800,000 in Thailand; 250,000 in Brazil; and 60,000 in the Philippines).

14. *Prepared Testimony of John Shattuck Before the Subcommittee on Asia and the Pacific and the Subcommittee on Int'l. Operations and Human Rights Committee on Int'l. Relations*, FED. NEWS SERV., 1995 WL 10384399 (Mar. 16, 1995) [hereinafter Shattuck].

15. See *id.* supra note 14, at 283 (estimating that there are 400,000 child prostitutes in India); see also Mahesh Uniyal, *Social Summit-Children: Demand for Action on Child Labor*, INT'L. PRESS SERV. 1995 WL 2259597 (Mar. 7, 1995) (quoting a statement made by Swami Agnivesh of the Bonded Labor Liberation Front of India that "there are 60 million children aged between 5 and 16 in servitude in India [who] work on an average of 10 hours a day, and some of them even as long as 16 hours a day.").

16. Shattuck, *supra* note 14, at 286. The persistent human rights abuses found in India "may be rooted in ancient social systems, expressed as intercaste or inter-religious violence, or arise from the intense social tensions." *Id.* Furthermore, "the demand for underage sex has also been affected by cultural beliefs, social expectations, and in particular, misconceptions about AIDS." Vickie F. Li, Comment, *Child Sex Tourism to Thailand: The Role of the United States as a Consumer Country*, 4 PAC. RIM L. & POL'Y J. 505, 510-12 (1995) (citing Charles Wallace, *Widening the War on Child Sex: Weak Local Enforcement Has Helped South Asia's Vice Trade Flourish. Now the U.S. and European "Consumer" Countries are Joining the Battle to Keep Men From Seeking Young Prostitutes Overseas*, L.A. TIMES, July 13, 1994 at 1). For example, the interest of many cultures in child sex arises from the cultural belief that sexual intercourse with a virgin will bring longevity or heightened sexual intensity. *Id.* Also, many cultures believe that intercourse with a child is a form of safe sex. *Id.* Thailand, like India, still holds this belief, despite the fact that a positive correlation between prostituted children and the spread of AIDS exists. *Id.* Also, many regard prostitution as a very profitable venture, thus distorting a particular society's perception of sexual exploitation so that the prostitution of children appears acceptable. *Id.*

17. Li, *supra* note 16, at 510-12.

18. Maharjan, *supra* note 1. Estimates show that the market for child prosti-

this market, Nepali girls such as Maya go to Indian cities to work as prostitutes.¹⁹ Recruitment of children for the sex trade in India is fairly simple. Traffickers often entice girls with promises of marriage or jobs as maids in Indian households in return for sexual services.²⁰ These traffickers then sell the girls to brothels for up to \$500.00.²¹

Tragedy characterizes the lives of these child prostitutes. According to a report released by Human Rights Watch/Asia,²² Nepali girls work in conditions "tantamount to slavery."²³ These children suffer from severe beatings and isolation, and eventually most contract a sexually transmitted disease such as HIV.²⁴ Even so, the Indian government does little to combat these problems.²⁵ Although India's constitution mandates a government commitment to the eradication of human rights violations,²⁶ and the Indian government recently established a National Human Rights Commission,²⁷ the sheer number²⁸ of child-prostitutes in India demonstrates that child prostitution goes unrecognized by the Indian government as a violation of human rights. Thus, the

tutes is particularly strong in India, as there exist approximately 400,000 underage prostitutes. See also Serrill, *supra* note 13, at 52.

19. Maharjan, *supra* note 1. Trans-border trafficking of child prostitutes between Bombay and Nepal operates as a primary source for India's prostitute market. *Id.* Nepal's human export to India also includes girls who have migrated to India because of Nepal's stagnating economy and population pressures. *Id.* In fact, estimates show that of the 100,000 "sex workers" in Bombay, half are Nepalis, 20% of whom are under 18 years of age. *Id.*

20. *Id.* Family members often arrange for the abductions of their children into the prostitution trade in exchange for a small fee. *Id.*

21. *Id.* The sale price of the girls usually depends on their appearance and whether they are virgins. *Id.* The brothel owners recoup this fee quickly because they force many of the child prostitutes to pay back their "price." *Id.* Essentially, these children must work for free.

22. See *id.* (citing *Rape for Profit: Trafficking of Nepali Girls and Women to Indian Brothels*, REP. BY HUMAN RIGHTS WATCH/ASIA, Aug. 1995.) Human Rights Watch/Asia is a division of Human Rights Watch, an independent non-governmental organization that "conducts regular, systematic investigations of human rights abuses in some seventy countries around the world." FOREWORD TO HUMAN RIGHTS WATCH WORLD REP., EVENTS OF 1994, *supra* note 13.

23. Maharjan, *supra* note 1.

24. *Id.* In fact, the World Health Organization described several countries, including India, as "smoldering volcanoes" of AIDS. Pat Swift, *In Thailand, It's Prostitution or Destitution*, BUFF. NEWS, Apr. 22, 1995, at C5.

25. Maharjan, *supra* note 1.

26. Shattuck, *supra* note 14, at 287.

27. *Id.* See also Maharjan, *supra* note 1 (reporting that pressure by human rights groups in Bombay led the Indian police to conduct some raids of prostitution dens. These raids however, produced a minimal impact on child prostitution).

28. At least 400,000 child prostitutes work in India. Shattuck, *supra* note 14, at 283. See Levesque, *supra* note 14, at 961 (discussing the fact "that there are virtually no explicit, enforceable international protections against sexual maltreatment").

pervasiveness of the child-sex market in India makes it unlikely that the government will take steps to eradicate the problem any time soon. The same can be said of child labor in Pakistan.

B. The Child Laborers of Pakistan

The murder of young Iqbal Masih, while tragic, produced one positive result: the recognition of child labor problems in Pakistan.²⁹ The United Nations International Labor Organization estimates that there are 200 million child laborers worldwide.³⁰ Pakistan's own Human Rights Commission admits that close to eleven million children under the age of fourteen work six days a week and up to ten hours a day in the menial workforce.³¹ Half of these Pakistani children die before reaching twelve years of age, many succumbing to malnutrition.³² Most Pakistani children are forced into employment as hand-weavers in carpet factories, perhaps Pakistan's largest export industry.³³ A significant number of these children work as "bonded" laborers; that is, Pakistani factories bought the children for use as slaves or the children inherited the debt of a parent and must work to settle the debt.³⁴

29. Ramesh Jaura, *Children-Labor: Probe Into Pakistani Carpet Worker Slaying Urged*, INT'L PRESS SERV., 1995 WL 2260625 (Apr. 24, 1995). In fact, several non-governmental international organizations recently urged the Pakistani government to investigate the slaying. *Id.* Currently, the Pakistani Association Against Child Labor blames the murder on the country's "carpet mafia" in retaliation for Iqbal's accounts of the terrible working conditions faced by Pakistani child-laborers in numerous carpet factories throughout the country. *Id.*

30. Zuckoff, *supra* note 4, at 77.

31. Sydney H. Schanberg & Jimmy Briggs, *Six Cents an Hour*, LIFE, June 1, 1996, at 38, 42. Reporting on child labor practices in Pakistan has been difficult for Western journalists because they have been threatened or assaulted while attempting to investigate child exploitation. *Id.* at 41.

32. Jaura, *supra* note 29.

33. Uniyal, *supra* note 15. Another large industry, Pakistani soccer balls sold to American companies, is frequently supported by child labor. *Eye to Eye with Connie Chung: Children at Work; Pakistani Child Labor Prominent in Manufacture of Goods for U.S. Sports Companies and U.N.I.C.E.F.* (CBS television broadcast, Apr. 6, 1995)[hereinafter *Eye to Eye with Connie Chung*]. For example, approximately 50% of the soccer balls sold in America are made in Pakistan. *Id.* Connie Chung interviewed one 12 year old child who stated that he has labored in the soccer ball factory since the age of seven, working full time and never going to school. *Id.* Connie Chung visited this boy's factory during the interview and, although denied by his employer, numerous other children were found working in the factory, the youngest being six-years-old. *Id.* A Pakistani activist on education issues, Fawad Usman Khan, served as an interpreter during the interview, commenting that: "The kids come cheaper. They are very good workers. No complaints. They work full-time. They take the abuse, they take everything, and they don't protest. You couldn't find better labor anywhere else." *Id.*

34. Harkin, *supra* note 13, at 7. The typical "bonded" child laborer goes to work in a factory in return for a loan made to a parent in financial need. *Iqbal Gave Slavery a Face*, *supra* note 3, at B2. Usually, the terms of the loan and the virtual-

In response, various non-governmental international organizations continually call for the complete global elimination of child labor, often citing Pakistan as a primary target.³⁵ Even Benazir Bhutto, the Pakistani Prime Minister, supports making child welfare a priority, mandating the building of schools and proposing child-labor laws.³⁶ Yet, as the suggested laws would not affect all workplaces,³⁷ the complete eradication of this inhumane exploitation, at least in Pakistan, still seems very far in the future.³⁸

ly non-existent wages paid to the child make repayment nearly impossible. *Id.* For the most part, child labor persists in Pakistan due to its poor economic state, despite existing legislation making bonded labor illegal. *Id.* Governments of countries that rely on child labor remain unwilling to eradicate the problem because they feel a cessation of the practice may severely harm their economies. Maureen Moran, Comment, *Ending Exploitative Child Labor Practices*, 5 PACE INT'L L. REV. 287, 295 (1993). Furthermore, widespread corruption at the local level exists, so that sometimes the government itself operates a facility employing children, in defiance of its own laws. *Id.* The small amount of funds spent on education in Pakistan may also contribute to the child work-force. *Id.* at 296; *Eye to Eye with Connie Chung*, *supra* note 33. The government spends less than three percent of the gross national product in Pakistan on education. *Id.* Some authorities believe that the lack of education is the most significant factor contributing to the astronomical numbers of child laborers in Pakistan and the rest of Asia. One activist in India suggested establishing a global fund to support compulsory schooling for students up to age 14 and also recommended the implementation of a program which would teach these children certain trade skills useful in Asian workplaces. Uniyal, *supra* note 15. See also Schanberg & Briggs, *supra* note 31, at 38 (positing that education is a starting point for the eradication of child labor).

35. Jaura, *supra* note 29. Several of these organizations, mostly German-based, formed a campaign to battle child labor. *Id.* In support of the campaign, its spokesman, Uwe Kleinert, stated, "[f]aced with situations such as the slaying of Iqbal, one might be tempted to call for a boycott of all products made by child workers under inhuman conditions. But a boycott should be resorted to when all the other persuasive means have failed." *Id.* See also Harkin, *supra* note 13, at 7 (noting that in the United States, the Child Labor Coalition launched a campaign for the "rugmark," "a label affixed to carpets from India, Pakistan and Nepal assuring consumers that the product is not made with child labor.").

36. *Eye to Eye with Connie Chung*, *supra* note 33.

37. *Id.*

38. Recognition of child labor by the Pakistanis is essential to its ultimate elimination. Pakistan carpet factory owners still refuse to admit that they use young children to make their products, despite recent Western news reports and other types of publicity confirming such exploitation. Schanberg & Briggs, *supra* note 31, at 44. In fact, one speaker for the carpet manufacturers stated that any media reports showing child laborers making carpets actually derived from India and were an attempt to humiliate Pakistan. *Id.* This type of denial operates to obstruct any meaningful chance of remedying child exploitation in Pakistan.

C. *Child Labor Hits Closer to Home: The Child Laborers of Latin America*

The ruthless exploitation of Lesly³⁹ exemplifies the tragic lives of many Latin American children. In her pleas to the United States Senate, Lesly spoke of the Korean factory managers who beat and belittle the young workers, and who "like to touch the girls."⁴⁰ Lesly also recounted stories of locked bathrooms, choking dust and impossible quotas.⁴¹ Sadly, child labor is not limited to Lesly's country, Honduras.⁴² This tragic exploitation hits closer to our backyard, in fact, as close as Mexico.⁴³

Child labor in Mexico occurs regularly, especially with the advent of the "maquiladoras," the American-owned factories located in Mexico.⁴⁴ For instance, in a 1994 Human Rights Report, the State Department cited Mexico for many violations, including "extensive illegal child labor in the informal economy."⁴⁵ The State Department also observed that, although the Mexican government established a human rights commission, by the end of 1994, "it had tried and punished few human rights abusers, and abuses remained widespread."⁴⁶

United States trade policy seems at odds with these government findings of human rights abuses in Latin America. That is, recent economic policies emphasize the opening of American markets to this region through the passage of free-trade agreements such as the Uruguay Round of the General Agreement on Tariffs and Trade⁴⁷ (GATT) and The North American Free Trade Agree-

39. Zuckoff, *supra* note 4, at 77.

40. *Id.*

41. *Id.*

42. Studies also report that in other Latin American countries young boys burrow tunnels in mines. Epstein, *supra* note 13, at B7. See also Donna Larcen, *The Sweatshop Dilemma: How Can We Buy With a Clear Conscience?*, HARTFORD COURANT, Aug. 23, 1995, at E1 (writing that the recent report by the Labor Department also cites Brazil, Guatemala and Mexico as areas where child-labor abuses continue).

43. Larcen, *supra* note 42, at E1.

44. *Protectionism will Help Increase U.S. Economic Power*, DAYTON DAILY NEWS, Aug. 5, 1995, at 12A. See Sue Ann Pressley, *Cause Elusive in Tragic Case of Border Babies*, SEATTLE TIMES, Sept. 21, 1995, at A3 (defining the term "maquiladora").

45. Carol Giacomo, *U.S. Cites Rights Abuses in China, Russia, Mexico*, CHI. SUN-TIMES, Feb. 2, 1995, at 8 (quoting the State Department's annual human rights report).

46. *Id.*

47. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Art. XXIX(2)(b), Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter GATT]. As an executive agreement, GATT operates as a treaty obligation to reduce barriers to free trade. James P. Kelleher, *The Child Labor Deterrence Act*, 3 MINN. J. GLOBAL TRADE 161, 161 (1994).

ment (NAFTA).⁴⁸ Thus, as American businesses take increasing advantage of these open markets, the United States' incentive to actively protect human rights in Latin America diminishes proportionately.⁴⁹ In balancing U.S. concerns over the international use of child labor and our interests in free trade, the scale has clearly tipped in favor of the latter.

The descriptions of regional exploitation in this Part constitute serious human rights violations from the United States' and most international perspectives.⁵⁰ Yet, although the United States protects its own children from these practices,⁵¹ it does not actively encourage these same protections globally.⁵² The

48. North American Free Trade Agreement, Dec. 12, 1992, 32 I.L.M. 605 [hereinafter NAFTA]. Ironically, trade specialists agree that passing child labor bills, such as the Child Labor Deterrence Act, would create a conflict with GATT and NAFTA. Zuckoff, *supra* note 4, at 77. For example, some authorities believe that a U.S. ban on products made by child labor could result in punitive tariffs on key exports from the United States, thus hindering the purpose of the agreement, the opening up of markets. *Id.* On the other hand, many believe that these free-trade policies will only promote the use of child labor. *Protectionism Will Help Increase U.S. Economic Power*, *supra* note 44, at 12A. Senator Tom Harkin, who sponsored the unsuccessful Child Labor Deterrence Act recently stated, "[i]f a Third World country wants to compete in the global economy, what does it have to compete with? Cheap labor. And the cheapest source of labor is kids. So, in some ways, this new GATT could actually be a stimulus to using more child labor in Third World countries." Zuckoff, *supra* note 4, at 77. Estimates indicate that the passage of GATT and NAFTA will encourage American companies to open nearly 400 new plants and creating 364,000 new jobs in the maquiladora sector by the year 2000, taking full advantage of the cheap child labor. *Id.*

49. Moran, *supra* note 34, at 302. American businesses conduct business relations with Latin American companies, despite knowledge of exploitative practices. *Id.* In fact, to maximize profits, these businesses often use the cheap child labor for their own ventures, no matter how oppressive. *Id.*

50. Cynthia Price Cohen, *Freedom from Abuse: One of the Human Rights of Children*, 11 U. DAYTON L. REV. 601, 619-20 (1986). The International Labor Organization [hereinafter ILO] classifies all child labor as illegal. *Id.* at 619. In a seminar discussing methods for achieving the elimination of child labor, the ILO determined certain types of child labor to be especially exploitative:

The special attention of the seminar was drawn to the problems of bonded labor, the use of children in pornography and prostitution and the employment of children in armed conflicts as soldiers. The seminar was in complete agreement that these forms of child labor should certainly be considered exploitative, and should be eliminated as soon as possible.

Id. at 620.

51. The United States continually enacts various legislative measures protecting children from sexual and economic exploitation. For example, the United States enacted the Child Abuse Prevention & Treatment Act in 1974 to protect children from sexual abuse. 42 U.S.C. §§ 5101-5115 (1988). Moreover, to safeguard children from exploitative labor practices, Congress enacted the Fair Labor Standards Act which prohibits the shipment of goods made with oppressive child labor in the United States into the stream of commerce. Fair Labor Standards Act, 29 U.S.C. § 212(a) (1988). Furthermore, the Fair Labor Standards Act also punishes employers who employ child labor. *Id.* at § 212(c).

52. See *infra* notes 54-65 and accompanying text for a discussion of the United

next Part examines this disparity.

II. THE PROTECTION OF CHILDREN'S HUMAN RIGHTS: A UNITED STATES PERSPECTIVE

The United States government faces frequent criticism for its lack of attention to international human rights law and its failure to actively protect children abroad from human rights abuses.⁵³ This Part presents a history of United States laws addressing international human rights issues affecting children. Section A examines the United States' ratification of various international human rights treaties. Section B focuses on the United States' refusal to ratify the Convention on the Rights of the Child. Finally, Section C discusses the enactment of the Refugee Act of 1980 as a measure designed to combat human rights abuse around the world.

A. United States Policies Toward the International Protection of Human Rights

Many believe that the United States must bear some responsibility for the tragic abusive practices existing throughout the world. As the world's largest economy and one of the biggest consumers of foreign made goods, the United States' desire for cheap imports from around the globe in large part fuels child labor abuses in developing countries.⁵⁴ Because the United States is a potential indirect cause of these serious human rights abuses, some international organizations have called upon the federal government to help eradicate the problem. For instance, a 1994 Human Rights Watch report charged a serious human rights abuse against the United States: the failure of the United States to comply with international agreements protecting human rights.⁵⁵ It seems that the United States should bear some responsibility for protecting children from exploitation.⁵⁶

Arguably, United States policy indirectly plays a significant role in facilitating oppressive child labor practices, as illustrated

States' failure to directly promote the worldwide eradication of abuses against children.

53. Hoffman & Strossen, *supra* note 7, at 1. The authors cite the recent Haitian interdiction program to illustrate that the United States hesitates to grant asylum to refugees claiming to be fleeing from human rights abuses in their native countries. *Id.*

54. See Moran, *supra* note 34, at 302 (arguing that the United States influences the horrific labor practices existing in less developed countries).

55. FOREWORD TO HUMAN RIGHTS WATCH WORLD REP., EVENTS OF 1994, *supra* note 13, at 313. Included in one of Human Rights Watch's projects is a division on children's rights. *Id.*

56. *Id.*

by the Mexican maquiladoras.⁵⁷ For example, the United States continuously maintains relations and grants "Most Favored Nation Status", duty-free benefits and other trade incentives under The Generalized System of Preferences to countries that consistently violate the human rights of their citizens.⁵⁸ Although economic agreements serve as important means for opening trade markets between Latin American countries and the United States, documented oppressive child labor practices still continue.⁵⁹ For example, transnational American corporations provide significant labor opportunities to less developed nations where such corporations can take advantage of cheaper laborers, often children, who must work under whatever conditions prevail.⁶⁰ This trend has become more evident in light of recent controversies surrounding transnational companies accused of using children to make their products.⁶¹ Nike Corporation, for example, has been barraged with criticism that its popular shoe line is manufactured abroad using child labor.⁶² Even the immensely popular Michael Jordan, who has his own famous line of Nike shoes, has received his fair share of criticism for endorsing Nike products.⁶³ And if that was

57. Moran, *supra* note 34, at 302.

58. *Id.*; NAFTA, *supra* note 48; GATT, *supra* note 47. The United States government maintains that these privileges and agreements are conditioned upon a commitment to international labor standards. Shattuck, *supra* note 14, at 277. See *Eye to Eye With Connie Chung*, *supra* note 33 (reporting that First Lady Hillary Rodham Clinton recently visited Pakistan to promote relations between the United States and Pakistan and that the United States imports a large number of Pakistani goods produced by child labor such as soccer balls and carpets); Ron Fournier, *Hillary Clinton Derides 'Extremists', First Lady Says Proposed GOP Budget Cuts and Welfare Plans Harm Women and Children*, ORANGE COUNTY REG., Mar. 20, 1995, at A6. During her trip to Pakistan in 1994, Mrs. Clinton refused to speak about Pakistani human rights abuses during her trip to Pakistan: "I do not intend to bring it up. That is not something on my list of issues to be addressed." *Id.* However, the Clinton Administration subsequently decided to halt all trade benefits to Pakistan pursuant to The Generalized System of Preferences for certain goods such as sporting goods, surgical instrument and hand-knotted goods. *Statement of Maria Echavesto Before the Subcommittee on Int'l Operations and Human Rights of the House Committee on Int'l Relations*, 1996 WL 316068 (June 11, 1996). All of these goods are reported to be made with child labor. *Id.*

59. Moran, *supra* note 34, at 302.

60. *Id.* Many Western corporations and importers readily admit that they capitalize on the fruits of child labor, but they argue that child labor is the inevitable result of ever-present poverty. Schanberg & Briggs, *supra* note 31, at 44. These corporations also claim that a sudden termination of the use of child labor in some countries would lead to economic deterioration. *Id.*

61. See, e.g., Chet Whye, *The Saga of Kathie, Nike, Spike, and the Rest of Us*, DENVER POST, June 27, 1996, at B7 (discussing celebrity endorsement of imported products manufactured by child labor).

62. Thomas Farragher, *Gifford, Child Labor in Spotlight*, MORNING N. TRIB., July 16, 1996, at A4.

63. Whye, *supra* note 61, at B7.

not enough, television personality Kathy Lee Gifford came under fire for her Wal-Mart line of clothing produced by child labor in Honduras.⁶⁴ Possibly because of beneficial economic relationships with countries that allow the violation of human rights, including the exploitation of children, the United States maintains a poor record on the ratification of treaties proposed by the United Nations which protect various human rights.⁶⁵

B. United States' Refusal to Ratify the Convention on the Rights of the Child

The United States' refusal to ratify human rights treaties signifies its failure to address the international problem of child exploitation.⁶⁶ Human rights scholars document that

[t]he United States has ratified few international human rights treaties, has encumbered those few ratification with numerous 'reservations,' 'understandings,' and 'declarations' that severely limit the impact of ratification within the United States, and has treated most such treaties as not being enforceable in domestic courts under the 'non-self-executing treaty' doctrine.⁶⁷

The United States' approach to the human rights of children is no exception to this tendency. The principal global legal instrument addressing the exploitation of children is the Convention on the Rights of the Child, adopted by the United Nations in 1989.⁶⁸ The Convention acts as a comprehensive "Bill of Rights," incorpo-

64. Farragher, *supra* note 62, at A4. Kathie Lee Gifford turned this controversy into a personal crusade and speaks out publicly and before Congressional committees about international child labor abuses. *Money Tonight: Kathie Lee Gifford Throwing Support Behind Legislation to Curb Child Labor & Sweatshops*, (CNBC Television Broadcast, July 15, 1996) [hereinafter *Money Tonight*].

65. Some of the treaties ratified by the United States include: The UN sponsored Protocol Relating to the Status of Refugees; The International Covenant on Civil and Political Rights; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Convention on the Political Rights of Women; and, The Convention on the Prevention and Punishment of the Crime of Genocide. U.N. CHART OF RATIFICATION, 1993, U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (1993).

Some of the treaties signed, but not ratified by the United States include: Convention on the Rights of the Child; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; The Convention on the Elimination of All Forms of Discrimination Against Women; The International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; and, The American Convention on Human Rights. *Id.*

66. None of the treaties ratified by the United States addresses child exploitation. *Id.*

67. Hoffman & Strossen, *supra* note 7, at 3.

68. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989). [hereinafter *Convention*]

rating most of the rights of children into one document.⁶⁹ The Convention's declaration that children must be protected from sexual and economic exploitation operates as its most significant mandate.⁷⁰ The General Assembly of the United Nations adopted the Convention on November 20, 1989, and the Convention was offered for signature on January 26, 1990.⁷¹

One hundred and seventy seven of 185 member countries of the United Nations have ratified the Convention.⁷² The United States is one of only eight countries that refuses to ratify the Convention.⁷³ Thus, the desire of the United Nations to make the Convention the first "truly universal law in history" goes unfulfilled, despite constant urging by human rights groups.⁷⁴ Considering other failed attempts by Congress to pass legislation protecting the international human rights of children, U.S. ratification seems questionable.⁷⁵

Unfortunately, the consequences of the United States' limited acceptance of obligations under international human rights treaties are two-fold: first, the United States sends a message to the

69. *Id.*; see Moran, *supra* note 34, at 289; International Child Labor, *Prepared Statement of Dr. Guido Bertolaso Before the Labor Subcommittee of the United States Senate Committee on Labor & Human Resources re: Int'l. Child Labor*, 1994 WL 8371057 (Sept. 22, 1994) [hereinafter Bertolaso].

70. Convention, *supra* note 68, at art. 32. Specifically, Article 32 states: "States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." *Id.* Furthermore, Article 34 states:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other lawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

Id. at art. 34.

71. Moran, *supra* note 34, at 288.

72. HUMAN RIGHTS WATCH WORLD REP. EVENTS OF 1995, *supra* note 13, at 343.

73. *Id.* In February 1995, President Clinton signed the Convention, but never sent the treaty to the Senate for its ratification. Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, stated that the Convention was a pernicious document and refused to hold hearings on its ratification. Ironically, India, Pakistan, Mexico, and Honduras have all ratified the convention. U.N. CHART OF RATIFICATION, *supra* note 65.

74. Bertolaso, *supra* note 69.

75. For example, the unsuccessful Child Labor Deterrence Act of 1993 would have prohibited the importation of goods made by children into the United States in an attempt to curtail child labor and to encourage other nations to join a ban on trade in such products. Child Labor Deterrence Act, *supra* note 4; Kelleher, *supra* note 47, at 162. Despite the serious moral implications of the measure, the bill failed. Child Labor Deterrence Act, *supra* note 4.

rest of the world about the ambiguity of its own moral position on human rights; and second, the United States reinforces the idea that international human rights law is unnecessarily considered in the formulation of domestic human rights issues.⁷⁶ Thus, although the United States may exhibit strong vocal and financial support for human rights protections,⁷⁷ failing to affirmatively ratify international treaties or enact other effective legislation only betrays its lack of commitment and exacerbates the problem of child exploitation.⁷⁸

C. Asylum Law as a Remedy for Human Rights Violations

The Refugee Act⁷⁹ is the only human rights measure enacted by the United States government that could potentially protect exploited children.⁸⁰ Essentially, refugee law operates to provide

76. Hoffman & Strossen, *supra* note 7, at 1.

77. For example, Congress approved the forwarding of \$2.1 million in 1995 and \$1.5 million in 1996 to the United Nations' International Labor Organizations Program for the Elimination of Child Labor to help combat child prostitution and child labor in countries such as India, Brazil, Thailand, and Bangladesh. Robert Reich, *Testimony Before the Subcommittee on International Operations and Human Rights of the House Committee on International Relations*, 1996 WL 413539 (July 15, 1996) [hereinafter Reich]. The Secretary of Labor, Robert Reich, also discussed the issue of child labor at the 1996 ministerial meeting of the International Labor Organization and is holding bilateral discussions with other labor ministers. *Id.* However, providing financial aid and vocal support have been the only recent active measure taken by the United States to combat child exploitation. *Id.* The United States also employs less direct methods to promote human rights protections such as monitoring human rights violations in suspect countries, helping to create the new position of the United Nations High Commissioner for Human Rights, and encouraging the efforts of international humanitarian groups. *Id.* at 5. Yet, such superficial support and promotion will lead to little international reform unless U.S. government assumes a more active role to ensure human rights protections particularly for the world's children.

This more active role can be taken if Congress enacts the International Child Labor Elimination Act proposed by Representative Christopher Smith which punishes foreign countries and U.S. importers that do not discourage the use of child labor. H.R. 3812, 104 Cong. 2d Sess. (1996). See *infra* notes 195-200 and accompanying text for a discussion of this proposed measure.

78. See Moran, *supra* note 34, at 302 (arguing that through its economic relations with countries violating human rights, the United States indirectly encourages abuses to occur).

79. 8 U.S.C. § 1101.

80. Congress enacted the Refugee Act to protect individuals of "special humanitarian concern to the United States." Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 161-62 (1989). Congress also enacted the Immigration Act of 1990 for the same purpose. IMMIGRATION ACT OF 1990, Pub. L. No. 101-649, 104 Stat. 4798 (codified as amended in scattered sections of 8 U.S.C. (1988)).

The Immigration Act of 1990 allows the Attorney General to grant temporary protected status to certain aliens, thus preventing the alien's deportation. *Id.* However, the Attorney General usually uses this measure to protect refugees from

an important relief to victims of human rights violations.⁸¹ The United Nations Convention Relating to the Status of Refugees (UNCR)⁸² and the United Nations Protocol Relating to the Status of Refugees (UNPR)⁸³ set forth the internationally accepted definition of a refugee who should be entitled to asylum in a foreign country. According to the United Nations, a refugee is any person fleeing from his or her native country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion."⁸⁴

In its attempt to address human rights issues, the United States codified the United Nation's definition of "refugee" as set forth in the UNPR.⁸⁵ As a result, the Refugee Act's definition of refugee substantially resembles the definition found in the UNPR:

any person who is outside any country of such person's nationality, is outside any country in which such person last habitually resided, 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.⁸⁶

Thus, if a refugee proves a well-grounded fear of persecution based on any of above-mentioned five categories, the United States may grant refugee status or asylum.⁸⁷ As the next Part of

countries involved in internal a political struggle. *Id.* Such circumstances are generally temporary. *Id.* Since the exploitation of children is more likely a permanent cultural fixture, viable use of this measure seems unlikely. See *supra* note 70 for a listing of human rights measures ratified by the United States.

81. See Schenk, *supra* note 10, at 309.

82. Convention Relating to the Status of Refugees, *opened for signature*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. The United States never ratified the UNCR. U.N. CHART OF RATIFICATION, *supra* note 65.

83. United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter UNPR]. The UNPR eliminates the geographic restrictions found in the UNCR. *Id.*

84. *Id.* See UNCR, *supra* note 83. The UNPR and UNCR defines a refugee is one who:

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

Id.

85. 8 U.S.C. 1101(a)(42)(A). Applicants who apply for entry into the United States while in another country are characterized as seeking "refugee" status. Schenk, *supra* note 10, at 315. In contrast, aliens already in the United States apply for "asylum". *Id.* Both refugee and asylum applicants must meet the definition of "refugee" found in the Refugee Act of 1980. *Id.*

86. 8 U.S.C. § 1101(a)(42)(A).

87. See Schenk, *supra* note 10, at 315. The Refugee Act authorizes the Presi-

this Note demonstrates, federal courts and administrative judges interpreting the Refugee Act usually adopt a predictably narrow view of the term "refugee."

III. THE REFUGEE ACT TURNS A BLIND EYE TOWARD EXPLOITED CHILDREN

The Refugee Act fails as a proactive human rights measure in significant respects. This failure is due largely because federal courts and administrative immigration judges have traditionally applied an unnecessarily narrow interpretation of the Act's definition of refugee, thereby denying refugee status to countless numbers of persecuted people, and exploited children as well. Thus, contrary to the expansive purposes of international refugee law, the Refugee Act does not offer relief to many victims of various types of human rights violations.⁸⁸ Specifically, the Refugee Act fails to resolve the international dilemma of child exploitation.

In order to obtain refuge in the United States pursuant to the Refugee Act, an alien or refugee applicant must prove that she has a well-founded fear of persecution if forced to return to her native country.⁸⁹ Furthermore, the requisite fear can only stem from issues involving race, religion, nationality, membership in a particular social group, or political opinion.⁹⁰ Since the passage of the Act, however, definitional problems have continually plagued its application to certain types of asylum cases.⁹¹

As used in the Refugee Act, the word "refugee" is a legal term of art.⁹² In layman's terms, a typical refugee is a person who flees from a situation in which he or she faces significant risk of bodily or mental harm, loss of freedom, imprisonment, or other

dent to designate a specific number of refugees that will be admitted each year. *Id.* The President's determination is made with the "appropriate consultation" of Congress. 35 U.S.C. § 1157(a)(2). In contrast, The Refugee Act places no limit on the number of applicants who can receive asylum status. *Id.* Most asylum applications are filed during deportation or exclusion proceedings conducted by immigration judges or the Department of Immigration and Naturalization. *Id.*; 8 C.F.R. § 208.2 (1996). The grant of asylum to refugees or asylees is generally left to the discretion of the trier of fact. *Id.*

88. See Steinbock, *supra* note 80, at 147 (stating that "the Refugee Act created a permanent process for the selection of refugees of 'special humanitarian concern' to the United States.").

89. *In re Mogharrabi*, 19 I. & N. Dec. 439, 447 (B.I.A. 1987); 8 U.S.C. § 1101(a)(42)(A).

90. 8 U.S.C. § 1101(a).

91. See Barbara Jackman, *Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective*, in *ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 37, 37 (Geoffrey Coll & Jacqueline Bhabha eds., 1992)

92. *Id.* at 43.

forms of violence.⁹³ However, the United States limits this more general definition,⁹⁴ delineating the specific instances which transform a person into a "refugee," thus creating a much narrower legal definition.⁹⁵ Moreover, federal courts and immigration law judges apply strict standards which have the effect of further narrowing the official definition.⁹⁶

Legal scholars have criticized the narrow standards adopted by the Board of Immigration Appeals (B.I.A.) and federal courts to determine refugee status under the Refugee Act.⁹⁷ These authorities fault the standards because they exclude asylum seekers who do not fit neatly into the "legal" definition of "refugee." Although these victims flee their countries for very legitimate reasons, courts do not take into consideration many of those reasons when determining whether to protect an applicant for asylum.⁹⁸ Among the largest and most savagely victimized class which the courts would fail to recognize, and therefore fail to protect, are exploited children. This Part examines the two-pronged test that courts use to determine whether a refugee may qualify for refugee status. Part III also demonstrates how exploited children do not currently qualify for refugee status mainly because of definitional problems in the Refugee Act and the narrowness of the Act's application.

93. *Id.* at 38.

94. 8 U.S.C. § 1101(a)(42)(A).

95. *Id.*; Jackman, *supra* note 91, at 37.

96. Jackman, *supra* note 91, at 37. Immigration judges in the Department of Justice have original jurisdiction to hear all exclusion and deportation proceedings. 8 C.F.R. § 3.1(b) (1996). Refugee applicants may appeal adverse decisions to the Board of Immigration Appeals (B.I.A.). 8 C.F.R. § 3.38 (1996). Appeals of Board decisions are heard by the federal courts. *Id.*

97. See *supra* note 87 for a discussion of judicial immigration procedures.

98. Jackman, *supra* note 91, at 38. In contrast to U.S. refugee law, the United Nations, other international agencies, and individual nations typically apply broad definitions of "refugee" in recognition of the need to protect persons with legitimate claims of persecution. *Id.* For example, the Office of the United Nations High Commissioner for Refugees (UNHCR), which is responsible for the protection of persons who may not fall within the parameters of the UNCR, has very broad authority to protect persons facing serious social, political, or economic circumstances. *Id.* at 39. In some situations, UNHCR attempts to protect people fleeing intolerable conditions in large scale movements. Therefore, the UNHCR has authority to victimized groups rather than individually *Id.* Other international organizations, such as the Organization of African Unity extends the definition of refugee to those who must leave their countries because of external aggressions, occupation, or foreign domination. *Id.*

A. *Exploited Children and the Persecution Standard*

Pursuant to the Refugee Act, asylum applicants must demonstrate that they face persecution upon leaving their native countries or have a well-founded fear of persecution if forced to return.⁹⁹ The adjudicative standard that determines if these types of persecution fall within the class of protected circumstances takes into account three factors. The first factor explores the subjective and objective nature of an applicant's fear.¹⁰⁰ The second factor inquires into the degree of likelihood that the individual actually will face persecution if returned to his homeland.¹⁰¹ The third factor inquires whether the applicant can adduce proof that he or she would be "singled out" for persecution.¹⁰²

1. *Objective and Subjective Fear of Persecution*

Federal courts and immigration authorities interpret the "persecution or well-founded fear of persecution"¹⁰³ requirement as containing both subjective and objective components.¹⁰⁴ To meet their objective burden of proof, federal courts insist that asylum applicants present "specific facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be singled out for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁰⁵ Thus, specific facts supporting a past persecution or a risk of future persecution would satisfy this requirement.¹⁰⁶

The B.I.A.¹⁰⁷ in *In re Mogharrabi*¹⁰⁸ expanded on this burden of proof and developed its own test, holding that an applicant's well-founded fear can be based on what occurred to others similarly situated in her country.¹⁰⁹ However, evidence of conditions in an alien's native country is admissible, but not necessarily dispositive.¹¹⁰ The B.I.A. consistently insists that gener-

99. 8 U.S.C. § 1101(a)(42)(A).

100. Jackman, *supra* note 91, at 43.

101. *Id.*

102. *Id.*

103. 8 U.S.C. § 1101(a)(42)(A).

104. See, e.g., *Carvajal-Munoz v. I.N.S.*, 743 F.2d 562, 574 (7th Cir. 1984) (holding that specific facts supporting persecution, as well as the applicant's fear of persecution, necessitates consideration in determining whether an asylum applicant should receive refugee status).

105. *Id.*

106. *Id.*

107. See *supra* notes 99-106 and accompanying text for a discussion of the administrative procedural matters involved in adjudicating asylum claims.

108. 19 I. & N. Dec. 439 (B.I.A. 1987).

109. *Id.* at 447.

110. *In re Vigil*, 19 I. & N. Dec. 572, 581 (B.I.A. 1988).

alized statements of fear will not suffice.¹¹¹

In *In re Sanchez & Escobar*,¹¹² the B.I.A. incorporated a subjective requirement into the inquiry of whether the applicant's fear of persecution is viable under the Refugee Act.¹¹³ In *Sanchez*, the Board held that after a refugee applicant presents objective evidence sufficient to suggest the existence of a risk of persecution, he must then offer evidence of his own subjective fears and desires to avoid the risk.¹¹⁴ Consequently, courts will acknowledge that an applicant's risk of persecution is well-founded only if there is some factual basis leading the asylum seeker to experience a bona fide sense of fear.¹¹⁵ Courts will therefore gauge the degree of likelihood of persecution in their determination of the applicant's subjective sense of fear. If asylum applicants face only a minimal risk of persecution if forced to return to their home country, a court will question whether the applicant's fear of persecution rises to the level which triggers protection under the Refugee Act.¹¹⁶

2. Degree of Likelihood of Persecution

The degree of likelihood of persecution is an important determinative factor for proving a "well-founded fear."¹¹⁷ Sometimes, a fear may be well-founded even though persecution appears improbable. In *I.N.S. v. Cardoza-Fonseca*,¹¹⁸ the United States Supreme Court adopted the "reasonable possibility" test, stating that "it need not be shown that the situation will probably result in persecution, but it is enough that the persecution is a reasonable possibility."¹¹⁹ Yet, even if there exists a reasonable possibility

111. *Mogharrabi*, 19 I.& N. Dec. at 445.

112. 19 I. & N. Dec. 276 (B.I.A. 1985).

113. *Id.* at 279.

114. *Id.* at 279 (citing *I.N.S. v. Cardoza-Fonseca*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987)).

115. Jackman, *supra* note 91, at 44. The level of credibility of asylum seekers and their proffered evidence help to determine whether a subjective fear of persecution exists. *Id.*

116. *Id.*

117. *Id.*

118. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

119. *Id.* at 431. The "reasonable possibility" test follows the standard used by the United Nations in its handbook on refugees. *Id.* at 439-40. Elaborating on this standard, the Supreme Court added that "[t]here is simply no room in the United Nations definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has a 'well founded fear' of the event happening." *Id.* at 440. The Court quoted an example made by immigration law scholar A. Grahl-Madsen illustrating this standard:

Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone

that asylum applicants may face persecution, some courts continue to require proof that an applicant's well-founded fear is predicated on the probability that he or she will be "singled out" for persecution by a hostile regime.¹²⁰

3. "Singled Out for Persecution"

This factor produces less consistency in court and Immigration Service decisions than do the previous factors. In order to achieve refugee status, some courts hold that the asylum applicant must demonstrate that his homeland will single him out for persecution.¹²¹ Evidence supporting the likelihood of individualized persecution must include testimony about specific threats to an applicant's life or past acts of persecution committed directly against the applicant.¹²² Therefore, asylum seekers fleeing general conditions of violence and upheaval or typical military activities, such as a civil war in their countries, frequently do not qualify for refuge.¹²³ The case of *In re Sanchez & Escobar*¹²⁴ illustrates this point.

In *Sanchez*, the B.I.A. held that two El Salvadoran asylum applicants did not provide the requisite specific facts of past per-

who has managed to escape from the country in question will have a well-founded fear of being persecuted upon his eventual return.

Id.

120. See, e.g., *Sivaainkaran v. I.N.S.*, 972 F.2d 161, 163 (7th Cir. 1992) (holding that an asylum applicant must be singled out for persecution); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1284-86 (9th Cir. 1984) (ruling that specific threats of persecution to applicants are necessary). *But see Dolores v. I.N.S.*, 772 F.2d 223, 226 (6th Cir. 1985) (recognizing the "group" nature of persecution).

121. *Sivaainkaran*, 972 F.2d at 163. The court held that "[the] objective component of the test requires the applicant to 'present specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution.'" *Id.* (quoting *Zulbeari v. I.N.S.*, 963 F.2d 999, 1000 (7th Cir. 1992)). *But cf. M.A. A26851062 v. I.N.S.*, 858 F.2d 210, 214 (4th Cir. 1988), *aff'd*, 899 F.2d 304 (4th Cir. 1990) (holding that an applicant only needs "to adduce objective evidence that members of his group, which includes those with the same political beliefs of the petitioner, are routinely subject to persecution," thus minimizing the applicant's burden of proof in establishing a likelihood of individualized persecution).

122. *Bolanos-Hernandez*, 767 F.2d at 1286.

123. *In re Maldonado-Cruz*, 19 I. & N. Dec. 509, 512 (B.I.A. 1988); *Kaveh-Haghigy v. I.N.S.*, 783 F.2d 1321, 1323 (9th Cir. 1986) (holding that general conditions of violence do not demonstrate a well-founded fear of persecution); *In re Fuentes*, 19 I. & N. Dec. 658, 661 (B.I.A. 1988) (holding that military activities that do not constitute persecution include the service as a policeman and guard against guerilla forces).

124. 19 I. & N. Dec. 276, 284 (B.I.A. 1985) (holding that generally harsh conditions and the harm of civil war do not amount to persecution); see also *Sivaainkaran*, 972 F.2d at 165 (refusing to recognize that a minority Sri Lankan citizen faces persecution, as defined by the Refugee Act, because his social group is engaged in a civil war with the government).

secution necessary to support a claim for refuge.¹²⁵ The applicants gave testimony regarding their participation in demonstrations against the government and their subsequent kidnapping by a member of the municipal police.¹²⁶ Despite this evidence, the B.I.A. found that the applicants' documentary evidence supported only general conditions of violence in El Salvador and that the risk of harm arose only from commonplace activities in a country ravaged by civil war.¹²⁷ Consequently, the B.I.A. denied the Salvadorans' asylum requests.¹²⁸

Further limiting the scope and reach of the Refugee Act, courts often deny refuge to applicants claiming persecution by individuals, not a governmental entity.¹²⁹ For example, an abusive husband or a family that demands that a woman wear a veil under threat of physical violence or ostracism are perpetrators of forms of persecution typically outside of the control of government entities.¹³⁰ However, some foreign governments demonstrate a high degree of tolerance for these types of abuse and provide little or no relief to victims of domestic violence.¹³¹ Immigration judges and federal courts view these forms of abuse as manifestations of culture or private choices that do not constitute persecution for refugee status.¹³²

Arguably, this conclusion would also deny exploited children refuge in the United States. Scholars describe the exploitation of children in some countries as a cultural phenomenon, pervading all sectors of society.¹³³ Thus, claims of sexual or economic ex-

125. *Sanchez*, 19 I. & N. Dec. at 288.

126. *Id.* at 280.

127. *Id.* at 286-87. However, in *Bolanos-Hernandez*, the Ninth Circuit held that an El Salvadoran qualified for refugee status after recounting specific threats made to him by guerrillas after he refused to join their opposition movement. 767 F.2d at 1284-86. The *Bolanos-Hernandez* court also considered newspaper articles documenting the turmoil in El Salvador along with the applicant's testimony and concluded that the specific threats would lead the applicant to reasonably fear persecution upon return. *Id.*

128. *Sanchez*, 19 I. & N. Dec. at 288.

129. Nancy Ann Root & Sharyn A. Tejani, Note, *Undocumented: The Roles of Women in Immigration Law*, 83 GEO. L.J. 605, 617 (1994).

130. *Id.*

131. *Id.*

132. *Id.*; See *Behzadpour v. United States*, 946 F.2d 1351, 1353 (8th Cir. 1991). In *Behzadpour*, the court denied asylum to a female Iranian applicant claiming a fear of political persecution because of her "escape from service," a violation of Islamic and Iranian law. *Id.* Requiring that the applicant be the specific target of persecution, the court held that the status of women (and children) in Iran did not constitute persecution because this status was a part of the culture, applicable to all females. *Id.* See also *Zhang v. Slattery*, 55 F.3d 732, 751 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996) (rejecting a claim that China's "one child" policy requiring forced abortions or forced sterilizations of couples after they have one child constitutes persecution or that it creates a well-founded fear of persecution).

133. See *supra* note 18 and accompanying text discussing child exploitation as a

ploitation of children may not qualify as the types of persecution recognized under the Refugee Act.

4. Application of the Persecution Standard to Exploited Children

Since the exploitation of children for sexual or labor purposes is frequently the result of cultural values or tolerances, courts following the decisions of *Mogharrabi* and *Sanchez* would probably deny such exploited children refuge. The rationale behind this assumption is three-fold.¹³⁴ First, a child applicant may find the objective and subjective elements of the two-prong persecution test difficult to prove. An exploited child-applicant is unlikely to possess the specific facts which establish that he faced a form of persecution recognized under the Refugee Act, or that he harbors a well-founded fear of persecution. A child-applicant would probably also have difficulty establishing that sexual or economic exploitation is tantamount to persecution. For example, a child may provide generalized statements of fear regarding the treatment of children in Indian brothels or Pakistani workplaces, but as the court held in *Mogharrabi*, the trier of fact requires more objective evidence than this.¹³⁵

Furthermore, since evidence of general conditions is not dispositive of persecution, a child applicant faces a more onerous burden to provide specific facts.¹³⁶ Where the child cannot prove up specific facts of exploitation relating specifically to him, the objective element of the persecution standard fails.¹³⁷ Essentially, a child facing a system of insidious exploitation cannot claim that he suffers from a particularized risk of harm based on the pervasiveness and imminence of risk in his homeland.¹³⁸

Additionally, an exploited child-applicant would typically not be able to demonstrate the existence of the second persecution

manifestation of culture. See also Levesque, *supra* note 13, at 963-78 (positing that many nations fail to view children's protection from sexual mistreatment as an essential human rights issue because of a belief that the cultural rights of countries that practice exploitation should be tolerated, if not respected).

134. See *Mogharrabi*, 19 I. & N. Dec. at 447 (holding that the feared persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion); *Sanchez*, 19 I. & N. Dec. at 283 (holding that to be eligible for a grant of asylum, an alien must demonstrate that he is a refugee within the meaning of the Act).

135. *Mogharrabi*, 19 I. & N. Dec. at 448.

136. *In re Vigil*, 19 I. & N. Dec. 572, 581 (B.I.A. 1988).

137. *Sanchez*, 19 I. & N. Dec. at 279 (citing *I.N.S. v. Cardoza-Fonseca*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987)).

138. See *Jackman*, *supra* note 91, at 39 (explaining that in order to meet the subjective element of the persecution standard, an applicant must have a factual basis leading him to fear persecution).

factor: the existence of a reasonable possibility of persecution.¹³⁹ Again, a judge will not draw the inference of a reasonable chance of persecution without any basis in fact. Moreover, evidence of a general risk of harm does not support a claim of persecution.¹⁴⁰ Thus, although the U.S. government recognizes that children face abhorrent working conditions and disease-infested brothels in many countries, U.S. courts would characterize this harm as too generalized to create a reasonable possibility of persecution.¹⁴¹

Finally, an exploited child will encounter difficulty in proving that people target him or his "group" for persecution. Unless the child presents specific facts illustrating past persecution directed at him, the child will not meet his burden of proof based solely on evidence describing general conditions of harm.¹⁴² Moreover, as the sexual and economic exploitation of children operates as a cultural phenomenon¹⁴³ it cannot, by definition, constitute persecution. Therefore, the status of children in particular societies does not create a claim of persecution since exploitative practices apply even-handedly to most children, and because these societies do not single out any one particular individual for harm. Although exploited children do not meet the requirements of the first prong of the Refugee Act, thus automatically defeating any claim for asylum, the second prong, whether exploited children face persecution for a specific reason, should be considered to demonstrate how the application of the Refugee Act is further limited.

B. Exploited Children and the "On Account of" Requirement

The second prong of the Refugee Act mandates that an applicant prove persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ."¹⁴⁴ The only category remotely encompassing the circumstances of exploited children is membership in a particular social group. However, as this Section demonstrates, courts would prohibit a potential exploited child-applicant from obtaining refugee status on this basis.

139. *Cardoza-Fonseca*, 480 U.S. at 431.

140. *Vigil*, 19 I. & N. Dec. at 581.

141. See *supra* notes 129-34 and accompanying text for a discussion demonstrating that general conditions of violence or harm do not support a claim for persecution.

142. See, e.g., *Sivaaindaran*, 972 F.2d at 163; *Bolanos-Hernandez*, 767 F.2d at 1284-86.

143. See *supra* note 18 and accompanying text showing that the exploitation of children commonly exists in many cultures.

144. 8 U.S.C. § 1101(a)(42)(A).

1. "Membership in a Particular Social Group"

The social group category for refugee status has become an increasingly important element in many Refugee Act adjudications throughout the past decade, as increasing numbers of potential refugees have used this factor as a basis for asylum claims.¹⁴⁵ Yet, despite this increased recognition, courts continue to struggle with its application.¹⁴⁶ Evidence suggests that Congress intended a broad interpretation of the social group category, demonstrating a Congressional desire that the United States conform to the expansive interpretation advocated in the UNCR and UNPR.¹⁴⁷ Yet, because this basis for asylum could potentially sweep very broadly, and thus encompass millions of people, courts generally construe the category narrowly, denying most asylum requests by aliens who claim membership in a particular persecuted group.¹⁴⁸

The leading case interpreting the phrase "persecution on account of membership in a particular social group" is *In re Acosta*.¹⁴⁹ In this case the B.I.A. denied refugee status to Acosta, an El Salvadoran alien.¹⁵⁰ In El Salvador, Acosta founded a taxi drivers' cooperative whose members refused to participate in anti-government strikes.¹⁵¹ Several members, including Acosta, received death threats and assaults from anti-government guerrillas for their lack of participation.¹⁵² Subsequent to these threats, Acosta sought refuge in the United States, arguing that he feared

145. Carolyn Patty Blum, *Refugee Status Based on Membership in a Particular Social Group: A North American Perspective in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 81, 81 (Geoffrey Coll & Jacqueline Bhabha, eds. 1992). One reason for this recognition is "the changing nature of political persecution by many governments throughout the world. . . ." *Id.* The "new" political persecution includes persecution not because of political activity, but because the government opposes the political views of individuals or groups. *Id.* The political turmoil occurring in many Latin American countries helped precipitate the usage of this category. *Id.* at 81-82. For example, ruled by governments engaged in the persecution of persons actively participating in opposition activities, Chilean and El Salvadoran aliens claimed refugee status on the basis of membership in a particular social group - a group of government opponents. *Id.*

146. See *infra* notes 149-70 and accompanying text for a discussion of the narrow interpretation of the social group category espoused by courts.

147. Rebecca O. Bresnick, Note, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT'L. L. & COM. 121, 129-30 (1995).

148. *Id.* at 132-33. However, because the "membership in a particular social group" category exists without definite parameters, courts often produce inconsistent holdings, deeming some groups a particular social group covered by the Refugee Act while denying coverage to other groups. *Id.*

149. 19 I. & N. Dec. 211, 232-36 (B.I.A. 1985).

150. *Id.* at 236.

151. *Id.* at 216.

152. *Id.* at 216-18.

persecution by the guerrillas on account of his membership in the taxi drivers cooperative.¹⁵³ After denying the Salvadoran's request, the B.I.A. articulated the "immutable characteristic test," concluding:

[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. 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.¹⁵⁴

The B.I.A. did not elaborate on the types of group characteristics implicated in this test. Instead, the B.I.A. believed that this issue necessitated adjudication on a case-by-case analysis.¹⁵⁵ However, the board limited the social group category by requiring asylum applicants to prove one of two things: (1) that the common characteristic defining the group remains permanent; or (2) that the characteristic is one that the group members should not need to change because of its fundamental nature.¹⁵⁶ Applying this criteria to the facts in *Acosta*, the B.I.A. found the characteristics of the group of taxi cooperative members neither immutable nor fundamental to their beings, since the persecution against the taxi drivers could dissipate with a change in their employment.¹⁵⁷

The B.I.A.'s test in *Acosta* faces significant criticism today. Some fault the test largely because the requisite immutable or fundamental characteristic which qualifies a social group for protection under the Refugee Act gives little guidance to future decision-makers. The determination must be made on a case-by-case analysis using very ambiguous standards.¹⁵⁸ Attempting to cure this imperfection, the United States Court of Appeals for the Ninth Circuit in *Sanchez-Trujillo v. I.N.S.*¹⁵⁹ promulgated its own definition of a "particular social group."¹⁶⁰

In *Sanchez-Trujillo*, the Ninth Circuit denied two El Salvadoran refugee applicants asylum by refusing to apply the "membership in a particular social group" category to their group comprised of young, urban, working-class males claiming persecution because the government would draft them into the mili-

153. *Id.* at 217.

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

155. *Id.*

156. *Id.*

157. *Id.*

158. Blum, *supra* note 145, at 91.

159. 801 F.2d 1571 (9th Cir. 1986).

160. *Id.* at 1573-79.

tary.¹⁶¹ The court explained that a cognizable social group exists if a "voluntary associational relationship among its purported members" develops.¹⁶² The Ninth Circuit added that the homogeneity of the group remains critical, and that major segments of a nation's population would rarely qualify.¹⁶³ The *Sanchez-Trujillo* court used the example of a family to demonstrate the perfect social group because a family focuses on "fundamental affiliational concerns and common interests" and is a "small, readily identifiable group."¹⁶⁴

Applying these considerations to the Salvadoran petitioners, the court concluded that the young, urban, working-class males did not constitute a group for purposes of the Refugee Act.¹⁶⁵ The court reasoned that evidence of age and gender, even when combined with urban residence and political neutrality, did not support claims of persecution.¹⁶⁶ Specifically, the court rejected testimony that the age and sex of these applicants targeted them for persecution.¹⁶⁷

The *Sanchez-Trujillo* decision, like *Acosta*, faces continued criticism. Many scholars believe that the Ninth Circuit's opinion places too much emphasis on "the internal characteristics of the group at issue, [ignoring the relevant public's] perceptions of the group."¹⁶⁸ Thus, the Ninth Circuit's test potentially excludes groups, such as disabled persons or homosexuals, who do not associate voluntarily, but who the public perceives as distinct groups, and ones that frequently face severe persecution in a number of countries.¹⁶⁹

The criticisms of *Acosta* and *Sanchez-Trujillo* seem well grounded, since asylum claims based on the social group category often fail.¹⁷⁰ For example, in *In re Chang*,¹⁷¹ the B.I.A. held

161. *Id.* at 1573.

162. *Id.* at 1576. Thus the Ninth Circuit's test, with its "voluntary associational" element, seems to run counter to the B.I.A.'s test requiring immutable, and involuntary characteristics.

163. *Id.* at 1577. The court also refused to characterize group membership as containing internal cohesiveness and commonality of interests. *Id.* at 1576-77.

164. *Id.* at 1576. Thus, the court firmly believed that size played a significant role in determining whether a social group was cognizable. Blum, *supra* note 149, at 86.

165. *Sanchez-Trujillo*, 801 F.2d at 1576-77.

166. *Id.* at 1577.

167. *Id.*

168. Blum, *supra* note 145, at 91.

169. *Id.*

170. The social group category remains unclear, as courts seem to rule on an ad hoc basis. For example, in *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993), the Third Circuit found that Iranian women who oppose gender-specific Iranian rules may constitute a particular social group because gender is an immutable characteristic. *Id.* at 1240. In addition, in *Safaie v. I.N.S.*, 25 F.3d 636 (8th Cir. 1994), the Eighth

that individual opponents of China's "One Couple, One Child" birth control policy did not comprise a particular social group because the governmental action they opposed was only meant for general population control and did not specifically target any particular social group.¹⁷² The applicants in *Chang* were merely denied the opportunity to have more than one child, a right Americans believe to be fundamental to all human beings.¹⁷³ Furthermore, even if a cognizable social group is determined to exist, applicants for asylum must still prove actual membership in the group, which is sometimes difficult to accomplish.¹⁷⁴ A court would likely deny refugee status to applicants claiming membership in a particular group of sexually and economically exploited children due to the narrow application of the "social group" category by the B.I.A. and the circuit courts.

2. Application of the Social Group Category to Exploited Children

Exploited children seeking refuge in the United States would probably fail to satisfy the "immutable characteristic" test articulated in *Acosta*.¹⁷⁵ Arguably, a child applicant would fail the first element of the test because the common characteristic defin-

Circuit held that a group of women who would not conform to rules which discriminated against Iranian women and suffer the consequences for their noncompliance qualified as a recognized social group. *Id.* at 639-40. Finally, in *In re Toboso-Alfonse*, the B.I.A. held that homosexuality was not an immutable characteristic for the purposes of the Refugee Act, and therefore, provided a basis for operating as a particular "social group." Interim Decision 3222 (B.I.A. 1989).

171. Interim Decision 3107 (B.I.A. 1989). *Chang* was the first reported case discussing China's "One Couple, One Child" family planning policy as a ground for asylum. Gerrie Zhang, *U.S. Asylum Policy and Population in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 579 (1996).

172. *Chang*, Interim Decision 3107 (B.I.A. 1989). The court held, "[i]f a law or policy is not inherently persecutive . . . one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it . . ." *Id.* The B.I.A. also rejected the claim for asylum in this case because it argued that the "One Couple, One Child" policy was not persecution. *Id.*

173. Due to the continuous rejection of asylum claims of other Chinese applicants based on the "one couple, one child" birth control policy, the Clinton Administration conducted an inter-agency review of Chinese nationals' asylum requests. Zhang, *supra* note 173, at 589. In August 1994, the Administration decided that the INS can give discretionary humanitarian relief through stays of deportation, not asylum, to some Chinese nationals who fear returning to China and its restrictive family planning measures. *Id.* at 559.

174. 8 U.S.C. § 1101(a)(42)(A). Both the *Fatin* and *Safaie* courts held that, although a cognizable social group may have existed, the Iranian applicants either did not prove their membership in the social group or did not make an adequate showing of a fear of persecution. *Fatin*, 12 F.3d at 1240; *Safaie*, 25 F.3d at 640.

175. See *supra* notes 155-60 and accompanying text for a discussion of the "immutable characteristic" test.

ing the group, age, changes with time.¹⁷⁶ Age, therefore, is not an immutable characteristic since an exploited child will reach adulthood. Thus, because a person's age continually increases, he or she probably cannot use age as a basis for persecution.

Additionally, the exploitation affecting a group of children also operates as a transient characteristic. For example, upon reaching maturity, many children may be forced out of the brothels or factories that exploit them.¹⁷⁷ This in turn precludes the argument that sexual or economic exploitation, the common characteristics defining the group of children, remains permanent. Moreover, the second element of the "immutable characteristic" test also goes unsatisfied. Since forced sexual or economic exploitation is a burden that the group members presumably desire to change and is definitely not fundamental to their beings, it cannot create an immutable characteristic.¹⁷⁸ Following the Board's decision in *Acosta*, sexual or economic exploitation of children would not form a basis for persecution under the "immutable characteristic" test defining the social group category.¹⁷⁹

Similarly, following the Ninth Circuit's test in *Sanchez-Trujillo*, exploited children would not be able to prove membership in a cognizable social group.¹⁸⁰ Analogous to the large group comprised of young, urban, working-class males in El Salvador, exploited children, as a major segment of the population, would not constitute a small, readily identifiable group.¹⁸¹ Furthermore, a child seeking refuge would not satisfy the "voluntary associational" element of the *Sanchez-Trujillo* test because, generally, children do not voluntarily choose to be exploited.

Thus, despite its expansive purposes, the Refugee Act fails to protect one of the most vulnerable classes of persecuted people — exploited children. First, exploited children such as Maya, Iqbal or Lesly may not possess the capability to produce specific facts demonstrating that they harbor a "reasonable fear of persecution," as defined by the courts, or that they are singled out for persecution. The exploitation pervading their lives is too generalized and too common to form an officially recognized "reasonable fear."

176. See *Acosta*, 19 I. & N. Dec. at 233 (requiring that the common characteristic defining the group be permanent).

177. See, e.g., Maharjan, *supra* note 1 (recounting the life of Maya, a young Nepali prostitute in India who contracted HIV and was thrown out of the brothel where she worked by the brothel owner).

178. See *Acosta*, 19 I. & N. Dec. at 233-34 (holding that an asylum applicant may prove membership in a particular social group if he shows that the common characteristic defining the group is one that the group members should not be required to change because of its fundamental nature).

179. See *id.*

180. See *Sanchez-Trujillo*, 801 F.2d at 1577.

181. *Id.*

Second, exploited children do not constitute a cognizable social group for the very same reason - the millions of abused children throughout the world make any alleged social group unidentifiable. Consequently, United States law offers no protection to the world's viciously exploited children.

IV. A NEW ERA FOR THE PROTECTION OF CHILDREN'S HUMAN RIGHTS: ALTERNATIVES TO THE REFUGEE ACT

The narrow scope of the Refugee Act and the probable inapplicability of the Act to exploited children circumscribes its intended purpose to protect fundamental human rights. Yet, as child exploitation across the globe flourishes, partly as a result of foreign influence and involvement, important consumer countries and trading partners such as the United States should take on the responsibility to encourage the acknowledgment and resolution of these types of human rights abuses.¹⁸² The failure of the United States' efforts to effectively address children's human rights violations through the Refugee Act demands new strategies to protect the world's children from the evils of sexual and economic exploitation.

In addressing asylum claims based on gender, refugee law scholars often propose adding another category for persecution based on gender to the traditional grounds found within the Refugee Act to remedy its current inadequacies.¹⁸³ This also seems to be a logical solution to combat the Refugee Act's probable denial

182. Li, *supra* note 16, at 540-42. See Shattuck, *supra* note 14, at 275 (stating that "there is a close relationship between our interests in human rights in Asia and our economic interests there . . .").

183. See Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. J. GENDER & L. 107, 132 (1994) (proposing a sixth category for the Refugee Act which would allow asylum based on persecution due to gender). See also Daliah Setareh, *Women Escaping Genital Mutilation: Seeking Asylum in the United States*, 6 U.C.L.A. WOMEN'S L. J. 123, 157-59 (1995) (proposing that gender discrimination operate as a basis for refugee protection). In fact, the Immigration and Naturalization Service recently adopted in large part the "Guidelines for Women's Asylum Claims," authored by the Women's Refugee Project of Cambridge Massachusetts. Kris Ann Balser Moussette, *Female Genital Mutilation and Refugee Status in the United States — A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 390-94 (1996). By recognizing gender-related forms of persecution, the Refugee Act would make it easier for women to prove harm would come to them if forced to return home. *Id.* at 393-94. Other scholars disagree that additional categories are necessary or desirable. For example, although agreeing that the narrow application of the Refugee Act precludes its effectiveness, Professor T. Alexander Aleinikoff argues against adding a new category to the five traditional categories. Kim, *supra*, at 132. (citing T. Alexander Aleinikoff, *The Meaning of Persecution in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5 (1991)). Thus, instead of creating new categories for the Refugee Act, Aleinikoff proposes a "rethinking" of the definition of persecution so that protection remains the primary concern of refugee law. *Id.*

of asylum to exploited children. Adding a sixth category for exploited children to the "persecution on account of" requirement would give many children such as Maya, Iqbal, and Lesly the opportunity to escape from their oppression and seek a safe haven, knowing that the Refugee Act will no longer stand in their way. The addition of a sixth category allowing asylum to children who may face persecution in the form of exploitation may also give children throughout the world hope and comfort that they are no longer helpless and alone. If children do not feel helpless they will have a better chance of improving their lives. Thus, the Refugee Act can and should provide both a legal means for protection and an impetus for children to survive.

Although seemingly a simple solution, adding a new category to the Refugee Act for exploited children may pose some problems for the United States. First, providing refuge to the tens of millions of exploited children in the world simply would be problematic in a country already crowded with immigrants.¹⁸⁴ Second, allowing these exploited children to enter the United States raises another important issue — should the United States also give asylum to the parents of these children? Finally, there is the question of who will possess standing to present exploited children's applications for asylum. For these reasons, some may argue that a broader application of the Refugee Act may be impractical. The main weakness in this argument is that while there are tens of millions of exploited children, practically speaking, only a fraction could be expected to apply for asylum. The typical exploited child simply lacks the financial resources to obtain transit to the United States. Moreover, most exploited children never even know of the asylum opportunities that the Refugee Act may afford, if amended. In addition to amending the Refugee Act, Congress and other parts of the United States government should also consider other measures to protect the world's exploited children.¹⁸⁵

A. *Ratification of the Convention*

The first step that the United States should take to protect exploited children is the immediate ratification of the Convention on the Rights of the Child.¹⁸⁶ Through ratification of this United

184. Since the House Judiciary Committee will soon consider cutting the number of legal immigrant entries by more than thirty percent, giving refuge to refugee children seems even more unlikely. *Immigration Cuts Proposed*, WASH. POST, June 22, 1995, at A10.

185. It should be noted that any protection of human rights must take the cultural rights of nations into consideration, so that a Western form of society or idea of human rights is not imposed. Shattuck, *supra* note 14, at 274.

186. Li, *supra* note 16, at 537. See also *supra* notes 68-78 and accompanying text for a discussion of the Convention on the Rights of the child.

Nations treaty, the United States would provide significant moral support for the international human rights of children, including cultural and economic rights.¹⁸⁷ Furthermore, as the fiftieth anniversary of the United Nations has just passed,¹⁸⁸ ratification of the Convention would help to emphasize the humanitarian traditions of the United Nations, especially as they relate to the world's children. However, although recognition of these rights remains crucial, as a mere proclamation, the Convention does not itself operate as an active deterrent for human rights abuse.¹⁸⁹ Therefore, when ratifying the Convention, the United States should also take active steps that would more effectively promote recognition and enforcement of fundamental children's rights throughout the world.

B. Implementation of the Convention and Other Legislation

The world should strive to preserve the cultural rights of all nations. But this goal should be balanced against the important objective of protecting fundamental rights of children, specifically, the right to be free from sexual and economic exploitation. Given this, the United States should activate economic and social measures to induce other countries to recognize and enforce children's human rights.¹⁹⁰ Conducting, discussing and publishing continuous reports on the problem of child labor is not enough.¹⁹¹ The problem has been sufficiently identified and now it is time for solutions. Congress has approved a \$2.1 million contribution to

187. See Li, *supra* note 16, at 537.

188. Richard Z. Chesnoff & Linda Fasulo, *Dropping in for the U.N.'s 50th*, U.S. NEWS & WORLD REP., Nov. 6, 1995, at 1011.

189. See *supra* notes 15-54 and accompanying text describing the persistent human rights abuses occurring globally and discussing the probability that such abuse will likely continue indefinitely.

190. Moran, *supra* note 34, at 308. The United States prefers positive over negative measures, believing that this encourages cooperation amongst countries. Shattuck, *supra* note 14, at 277. Negative and more controversial inducements include economic sanctions and military intervention. *Id.* at 277-78. One human rights scholar, Professor Fernando R. Teson, advocates the use of international violence to provide a solution for the abuses of human rights undermining the world order. See Fernando R. Teson, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 5 (1988). Labeling this "humanitarian intervention," Professor Teson argues that war can be justified if supporting a unified and coherent theory of international law so that human rights remains a pillar of international law. *Id.* at 3. A justified forcible intervention must aim at restoring basic human rights, act proportionately to the evil that it seeks to suppress, and be welcomed by the victims of oppression. Shattuck, *supra* note 14, at 247.

191. The Secretary of Labor, Robert Reich, recently testified before the Subcommittee on International Operations and Human Rights of the House Committee on International Relations about the importance of the United States government publications documenting the prevalence of child labor worldwide. Reich, *supra* note 77.

the International Labor Organization's International Program for the Elimination of Child Labor which funds projects that lead children away from child labor and into school.¹⁹² This is a necessary beginning, as education has a great potential to reduce child exploitation.¹⁹³ Other important initiatives include working alongside other state parties to monitor human rights issues and forcefully imposing economic or other sanctions when a country violates fundamental rights, as set forth in the Convention.¹⁹⁴ Furthermore, when providing economic or commercial aid to other countries, the United States should condition its support on a country's ratification of the Convention and its compliance with the Convention's provisions. In addition, Congress should enact legislation which bans commercial imports that are manufactured abroad using child labor.

In fact, Congress is now reviewing a bill that seeks to achieve similar goals.¹⁹⁵ Representative Christopher Smith, the Chairman of the House Subcommittee on International Operations and Human Rights of the, recently introduced a bill called the International Child Labor Elimination Act that would prohibit U.S. companies from selling imported goods made with child labor.¹⁹⁶ The proposed measure would also prohibit foreign aid or loans, other than funds for humanitarian purposes, to countries that do not enforce child labor laws.¹⁹⁷ Finally, the proposed measure will give \$50 million over five years to the International Labor Organization's International Program on the Elimination of Child Labor.¹⁹⁸ This measure comes as a direct response to the recent recognition and publicity about the use of foreign child labor by American companies in their international production lines.¹⁹⁹ Not surprisingly, Kathie Lee Gifford has become an avid supporter of the proposed measure and is pushing for an independent monitoring system to expose other types of labor abuse.²⁰⁰

As an alternative to an outright ban on imported products that are the fruits of child labor, Congress should also consider

192. *Id.*

193. See *supra* note 34 (explaining that a lack of education encourages child exploitation).

194. See Moran, *supra* note 34, at 310.

195. H.R. 3812, 104th Cong., 2d. Sess. (1996).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Panel Backs Law Banning Sale of Goods Made By Child Labor*, BUFF. N., July 16, 1996, at A4. See *supra* notes 66-70 and accompanying text for a discussion of the recent controversies surrounding Kathie Lee Gifford, Michael Jordan, the Nike Corporation and other American companies because their speculated use of foreign child labor.

200. *Panel Backs Law Banning Sale of Goods Made By Child Labor*, *supra* note 199, at A4.

enacting legislation that would allow the U.S. Trade Representative to impose significant sanctions, such as the imposition of stiff tariffs, on countries that countenance insidious child labor practices.²⁰¹ Congress should use as its model the Trade Act of 1974, which authorizes the Trade Representative to monitor foreign countries' intellectual property enforcement practices and to invoke punitive economic sanctions against countries that fail to effectively protect trademarks and copyrights.²⁰² In recent years, the United States government has very effectively used the provisions of the Trade Act of 1974 in persuading numerous countries to strengthen intellectual property protection.²⁰³

For example, China recently promised sweeping reforms in its intellectual property enforcement regime after the United States threatened to impose prohibitive tariffs on over \$2 billion worth of Chinese imports.²⁰⁴ One can assume that the U.S. government's use of trade sanctions against countries that permit wide-ranging child labor or sexual exploitation would be just as effective in eradicating these types of abuse. That the United States is more interested in actively protecting intangible commercial property, such as foreign trademark rights, than in protecting the lives and health of tens of millions of children seems strange for a democracy predicated on the inalienable rights to life, liberty and happiness.

The United States' financial aid to countries should help to alleviate the poverty that often precipitates the onset of child

201. Congress should consider amending the Trade Act of 1974, 19 U.S.C. § 2411 (1988). Under the present version of the Trade Act, Congress authorizes the Trade Representative to impose economic sanctions against foreign countries that do not enforce basic intellectual property protections. *Id.* To those who find this type of intervention too controversial, human rights scholars have also proposed the use of economic sanctions against countries violating their citizens' human rights. Ivan Eland, *Economic Sanctions as Tools of Foreign Policy*, in *ECONOMIC SANCTIONS: PANACEA OR PEACEBUILDING IN A POST-COLD WAR WORLD?* (David Cortright & George A. Lopez eds., 1995) (advocating the use of economic sanctions against countries violating their citizens' human rights); See Shattuck, *supra* note 14, at 277 (noting that negative economic measures include trade sanctions, opposition to loans by multilateral development banks, reduction of U.S. economic or security assistance, reduction or suspension of senior-level visits, and prohibition of some or all military sales).

202. 19 U.S.C. § 2411 (1988).

203. See, e.g., *China, U.S. Announce Eleventh Hour Agreement Averting Costly Trade War*, *WORLD INTELL. PROP. REP.* (BNA) No. 10, at 209-10 (July 1996).

204. *Id.* at 209. China promised U.S. officials that it would close down 15 compact disk factories that engaged in infringing activities and improve its board control efforts to combat intellectual property abuse. *Id.* One U.S. business leader made clear that "the U.S. Government's threat to impose punitive trade sanctions persuaded the Chinese that progress on IPR rights is in their national interest." *Id.* at 210.

exploitation.²⁰⁵ However, this financial assistance should be conditioned upon its use to create improved educational and health measures, such as compulsory education and mandatory doctor visits.²⁰⁶ Finally, U.S. trade policies should be directly connected to a country's ratification and compliance with the Convention.²⁰⁷ Essentially, the United States should withhold benefits from countries that violate their children's human rights or countenance others in such violations.

C. Encouraging Private Industries to Join the Battle Against Child Exploitation

Besides legislation and governmental initiatives, the United States can also work closely with private industries to encourage them to join the fight against child exploitation.²⁰⁸ Private industries can help deter child labor in many ways. First, they can participate in voluntary labeling initiatives by producers of goods which inform consumers of how the goods are made.²⁰⁹ For example, many private Indian industries have taken a step in this direction through the "Rugmark" program.²¹⁰ This program allows hand-woven carpets to carry the "Rugmark" label if they are not made with child labor.²¹¹ Private importers in the United States can educate international exporters about the dangers of using child labor and encourage them to halt all use of child labor used in products going to destinations other than the United States.²¹²

CONCLUSION

As a leading global power, the United States must bear some responsibility for the worldwide proliferation of practices exploiting children sexually and economically. The United States pays lip service to this responsibility through the Refugee Act, the only significant human rights measure enacted to protect the world's children seeking refuge from such abuse. However, courts and administrative agencies interpret the Refugee Act narrowly, resulting in the probable denial of asylum to exploited children because they do not face a reasonable fear of persecution or constitute a cognizable social group. It follows, then, that the Refugee

205. Moran, *supra* note 34, at 308.

206. *Id.* at 309. Lack of education is perhaps the most significant factor contributing to the exploitation of children. *Id.* at 296.

207. *Id.* at 309.

208. Reich, *supra* note 77.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

Act fails in purpose by not providing an adequate remedy for human rights violations. Congress should rectify this failure by amending the Refugee Act to include a category expressly covering exploited children as a protected class. Alternatively, if the United States remains unwilling to accept child refugees into its borders, supplemental solutions are needed to effectuate the protection against child exploitation. This includes ratifying the Convention on the Rights of the Child and initiating and promoting direct action to enforce it. Other possibilities include legislation that would ban imported products made with child labor or legislation that would impose economic trade sanctions against countries that countenance child exploitation. The Refugee Act is an empty promise to exploited children. The time for a new era in the protection of children's rights has arrived.

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