



Content downloaded/printed from

[HeinOnline](#)

Mon Oct 14 04:24:04 2019

Citations:

Bluebook 20th ed.

Zona Sharfman, The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum, 29 *Women's Rts. L. Rep.* 149 (2007).

ALWD 6th ed.

Zona Sharfman, The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum, 29 *Women's Rts. L. Rep.* 149 (2007).

APA 6th ed.

Sharfman, Z. (2007). The lost girls of sudan: Forced marriage as vehicle for asylum. *Women's Rights Law Reporter*, 29(2 and 3), 149-166.

Chicago 7th ed.

Zona Sharfman, "The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum," *Women's Rights Law Reporter* 29, no. 2 and 3 (Winter/Spring 2007-2008): 149-166

McGill Guide 9th ed.

Zona Sharfman, "The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum" (2007) 29:2 and 3 *Women's Rts L Rep* 149.

MLA 8th ed.

Sharfman, Zona. "The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum." *Women's Rights Law Reporter*, vol. 29, no. 2 and 3, Winter/Spring 2007-2008, p. 149-166. HeinOnline.

OSCOLA 4th ed.

Zona Sharfman, 'The Lost Girls of Sudan: Forced Marriage as a Vehicle for Asylum' (2007) 29 *Women's Rts L Rep* 149

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device



NOTE

The “Lost Girls” of Sudan: Forced Marriage as a Vehicle for Asylum

Zona Sharfman*

In 1999, the Department of State authorized the relocation of approximately 3,800 Sudanese children and young adults to the United States.¹ The Refugee Admissions Program- the program through which refugees are resettled into the U.S. each year- is administered by the Bureau of Population, Refugees and Migration.² The United States Resettlement Program provides services to refugees in the years following their arrival in the U.S. and is run by the Office of Refugee Resettlement (ORR).³ Resettling refugees in the United States additionally requires the combined effort of the United Nations High Commissioner for Refu-

gees (UNHCR), non-governmental organizations (NGOs), and other government agencies.⁴ The Refugee Admissions Program is based on a priority system,⁵ whereby the President of the United States consults with Congress and the State Department to determine the numerical limit for each priority level.⁶ These Sudanese children were designated as Priority Two,⁷ meaning they were of special humanitarian concern.⁸ The United States, the UNHCR, and non-governmental organizations (NGOs) succeeded in realizing the relocation of thousands of Sudanese youth to the United States.⁹ The UNHCR selected candidates for relocation

*B.A., Vanderbilt University (1999); M.A., New York University (2004); J.D., Brooklyn Law School (2008). I would like to extend a heartfelt thank you to Professor Schneider for her guidance and tremendous encouragement throughout this process. Thanks also to Professor Caplow for her comments and insight. I am grateful to the editors of the Women's Rights Law Reporter for their diligence. I would like to thank my parents for their enthusiasm.

1. BUREAU OF POPULATION, REFUGEES AND MIGRATION, U.S. DEP'T OF STATE, FACT SHEET – SUDANESE (KAKUMA) YOUTH, <http://www.state.gov/g/prm/rls/fs/2001/3398.htm> (last visited Apr. 5, 2008) [hereinafter U.S. DEP'T OF STATE, FACT SHEET ON SUDANESE YOUTH].

2. U.S. Dep't of State, Opening Doors, Restoring Hope: The U.S. Refugee Admissions Program, at 1, www.state.gov/documents/organization/82929.pdf.

3. InterAction, Refugee & IDPs: Frequently Asked Questions, <http://www.interaction.org/refugees/faq.html> (follow “Who provides assistance in the refugee resettlement process?” link) (last visited Mar. 9, 2008).

4. U.S. Dep't of State, *supra* note 2, at 1.

5. DAVID A. MARTIN, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT 62 (2004), available at www.state.gov/documents/organization/36495.pdf.

6. *See id.* at 30.

7. MARTIN, *supra* note 5, at 44 (Additionally, more focused P-2 groups have included the so-called “Lost Boys of Sudan.”).

8. U.S. Citizenship and Immigration Servs., The Worldwide Priority System, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=89f6194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=C9b4ef4c766fd010VgnVCM1000000ecd190aRCRD> (last visited May 1, 2008).

9. The exact number of how many children were relocated in this program varies tremendously from source to source, with figures ranging from about 3,200 to 3,800. *See, e.g.,* Jim Fisher-Thompson & Al Murphy, *Sudanese “Lost Boy” Builds New Life in America*, USINFO.STATE.GOV, Aug. 26, 2005, <http://usinfo.state.gov/af/Archive/2005/Aug/26-823395.html> (reporting that 3,600 children were relocated to the United States in this program); CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., RECOMMENDATIONS FOR PRESUMPTIVE TREATMENT OF SCHISTOSOMIASIS AND STRONGYLOIDIASIS AMONG THE LOST BOYS AND GIRLS OF SUDAN 1 (2005), available at [http://www.cdc.gov/Ncidod/dq/pdf/Lost Boys and Girls Presumptive Treatment Recommendations.pdf](http://www.cdc.gov/Ncidod/dq/pdf/Lost%20Boys%20and%20Girls%20Presumptive%20Treatment%20Recommendations.pdf); *Do Not Forget the Lost Girls of Sudan*, REFUGEES INT'L, Feb. 11, 2002, <http://www.refugeesintl.org>.

from the Sudanese children who had been living in Kakuma, a refugee camp in Kenya.¹⁰ The program was limited to children who had arrived at the camp as unaccompanied minors prior to 1999.¹¹ After being interviewed and processed, thousands of Sudanese boys streamed into host cities¹² throughout the United States in 2000 and 2001.¹³ Named after the Peter Pan's orphans, they became known as the "Lost Boys of Sudan."¹⁴ Their nickname reflects the extent to which the program failed the Sudanese girls.¹⁵ The term "Lost Girls" has been used to refer to the girls who, like the boys, were forced to flee Sudan and settle in the Kakuma Refugee Camp in Kenya.¹⁶ Only 89 girls were able to avail themselves of this program to relocate to the United States, compared to the over 3,200 boys were able to do the same.¹⁷ A recent holding by the Court of Appeals in the Second Circuit in *Gao v. Gonzales*¹⁸ offers hope to the "Lost Girls" who may seek asylum on the grounds that they were forced into marriages while in Sudan. This hope was

diminished by the United States Supreme Court's decision, in October 2007 that vacated and remanded *Gao*.¹⁹ But the hope has not been extinguished.²⁰ While the possibility of granting asylum based on forced marriage will not rectify the shortcomings of either this specific relocation program or refugee admissions policy in general, it could reduce the gender disparity of Sudanese youth able to relocate to the United States.

The UNHCR proclaims that it "is mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems."²¹ Refugee policy focuses on three measures (also known as durable solutions) to provide lasting resolutions for refugees: voluntary repatriation, local integration, and resettlement to a third country.²² Refugee agencies tend to favor voluntary repatriation and local integration,²³ but these were not viable options

refugeesinternational.org/content/article/detail/788/ (last visited Apr. 5, 2008).

10. Emmanuel Nyabera, *Sudanese Refugees Sharpen Their Skills As They Prepare to Return Home*, UNHCR: SOUTH SUDAN OPERATION, Oct. 26, 2007, <http://www.unhcr.org/cgi-bin/texis/vtx/southsudan?page=news&id=435fa3c34> ("The camp, which was opened in 1991, covers an immensely long strip – 15 km long by 1 km wide. It hosts more than 90,000 refugees, including Somalis, Ethiopians, Eritreans, Burundians, Ugandans and Congolese."). See also Sara Corbett, *The Lost Boys of Sudan: The Long, Long, Long Road to Fargo*, N.Y. TIMES MAGAZINE, Apr. 1, 2001, at 48 available at <http://query.nytimes.com/gst/fullpage.html?res=9A06E1DE113CF932A35757C0A9679C8B63&sc=6&sq=Lost+Boys+of+Sudan&st=nyt> (subsequent citations follow html pagination)

11. Corbett, *supra* note 10, at 9.

In order to qualify, the refugees had to have arrived in Kakuma before 1995 as unaccompanied minors, and perhaps most important, they had to convince the interviewers that their parents were either dead or untraceable. Because the U.N. tries to resettle refugees in a third country only as a last resort, when there is little or no hope of a safe return—or, in the case of children, family reunification—the consultants specifically asked each boy whether he had tried to trace surviving relatives.

Id.

12. See U.S. DEP'T OF STATE, FACT SHEET ON SUDANESE YOUTH, *supra* note 1 (describing the relocation program and noting that ten resettlement programs facilitated the relocation and twenty eight states received the participants).

13. See Office of Refugee Resettlement, U.S. Dep't of Health and Human Servs., Fiscal Year 2000 Refugee Arrivals, <http://www.acf.hhs.gov/programs/orr/data/fy2000RA.htm> (last visited Apr. 5, 2008). In Fiscal Year 2000, the United States accepted a total of 3,830 asylees, entrants, and refu-

gees with Sudan as their country of origin. *Id.* In Fiscal Year 2001, that number rose to 5,950. Office of Refugee Resettlement, U.S. Dep't of Health and Human Servs., Fiscal Year 2001 Refugee Arrivals, <http://www.acf.hhs.gov/programs/orr/data/fy2001RA.htm> (last visited Apr. 5, 2008).

14. Stephanie Kriner, American Red Cross, *The Lost Boys of Sudan Part I: The Long Journey*, http://www.redcross.org/news/in/africa/010814lostboys_a.html (last visited Apr. 5, 2008).

15. *Do Not Forget the Lost Girls of Sudan*, *supra* note 9.

16. Ishbel Matheson, *The "Lost Girls" of Sudan*, BBC News, June 7, 2002, <http://news.bbc.co.uk/2/hi/africa/2031286.stm> (last visited May 1, 2008).

17. *Do Not Forget the Lost Girls of Sudan*, *supra* note 9. "The U.S. has received 3,276 Sudanese boys from this group since 2000 [but] only 89 girls. The original list of boys to be received in the U.S., compiled and handed to the U.S. government by the UNHCR, did not have any girls' names." *Id.* Sources vary on how many Sudanese boys relocated to the United States, but many sources agree that only eighty-nine girls arrived. *Id.*

18. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated*, *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.).

19. *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.). To minimize confusion, this note will refer to *Gao v. Gonzales* as *Gao* and *Keisler v. Gao* by the full case name.

20. Cara Goeller, Note, *Forced Marriage and the Granting of Asylum: A Reason to Hope After Gao v. Gonzales*, 14 WM. & MARY J. OF WOMEN & L. 173, 173 n.1 (2007).

21. UNHCR, Mission Statement, <http://www.unhcr.org/publ/PUBL/4565a5742.pdf> (last visited Apr. 5, 2008).

22. UNHCR, CORE GROUP ON DURABLE SOLUTIONS, FRAMEWORK FOR DURABLE SOLUTIONS FOR REFUGEES AND PERSONS OF CONCERN, 7 (2003), available at <http://www.unhcr.org/partners/PARTNERS/3f1408764.pdf>.

23. MARTIN, *supra* note 5, at 162.

for the Sudanese youth.²⁴ Relocation was the only tenable solution for the Sudanese youth, yet it failed to provide relief to the girls in any meaningful way.

The 1951 U.N. Convention relating to the Status of Refugees defines the term refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁵

The 1967 Protocol, to which the United States became a party in 1968, expands the definition by eliminating the requirement that the event causing a person to become a refugee occur before January 1, 1951.²⁶ The Immigration and Nationality Act (INA) employs similar language in its definition of refugees.²⁷ Furthermore, section 208 of the INA outlines the requirements for asylum. In addition to meeting the definition for a refugee, as it was adopted from the Protocol and the Convention, an asylum seeker must be located in the United States.²⁸

This note proposes that a recent holding by the Court of Appeals for the Second Circuit in

*Gao v. Gonzales*²⁹ might help pave the way for some Sudanese girls at Kakuma Refugee Camp to gain asylum in the United States. The *Gao* court held that the petitioner had established a fear of persecution on account of her membership in a particular social group consisting of women who have been sold into marriage and live in a feudal community in China where forced marriage is condoned.³⁰ Recently, the Supreme Court vacated *Gao* and remanded it with instructions to reconsider the case in light of the Court's decision in *Gonzales v. Thomas*.³¹ In *Thomas*, the Court held the Ninth Circuit erred in determining that an asylum applicant was a member of a particular social group because the question had not first been addressed by the relevant administrative agency.³² Despite the ruling in *Thomas*, this note suggests that the Second Circuit's holding in *Gao* still provides some hope for those applying for asylum based on forced marriage and further, that this relief could extend to some of the Sudanese girls at Kakuma Refugee Camp.

Part I of this note explores the background of the "Lost Girls," including traditional and cultural factors which contributed to their *de facto* exclusion from the Lost Boys program. Part II of this note focuses on forced marriage as a basis for establishing a well-founded fear of persecution on account of membership in a particular social group. It evaluates this claim in light of the Second Circuit's holding in *Gao*. It then considers the effect that the Supreme Court's decision to vacate *Gao* for further consideration will have on asylum claims resting on forced marriage. Part III of this note then con-

24. U.S. DEP'T OF STATE, FACT SHEET ON SUDANESE YOUTH, *supra* note 1 (citing the ongoing war in Sudan as a factor barring voluntary repatriation as an option for Sudanese refugees outside their country of origin); Jeff Crisp, *Forms and Sources of Violence in Kenya's Refugee Camps*, 19 REFUGEE SURV. Q. 54, 64 (2000) (noting that the significant problems in the areas surrounding Kakuma Refugee Camp made local integration unrealistic as a durable solution). "There is general recognition in Kakuma and Dabaab that the refugees enjoy a standard of living which is equal to if not better than many local people." *Id.*

25. United Nations Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

26. Protocol Relating to the Status of Refugees art. 1, Oct. 4, 1967, 19 U.S.T. 6223.

27. Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(a)(42) (2000). Refugees are defined as any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return

to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id.

28. Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158 (2000).

29. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated*, *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.).

30. *Gao*, 440 F.3d at 70.

31. *Keisler*, 128 S. Ct. at 345.

32. 547 U.S. 183, 185 (2006).

siders forced marriage in the specific context of the girls who were overlooked by the Lost Boys program. It explores whether the girls can establish a claim for asylum based on the holding in *Gao v. Gonzales*. It concludes that some of the Sudanese women and girls who have been sold into marriage and overlooked for relocation might have a remote chance of succeeding on such a claim. Part IV sets forth recommendations to remove some of the gender bias from relocation programs.

I. SUDANESE GIRLS AT KAKUMA REFUGEE CAMP: HOW THE RELOCATION PROGRAM FAILED THEM

This part of the note explores the events leading up to the Lost Girls' flight to Kakuma Refugee Camp and various factors in Sudanese culture which create a gender disparity. These circumstances discount justifications posited by U.S. government officials for the imbalance of this relocation program.

A. The Conflict in Sudan and the Ensuing Displacement

Sudan, the largest country in Africa,³³ has experienced violence and civil war throughout its history,³⁴ with only brief periods of respite.³⁵ Culture and religion have divided the country for decades.³⁶ The Arabic government of the

north is in direct conflict with split Christian and animist forces in the south.³⁷ By the time the U.S. Department of State decided to resettle Sudanese youth affected by a civil war that erupted in 1983, two million people had died and five million had been displaced.³⁸

Many of those who were driven from Sudan by war and attacks embarked on a circuitous journey that led to Ethiopia.³⁹ They settled there briefly before a change in government forced them to continue by foot to Kenya.⁴⁰ The arrival of nearly 12,000 unaccompanied minors at the Kenyan border led to the founding of the Kakuma Refugee Camp in 1992.⁴¹ Located in north-west Kenya,⁴² Kakuma became home to the population from which the United States selected participants for the Lost Boys program.⁴³ An NGO letter commenting on the desperate conditions of these children arriving at the refugee camp stated, "[t]hese refugees arrive in the camp with little or nothing in the way of possessions and are in urgent need of food, shelter, water, clothing, medical and psychosocial care."⁴⁴ The international community gradually discovered what these displaced Sudanese, many of them children, had endured, and continued to endure in the camp. One State Department official spoke of the decision to relocate thousands of Sudanese youth from Kakuma to the United States: "'We are giving them a chance. . . . It's kind of a recognition that

33. BUREAU OF AFRICAN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: SUDAN, <http://www.state.gov/r/pa/ei/bgn/5424.htm> (last visited Apr. 5, 2008) [hereinafter U.S. DEP'T OF STATE, BACKGROUND NOTE: SUDAN].

34. *Id.* ("Sudan has been at war with itself for more than three quarters of its existence.")

35. See generally TASNEEM MOWJEE, FEINSTEIN INT'L CTR., BRIEFING PAPER: HUMANITARIAN AGENDA 2015: SUDAN COUNTRY STUDY (2006), available at <http://fic.tufts.edu/downloads/HA2015SudanCountryStudy.pdf>.

36. U.S. DEP'T OF STATE, BACKGROUND NOTE: SUDAN, *supra* note 33 ("Since independence, protracted conflict rooted in deep cultural and religious differences retarded Sudan's economic and political development and forced massive internal displacement of its people.")

37. *Religion and Ethics Newsweekly, Evangelicals in Sudan* (PBS television broadcast May 28, 2004), available at <http://www.pbs.org/wnet/religionandethics/week739/feature.html> ("For more than 20 years, Sudan has been locked in a brutal civil war between the Islamist government in the North and the Christian and animist South."). See also Appeal Letter from Action by Churches Together International 1 (Jan. 8, 2002), available at http://www.act-intl.org/appeals/appeals_2002/AFKE21.pdf (Noting the difficulty of resolving the con-

flict in Sudan "because of the nature of issues ranging from the connection of religion and state, economic and political marginalisation of minorities, and the diversity of Sudan's Arab and African, Muslim and non-Muslim population. In southern Sudan, the conflict is compounded by ethnic clashes within rebel ranks." *Id.* at 3.)

38. Letter from Lavinia Limon, Dir., Office of Refugee Resettlement, to State Refugee Coordinators, Nat'l Voluntary Agencies and Other Interested Parties (Jan. 11, 2001), available at <http://www.acf.hhs.gov/programs/orr/policy/sl01-01.htm>.

39. *Id.*

40. *Id.*

41. Appeal Letter from Action by Churches Together International, *supra* note 37, at 1.

42. Crisp, *supra* note 24, at 1.

43. Corbett, *supra* note 10, at 1-2. (discussing how the Lost Boys reached Kakuma Refugee Camp). "In 1999, having determined that repatriation was not an option, the United Nations High Commissioner for Refugees, working together with the State Department, recommended roughly 3,600 of them for resettlement in the United States." *Id.* at 2.

44. Letter from Action by Churches Together International, *supra* note 37, at 3.

enough is enough for this group.'"⁴⁵ Unfortunately, that was not equally true for the girls.

The U.S. Refugee Admissions Program, described by the State Department as "a critical humanitarian undertaking that demonstrates the compassion of Americans for the world's most vulnerable people,"⁴⁶ is structured on a priority system.⁴⁷ Pursuant to section 207(a)(3) of the INA, each year the President allocates admission of refugees who are "of special humanitarian concern" based on a priority system.⁴⁸ Classification in one of the priorities does not ensure that a refugee will ultimately be relocated to the United States, but it serves to organize refugee applications for processing.⁴⁹ Priority One status is for individuals who have been referred by UNHCR, a U.S. embassy, or designated NGOs for the Refugee Program.⁵⁰ Priority Two status is reserved for group referrals, "includ[ing] specific groups (within certain nationalities, clans or ethnic groups, sometimes in specified locations) identified by the Department of State in consultation with the Department of Homeland Security, NGOs, UNHCR, and other experts as in need of resettlement."⁵¹ As previously noted, the Lost Boys of Sudan were designated as a Priority Two group of special humanitarian concern for resettlement processing.⁵²

The Department of State's decision to label this population as Priority Two initiated a complex relocation process.⁵³ United States refugee policy⁵⁴ made it impossible to accommodate the

entire Kakuma population.⁵⁵ "In 1999 the UNHCR . . . referred over 3,300 of these youth to the United States for resettlement processing. Once the U.S. agreed to admit this group, the UNHCR undertook formal identity and background checks. The U.S. then began formally processing the group for resettlement"⁵⁶ The program requirements and the manner in which they were implemented resulted in the near total exclusion of girls from the relocation program, thus reinforcing Sudanese traditions that marginalize girls and women.

B. Cultural Factors Contributing to the Exclusion of Girls from the Relocation Program

While the following demographic data indicates that Kakuma had slightly more males, the difference was not so great as to explain the extent of the under-representation of girls in the relocation program. In 2001, girls represented 46% of the Kakuma population under five-year-olds and 38% of the population of six- to seventeen-year-olds, totaling 17,521 girls.⁵⁷ This gender imbalance can be attributed to the following factors: 1) Sudanese boys are responsible for hunting and were able to escape because they were away from home at the time of attacks; and 2) girls are less free to leave their homes for refugee camps because they are ex-

45. Donatella Lorch, *Out of Africa*, NEWSWEEK, Mar. 19, 2001, at 2.

46. BUREAU OF POPULATION, REFUGEES AND MIGRATION, U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2008: REPORT TO CONGRESS iii (2008), available at <http://www.state.gov/documents/organization/91978.pdf> [hereinafter U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSION FOR 2008].

47. MARTIN, *supra* note 5, at 62 (describing the priority system).

48. U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSION FOR 2008, *supra* note 46; OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., ANNUAL OFFICE OF REFUGEE RESETTLEMENT REPORTS TO CONGRESS (2001), <http://www.acf.hhs.gov/programs/orr/data/01arc2.htm> (last visited Apr. 5, 2008) ("The ceiling for the number of refugees to be admitted each year is determined by the President after consultation between the Executive Branch and the Congress.").

49. U.S. Citizenship and Immigration Servs., *supra* note 8.

50. PROPOSED REFUGEE ADMISSIONS FOR 2008, *supra* note 46 (defining priority one of the worldwide priority system).

51. *Id.*

52. MARTIN, *supra* note 5, at 64.

53. Barbara Stark, *Lost Boys and Forgotten Girls: Intercountry Adoption, Human Rights, and African Children*, 22 ST. LOUIS U. PUB. L. REV. 275, 276-77 (2003) (concluding the asylum policies of the United States and refugee resettlement "system works, like too many child welfare regimes, in a patched-together, haphazard way. But it did work- at least for the Boys [of Sudan]. For the Girls, however, the results have been disastrous.").

54. See generally DEP'T OF STATE AND U.S. AGENCY FOR INT'L DEV., FY 2007 JOINT PERFORMANCE SUMMARY 212-27 (2006), available at <http://www.state.gov/documents/organization/59180.pdf>.

55. See Letter from Action by Churches Together International, *supra* note 41, at 1. While there do not appear to be exact population figures for 1999, the refugee camp had over 82,000 refugees in 2001 and was expected to grow to about 90,000 by 2002. *Id.*

56. Letter from Lavinia Limon, *supra* note 38.

57. Letter from Action by Churches Together International, *supra* note 41.

pected to remain home and support their families.⁵⁸

The gender imbalance present in Sudanese culture extends to access to education, and the refugee camps are no exception. For example, only 22% of the participants in a school program at Kakuma were girls.⁵⁹ Many reasons have been posited for this failure to educate Sudanese girls in equal numbers: "[a]rranged early marriages, domestic overload for the girls, misconceptions regarding a girl's competence and position in society; fear of possible consequences of mixing girls and boys in school and the girls' [sic] limited exposure to challenges and opportunities open to both boys and girls."⁶⁰ The few girls able to attend school are often treated as inferior to the boys and are not given the necessary encouragement to excel.⁶¹

The disparity between the genders encompasses more than just formal education; while the Lost Boys were relocated to the United States, the girls at Kakuma Refugee Camp failed to receive equal consideration for the relocation program.⁶² The "success [of the Lost Boys program] . . . has not been matched by an equally determined effort to resettle their female counterparts. The 'Lost Girls' have been neglected by the United States and by the UN High Commission for Refugees (UNHCR)."⁶³

In 2000, four American consultants were sent to Kakuma by the UNHCR.⁶⁴ These con-

sultants assessed the children to determine which were eligible for the relocation initiative.⁶⁵ However, sufficient efforts were not made to include the girls in the relocation program.⁶⁶ "The boys were also counseled by aid workers upon arrival in the camp - something considered unnecessary for the girls since they were supposedly in a 'nurturing' family environment . . . [I]t was largely the counselors' lists that were later used to identify resettlement candidates"⁶⁷ Because Sudanese culture places little emphasis on educating its women, the girls had become inured to their lack of access to education and information. UNHCR's implementation of the program failed to recognize this imbalance and educate the female population about the program.

Eligibility for the program was limited to unaccompanied minors, which the UNHCR defines as children under 18 or the country's legal age of majority, who are separated from both parents and are not being cared for by a guardian or other adult who by law or custom is responsible for them.⁶⁸ Unlike the "Lost Boys," the girls were subsumed into foster families in accordance with Sudanese custom.⁶⁹ By limiting the program to those who were unaccompanied,⁷⁰ instead of those who were separated from their parents, the program's standard automatically disqualified a large portion of the

58. ANNA P. OBURO, UNHCR, PEACE EDUCATION PROGRAMME IN DADAAB AND KAKUMA, KENYA: EVALUATION SUMMARY 7 (2002), available at <http://www.unhcr.org/publ/RESEARCH/3e1a9fd0b.pdf> ("Kakuma has only 37-38 percent girls and women, which reflects the more mobile lifestyle of Sudanese men and boys . . . and the pressure put on women to stay at home to feed the remaining population and the armies through agricultural output.").

59. *Id.* at 9.

60. Letter from Action by Churches Together International, *supra* note 41, at 11.

61. OBURO, *supra* note 58, at 23 ("Gender issues in the classroom have received little or no attention judging by the incessant put-down of girls in schools, ranging from seating arrangements, to the total lack of communication by the (male) teacher with girls in some classrooms, and the lack of change expected by teachers.").

62. *Do Not Forget the Lost Girls of Sudan*, *supra* note 9.

63. *Id.*

64. Corbett, *supra* note 10, at 9 ("The United Nations High Commissioner for Refugees sent four American consultants to Kakuma to interview Lost Boys and consider them for the newly announced settlement plan.").

65. JULIANNE DUNCAN, U.S. CATHOLIC CONFERENCE, SUDANESE "LOST BOYS" IN THE UNITED STATES: ADJUSTMENT

AFTER SIX MONTHS 2 (2001), available at www.brycs.org/documents/SUDANESE.PDF.

66. *Do Not Forget the Lost Girls of Sudan*, *supra* note 9 ("As one UN official told *RI*, 'Everyone says 'yes, yes, yes' [about including the girls in resettlement] but then no one has taken any significant action.'" (alteration in original)).

67. Consultative Meeting on Migration and Mobility and How This Movement Affects Women, Malmö, Swed., Dec. 2-4, 2003, *Seeking Protection: Women in Asylum and Refugee Resettlement Processes*, 9 U.N. Doc. CM/MMW/2003/EP.8 (Jan. 14, 2004) (prepared by Kathleen Newland) [hereinafter Newland, *Seeking Protection*].

68. The Secretary-General, *The Report of the United Nations High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions*, ¶ 2, delivered to the General Assembly, U.N. Doc. A/52/273 (Aug. 7, 1997), available at <http://www.un.org/documents/ga/docs/52/plenary/a52-273.htm>.

69. Matheson, *supra* note 16.

70. *Sudan's 'Lost Boys' Head for US*, BBC NEWS, Nov. 9, 2000, <http://news.bbc.co.uk/2/hi/africa/1015197.stm> ("The American Government has set strict conditions for the boys and girls now aged between 14 and 21 years. They must not have known relatives or dependants.") (last visited Apr. 7, 2008).

female population.⁷¹ Furthermore, this requirement was predicated on the misguided notion that children who have family members are in a better situation than those who do not.⁷² In fact, many foster families sold the girls for bride prices or forced them into labor on their behalf.⁷³ Therefore, it appears that in the Sudanese cultural context, the term "unaccompanied" is not gender neutral, and the relocation policy ignores both the gendered nature of the term and the vulnerability of the girls within foster families.

Another factor that contributed to the vast under representation of girls in the UNHCR relocation program was the relative invisibility of girls in the Kakuma camp. While girls lived out of sight with their foster families, the boys were accommodated together and without adults.⁷⁴ The boys were easier to identify and therefore easier to help because they were grouped together.⁷⁵ A Sudanese girl describes how the girls, on the other hand, were overlooked in the relocation program: "We girls were not put into groups like the boys. If we had been put into groups, we might have been attacked. We are now in the community, and no one knows

where we are."⁷⁶ Clearly, the girls were overlooked.⁷⁷ "In selecting refugees for resettlement, many women and girls are often quite literally invisible to those who do the selecting because they do not inhabit public spaces, do not appear on registration lists as individuals rather than as members of family groups, and are inhibited from interacting with strangers."⁷⁸ As a result, the girls disappeared into the private sphere, while the boys' independence and collective identity as orphans attracted the attention of those responsible for executing the relocation program.

Finally, the recruitment for the UNHCR program failed to account for the frequency of early and forced marriages in Sudanese culture.⁷⁹ The Sudanese government and culture recognizes marriage for girls as young as ten years old.⁸⁰ When girls marry, their families receive a dowry, typically in the form of cattle.⁸¹ Marriage confers majority upon the girls, meaning that they no longer count as minors, thereby excluding them from relocation with this program.⁸² Kofi Mable, head of the UN refugee agency in Kakuma, lamented that "we have lost them . . . they are completely lost . . . [t]hey

71. UNHCR, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM 1 (1997), available at <http://www.unhcr.org/publ/PUBL/3d4f91cf4.pdf> (UNHCR defines an unaccompanied child as one who "is under the age of eighteen, unless, under the law applicable to the child, majority is, attained earlier and who is 'separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so.") [hereinafter UNHCR, GUIDELINES ON DEALING WITH UNACCOMPANIED CHILDREN].

72. Matheson, *supra* note 16 ("According to Sudanese custom, the girls were placed with guardians who were supposed to protect them. But many foster-parents - it seems - did not have the girls' welfare at heart. . . . Sudanese leader, Gideon Kenyi, says, "[t]he issue of dowries had become a priority to the people who are owning the girls. They see the girls as a way of generating wealth, by marrying them or by giving them to someone rich.").

73. Stark, *supra* note 53, at 277.

74. Newland, *Seeking Protection*, *supra* note 67, at 9 ("[U]pon arrival in the camp, the boys were placed in group homes where they had minimal adult supervision and were able to maintain their personal and collective identities.").

75. Emmanuel Nyabera, *Man-eating Lions, Crocodiles, Famine . . .*, Refugees Magazine, April 2002, at 8, 8, available at <http://www.unhcr.org/publ/PUBL/3cb6ea2817.html> (link to pdf at bottom of page) ("The boys remained a reasonably identifiable group which finally caught the attention and sympathy of resettlement countries.").

76. *Do Not Forget the Lost Girls of Sudan*, *supra* note 9.

77. *Id.* ("The reality is that these lost girls have been forgotten twice: upon arrival in Kakuma Refugee Camp, and

again when the U.S. refugee resettlement program was started.").

78. Newland, *Seeking Protection*, *supra* note 67, at 2.

79. See THE WATCHLIST PROJECT, WATCHLIST ON CHILDREN AND ARMED CONFLICT: SUDAN 29 (2003), available at [http://www.reliefweb.int/rw/RWFiles2003.nsf/FilesByRWDocUNIDFileName/ACOS-64BTF8-wcrwc-sud-25mar.pdf/\\$File/wcrwc-sud-25mar.pdf](http://www.reliefweb.int/rw/RWFiles2003.nsf/FilesByRWDocUNIDFileName/ACOS-64BTF8-wcrwc-sud-25mar.pdf/$File/wcrwc-sud-25mar.pdf). Forced marriage in Sudan is a function of both Sudanese culture and the ongoing conflict in Sudan. See *id.* at 6. This report states that women are forced into marriage after being abducted by members of government-backed militias. *Id.* at 3. "GBV [Gender-based violence] connected to conflict, including sexual slavery of women and children, rape by military forces, forced prostitution and forced marriage, is known to be a widespread problem in Sudan." *Id.* at 22. In addition, "[g]irls in the South are generally expected to submit to arranged marriages as a matter of custom." *Id.* at 6.

80. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SUDAN (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm> (last visited May 3, 2008).

81. Stark, *supra* note 53, at 278 n.15.

82. *Id.* at 278 n.17 (citing Annie Bunting, *Child Marriage*, 2 WOMEN & INT'L HUM. RTS. L. 669 (2000)). "The CRC does not explicitly bar child marriage, but the Committee on the Rights of the Child has noted that since legal marriage confers majority upon a girl, it deprives her of any benefits under the CRC." *Id.*

have lost the status of single girls. Some of them are mothers. They are married There's nothing I can do - or anyone else can do.'"⁸³

While forced and early marriages are common in Sudanese culture, the problem is also exacerbated by life in the refugee camps because girls are often absorbed into foster families as soon as they reach the refugee camps.⁸⁴ These foster families consisted of extended family or clan members. This creates a dynamic in which the financially desperate foster families are able to profit from these forced marriages by receiving the bridal dowry.⁸⁵ This powerful financial incentive has actuated the marriage of young girls in Kakuma and in other refugee camp situations.⁸⁶ Amnesty International asserts that in the context of conflict, in general, "[p]arents fear that, being in refugee camps, it will be impossible for them to 'control' their daughters, and they will try to 'marry them' hastily, in order to save the honour of the girl and the family."⁸⁷ In this context, the Sudanese practice of early marriage for the girls was aggravated by the refugee situation and therefore further contributed to the exclusion of girls in meaningful numbers from the relocation program.

C. Possible Justification for the Exclusion of Girls

The interaction between the program requirements and cultural factors such as forced marriage resulted in a pronounced disparity between the number of boys and girls eligible for relocation. Several official governmental statements provided various reasons for the lack of girls included in the program. The Department of State avers, "[t]hese refugees are from the Kakuma Refugee Camp and are predominantly boys and young men . . . [and] return to a homeland for these children and young adults could

mean forced military conscription and/or other danger to their lives."⁸⁸ The ORR issued a statement regarding the implementation of this resettlement program, explaining that young male refugees were forced to flee Sudan because they were being kidnapped or made targets in the civil war; these boy refugees made their way to Ethiopia to avoid conscription.⁸⁹ The letter makes no reference to the girls who, along with the boys, endured the same harrowing journey, except to point out that approximately 150 of the 3,300 relocated youths would be girls.⁹⁰ The justifications from the Department of State and the ORR both ignore threats faced predominantly by the girls at Kakuma: forced marriage, rape, abusive foster families, and marginalization.

A reporter for Refugees International, an NGO, traveled to Kakuma to determine why the relocation program failed the girls.⁹¹ An ensuing interview with a resettlement official at Kakuma revealed a more plausible reason for the exclusion than the justifications offered by the Department of State and the ORR: "[The resettlement of the Sudanese boys as a group and not the girls] was not due to gender bias by attitude or design," said one US official who works with resettlement. "It was simply easier."⁹²

Each of the factors detailed above skewed UNHCR's resettlement efforts and as a result, far fewer girls than boys benefited from this relocation program. Even though the standards were facially neutral, they ignored the cultural factors specific to this particular refugee population. Sudanese traditions such as forced marriage marginalized the girls, and the selection process for the relocation program reinforced this gender disparity. The relocation program failed to provide a meaningful remedy for the girls.

83. Matheson, *supra* note 16.

84. Stark, *supra* note 53, at 277.

85. Shelly Dick, *The Lost Children of Sudan*, REFUGEES INT'L, Apr. 25, 2002, <http://www.refintl.org/content/article/detail/1389/> (last visited May 3, 2008).

86. See Stark, *supra* note 53, at 277-78.

87. AMNESTY INT'L, RAPE AS A WEAPON OF WAR: SEXUAL VIOLENCE AND ITS CONSEQUENCES 20 (2004), available at <http://www.amnesty.org/en/library/asset/AFR54/076/2004/en/dom-AFR540762004en.pdf>.

88. U.S. DEP'T OF STATE, FACT SHEET ON SUDANESE YOUTH, *supra* note 1.

89. Letter from Lavinia Limon, *supra* note 38.

90. *Id.*

91. Charles London, *The Forgotten Children of Sudan - Part III*, REFUGEES INT'L, July 14, 2003, <http://www.refugeesinternational.org/content/article/detail/1074>.

92. *Id.*

II. SEEKING ASYLUM BASED ON FORCED MARRIAGE

The statutory framework governing asylum claims and the various elements required for a successful claim are delineated in the following section. This analysis is applied to the recent holding in *Gao*. The recent holding in *Gonzalez v. Thomas* is explored in greater detail in order to consider the possible consequence it will have on *Gao*.

A. Seeking Asylum

The INA governs the procedural process for an alien to obtain asylum in the United States.⁹³ The Attorney General has discretion to grant asylum to aliens who are physically present in the United States and meet the definition of refugee set forth in the INA.⁹⁴ Although, as previously noted, to meet this definition of "refugee" an individual must have been subject to persecution or have a well-founded fear of persecution on account of one of five different grounds,⁹⁵ this section will focus on membership in a particular social group as a basis for an asylum claim. In addition to being in the United States, the alien must establish that he or she 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 . . . membership in a particular social group"⁹⁶

Women have historically faced additional challenges in establishing a successful claim for asylum,⁹⁷ notwithstanding the fact that gender is conspicuously absent from the list of five grounds upon which a "well-founded fear of persecution" may be based.⁹⁸ "The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men."⁹⁹ This lack of a direct vehicle for the processing of claims based on gender-related persecution stands in sharp contrast to the fact that the majority of the world's refugee population is female.¹⁰⁰ Since gender is not available as a ground for an asylum claim, many applicants seeking asylum from gender-related persecution choose to rest their claims on membership in a particular social group.¹⁰¹

1. Past Persecution or a Well-Founded Fear of Persecution

Obtaining refugee status requires that the alien establish either past persecution or a well-founded fear of future persecution.¹⁰² This has been a source of confusion for courts.¹⁰³ The Supreme Court, in *INS v. Cardoza-Fonseca*, explained the fact

that the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor

93. BUREAU OF POPULATION, REFUGEES AND MIGRATION, U.S. DEP'T OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2003: REPORT TO THE CONGRESS (2002), <http://www.state.gov/g/prm/refadm/rls/rpts/2002/13892.htm> (last visited May 3, 2008).

94. Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158 (b)(1)(A) (2000).

95. *Id.*

96. *Id.*

97. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 627 (1993) ("However, women are much less likely than men to be found to meet the eligibility criteria for refugee status because of the absence of explicit recognition of gender-based persecution, and because of the social and political context in which the claims of women are adjudicated.").

98. *Id.* at 626-27 ("The definition of 'refugee' incorporated into the Convention is gender-neutral, making no distinction between male and female applicants.").

99. *Id.* at 628 (quoting Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGEE 3 (1987)) (discussing the challenges facing women asylum seekers). "[B]ecause advocates have learned to present cases within a largely male-oriented body of law, women's cases are often formulated in ways which reflect the advocate's understanding of the law rather than the reality of the applicant's experiences. The

claims of women are often presented as derivative of the claims of their male partners." *Id.* at 629 (citations omitted). Published in 1993, this article notes that gender and its relationship to a claim of persecution had yet to be addressed by a decision from the Board of Immigration Appeals and had only been addressed a few times by a federal court. *Id.* at 636-37.

100. *World Refugee Day - UNHCR Pays Special Tribute to Women*, UNHCR, June 19, 2002, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.htm?tbl=NEWS&id=3d10980b4&page=PROTECT> (last visited May 3, 2008) (referring to High Commissioner Ruud Lubbers' statement that the "vast majority of the world's nearly 20 million refugees" are women and children.).

101. Cara Goeller, *supra* note 20, at 174-75 ("Despite its under-utilization, however, most asylum seekers tend to litigate claims of persecution based solely or predominantly on gender within the particular social group category.").

102. Won Kidane, *An Injury to the Citizen, a Pleasure to the State: A Peculiar Challenge to the Enforcement of International Refugee Law*, 6 CHI-KENT J. INT'L & COMP. L. 116, 130 (2006).

103. *Id.* at 130-31 ("Although the Convention provides this criterion, it does not outline a clear standard of adjudication. As a result, it has remained a subject of inconsistent interpretation and application.") (citation omitted).

does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.¹⁰⁴

Thus, in order to be deemed a refugee the alien must establish both a subjective and an objective fear of persecution.¹⁰⁵ "An alien may satisfy the subjective prong by showing that events in the country to which he or she will be deported have personally or directly affected him or her."¹⁰⁶ As for the objective component, an asylum seeker "must submit documentary evidence or testimony alleging specific facts from which it can be inferred that he or she may be singled out for persecution on the basis of his or her race, religion, nationality, political opinion or membership in a particular social group."¹⁰⁷

2. *Membership in a Particular Social Group*

Neither the INA nor the Refugee Convention defines "membership in a particular social group." This note will consider three interpretations of this term developed the courts, the administrative bodies that adjudicate immigration claims, and the UNHCR. First, the Board of Immigration Appeals (BIA) announced a broad interpretation of this phrase in *In re Acosta*,¹⁰⁸ which many circuits have followed.¹⁰⁹ According to the BIA, to meet this element a refugee must demonstrate that the

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. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹¹⁰

This approach, in contrast with the following interpretation, focuses on internal characteristics and immutability as the basis for membership in a particular social group.

The Court of Appeals for the Second Circuit offered a more restrictive interpretation of "particular social group" in *Gomez v. INS*.¹¹¹ In *Gomez*, the petitioner sought asylum based on membership in a particular social group of women who had been raped and beaten by Salvadoran guerillas.¹¹² The court declined to accept that this constituted a particular social group within the meaning of the statute.¹¹³ It held that "the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."¹¹⁴ The court based its holding, in part, on the fact that to be a particular social group the members must be recognized as such by would-be persecutors.¹¹⁵ The court found that the petitioner's contention that she had been raped by the guerillas in the past did not show she was likely to be persecuted in the future and therefore could not support her claim for asylum.¹¹⁶ As the court itself notes in a later decision, this external approach

104. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

105. *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991).

106. *Id.*

107. *Id.*

108. *In re Acosta*, 19 I. & N. Dec. 211, 233 (1985).

109. See e.g., *Rojas-Contreras v. Attorney General of the U.S.*, 188 Fed. Appx. 121, 125 (3d Cir. 2006); *Perdomo v. Attorney General of the U.S.*, 131 Fed. App'x 394, 396 (3d Cir. 2005); *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993); *Mwembie v. Gonzales*, 443 F.3d 405, 414-15 (5th Cir. 2006); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Volaj v. Gonzales*, 158 Fed. App'x 683, 688 (6th Cir. 2005); *Ljuljdjurovic v. Gonzales*, 132 Fed. App'x 607, 611

(6th Cir. 2005); *Sepulveda v. Gonzales*, 464 F.3d 770, 771 (7th Cir. 2006); *Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005); *Thomas v. Gonzales*, 409 F.3d 1177, 1186 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Njenga v. Attorney General of the U.S.*, 216 Fed. App'x 963, 965 (11th Cir. 2007).

110. *In re Acosta*, 19 I. & N. Dec. at 233.

111. *Gomez*, 947 F.2d at 664.

112. *Id.* at 663.

113. *Id.* at 664.

114. *Id.*

115. *Id.*

116. *Id.* at 664.

has "been read as conflicting with *Matter of Acosta*."¹¹⁷

The UNHCR distills these two approaches in its Guidelines on International Protection ("Guidelines"), providing its own recommendation for interpreting "particular social group."¹¹⁸ Although these proposals are not binding in a court of law, the Supreme Court has referred to the UNHCR's guidelines when interpreting provisions in the Protocol Relating to the Status of Refugees.¹¹⁹ The Guidelines describe the "protected characteristics" or "immutability" approach, like in *In re Acosta*, as one that focuses on "whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it."¹²⁰ It describes the other approach, sometimes referred to as social perception, like in *Gomez*, as focusing on "whether or not a group shares a common characteristic that makes them a cognizable group or sets them apart from society at large."¹²¹ The UNHCR proposes an amalgamation of the social perception approach and the immutability approach, resulting in the following interpretation of particular social group:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹²²

B. *Gao v. Gonzales*

The Court of Appeals for the Second Circuit's holding in *Gao v. Gonzales*¹²³ provides some hope that women forced into marriage would have a claim for asylum, although that hope has been tempered by the Supreme Court's recent decision in *Keisler v. Gao*.¹²⁴ In *Gao*, the Immigration Judge denied the petitioner's claims for asylum, which the BIA summarily affirmed.¹²⁵ The Court of Appeals, reviewed *de novo* the Immigration Judge's decision,¹²⁶ holding that the petitioner had in fact established a well-founded fear of persecution on account of membership in a particular social group.¹²⁷ After the Court of Appeals vacated the BIA's decision,¹²⁸ the United States Supreme Court granted the Attorney General's petition for a writ of certiorari.¹²⁹

The facts giving rise to *Gao* are sad, but not atypical. Petitioner's parents entered an agreement with a man in which they offered their daughter, Gao, in marriage in exchange for payment.¹³⁰ Gao left home in order to avoid being forced into marriage.¹³¹ When Gao left, the man threatened Gao and her family, which eventually resulted in Gao's decision to flee to the United States.¹³² After entering the United States, Gao petitioned for asylum, and filed with her application a State Department Country Report on Human Rights Practices in China, describing, among other injustices against women, the practice of forced marriage in China.¹³³

One of the three issues in the case was whether petitioner fell within the protected ground of membership in a particular social group, in satisfaction of section 1101(a)(42).¹³⁴

117. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated*, *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.).

118. UNHCR, *Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 2-3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/publ/PUBL/3d58de2da.pdf> [hereinafter UNCHR, *Guidelines on International Protection*].

119. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979).").

120. UNHCR, *Guidelines on International Protection*, *supra* note 118, at 2-3.

121. *Id.* at 3.

122. *Id.*

123. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated*, *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.).

124. *Keisler v. Gao*, 128 S. Ct. 345, 345 (2007) (mem.).

125. *Gao*, 440 F.3d at 64.

126. *Id.* at 66.

127. *Id.* at 71.

128. *Id.* at 72.

129. *Keisler*, 128 S. Ct. at 345.

130. *Gao*, 440 F.3d at 64.

131. *Id.*

132. *Id.*

133. *Id.* at 65.

134. *Id.* at 66.

The Immigration Judge found that she did not.¹³⁵ Petitioner argued that the Immigration Judge erred in finding that she did not have a well-founded fear of forced marriage and that a forced marriage, even if it were to occur, would not constitute persecution within the meaning of 1101(a)(42), which sets forth the definition for refugees. The United States Court of Appeals for the Second Circuit found that petitioner did in fact belong to a particular social group, consistent with *In re Acosta*.¹³⁶ This group consists of "women who have been sold into marriage (whether or not that marriage has taken place) and who live in a part of China where forced marriages are considered valid and enforceable."¹³⁷ The Second Circuit further found that petitioner had established a well-founded fear of persecution on account of her membership in this group.¹³⁸ The court limited its holding to the facts of this case and refused to decide whether "young, unmarried women in rural China comprise a 'particular social group.'"¹³⁹

The Second Circuit additionally addressed two other issues in this opinion. First, the court questioned "whether the [Immigration Judge] had a substantial basis for finding insufficient evidence that the Chinese authorities would not protect Gao."¹⁴⁰ Secondly, the court asked "whether the [Immigration Judge] had a substantial basis for finding that Gao could safely relocate within China."¹⁴¹ The Second Circuit held that there was not a substantial basis to the Immigration Judge's finding of fact that the petitioner had not established sufficient evidence that the Chinese authorities would not protect her.¹⁴² In order to reach that conclusion, the Court considered the Country Report, the peti-

tioner's testimony, and the lack of evidence to the contrary.¹⁴³ The Second Circuit also rejected the Immigration Judge's finding that petitioner could have relocated within China.¹⁴⁴ The Court specifically considered the fact that before seeking asylum in the United States, Gao had tried unsuccessfully to escape the man she was supposed to marry by moving to another location in China.¹⁴⁵

In *Gao*, the Second Circuit had the opportunity to return to its holding in *Himanje v. Gonzales*. In *Himanje*, the petitioner claimed "that she belong[ed] to a specific group of woman from the Tonga tribe of Zambia who have been sold into marriage."¹⁴⁶ The Court, citing *Gao*, remanded the case to the BIA with instructions that it "consider whether petitioner is entitled to relief from removal based on her membership in a particular social group."¹⁴⁷ In another Second Circuit case, *Chen v. U.S. Department of Justice*, the Court remanded the case to the BIA to consider "whether, in light of *Hong Ying Gao*, Chen is a member of a particular social group and faces forced marriage on account of her membership in that group."¹⁴⁸

However, the Second Circuit's expansion of membership in a particular social group may have suffered a recent setback. Less than a year after the *Gao* holding, the Supreme Court granted certiorari, vacating and remanding the Second Circuit's decision.¹⁴⁹ The Supreme Court instructed the Second Circuit to consider the case in light of *Gonzales v. Thomas*.¹⁵⁰ As of the publication of this note, the case is on remand and the Court of Appeals has yet to issue a decision in light of *Thomas*.

135. *Id.* at 65 ("Specifically, the [Immigration Judge] found that Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply 'a dispute between two families.'").

136. *Id.* at 70. "Gao belongs to a particular social group that shares more than a common gender Clearly, these common characteristics satisfy the *Matter of Acosta* test." *Id.*

137. *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006), vacated, *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.).

138. *Id.* at 66. "An alien's fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).

139. *Gao*, 440 F.3d at 70 n.6.

140. *Id.* at 66.

141. *Id.*

142. *Id.* at 71 ("The [Immigration Judge] found that Gao had not met her burden of establishing that the Chinese government would not protect her. . . . We agree with Gao that this finding of fact was without substantial basis.").

143. *Id.*

144. *Id.*

145. *Gao*, 440 F.3d at 71.

146. *Himanje v. Gonzales*, 184 Fed. App'x 105, 107 (2d Cir. 2006).

147. *Id.* at 107-08.

148. See *Chen v. U.S. Dep't of Justice*, 175 Fed. App'x 492, 493 (2d Cir. 2006).

149. *Keisler v. Gao*, 128 S. Ct. 345, 345 (2007) (mem.).

150. *Id.* at 345.

C. *Gonzalez v. Thomas*

The Supreme Court decided *Thomas*¹⁵¹ a year prior to its decision in *Gao*.¹⁵² In *Thomas*, the Supreme Court held that "[t]he Ninth Circuit's failure to remand [to determine whether petitioners constitute members of a particular social group] is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal."¹⁵³ The respondents in *Thomas* were members of a family who had come to the United States seeking asylum from South Africa.¹⁵⁴ Their asylum applications indicated that they feared persecution in South Africa based on their political opinions and their membership in a particular group.¹⁵⁵ Respondents testified that their fear was based on the fact that they were white and that they were related to an alleged racist who treated black workers poorly.¹⁵⁶ Their claim was rejected by the Immigration Judge, and the BIA summarily affirmed.¹⁵⁷ The Immigration Judge and the BIA focused on whether or not the respondents could establish an asylum claim based on political view or race, but did not consider membership in a particular group as a basis for asylum.¹⁵⁸

On review, the Ninth Circuit held that the asylum applicants qualified as members of a particular social group of persons who were related to an alleged racist, and the *Thomas* family was threatened and attacked as a result of their membership in this particular social group.¹⁵⁹ The dissenting judges asserted that it was first up to the relevant administrative agency to consider whether the respondents were members of a particular social group before the federal courts could rule on this issue.¹⁶⁰

The Solicitor General petitioned for certiorari asking the Supreme Court to consider

"whether the Ninth Circuit 'erred in holding, in the first instance and without prior resolution of the questions by the relevant administrative agency, that members of a family can and do constitute a 'particular social group,' within the meaning of' the Act."¹⁶¹ The Supreme Court vacated and remanded the case after finding that the issue of whether the petitioners were members of this particular social group had not first been considered on the agency level and was therefore barred from consideration.¹⁶² Quoting from its decision in *SEC v. Chenery Corporation*, the Court stated that a "judicial judgment cannot be made to do service for an administrative judgment."¹⁶³ Thus, the final administrative decision in immigration law comes from the Immigration Judge, unless the matter is appealed to the Board of Immigration Appeals.¹⁶⁴

The *Thomas* decision, therefore, limits appellate courts from finding that an asylum claim rests on membership in a particular group if it has not first been considered at the agency level.¹⁶⁵ This does not prevent an agency from ruling that women forced into marriage in a country that condones it may rest an asylum claim on membership in this particular group. It signifies, however, that if the Immigration Judge and BIA have not considered it, it may not be introduced at any further point in the appeals process.

Thus, the Supreme Court's holding in *Thomas*, and its subsequent application to *Gao*, appears to be limited to the reversal of a procedural error made by the Second Circuit. The Court's decision to remand and vacate *Gao*, while technically erasing its precedential value, did not impugn the merits of the Second Circuit's analysis that *Gao* satisfied the "particular social group" and "well-founded fear" elements

151. *Gonzales v. Thomas*, 547 U.S. 183 (2006).

152. *Keisler*, 128 S. Ct. at 345.

153. *Thomas*, 547 U.S. at 185.

154. *Id.* at 184.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Gonzales v. Thomas*, 547 U.S. 183, 184-85 (2006) (quoting *Thomas v. Ashcroft*, 359 F.3d 1169, 1177 (2004)).

160. *Id.* at 185 ("The dissenting judges argued that the question 'whether the Thomases are a 'particular social group' should first be considered by the relevant administrative agency.'").

161. *Id.*

162. *Id.* at 186.

163. *Id.*

164. U.S. Dep't of Justice, U.S. Attorneys' Manual: EOIR Organization, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/doi00017.htm (last visited Apr. 5, 2008) ("U.S. Immigration Judges are responsible for conducting formal quasi-judicial proceedings, and act independently in their decision-making capacity; their decisions are administratively final, unless appealed or certified to the BIA.")

165. *Thomas*, 547 U.S. at 186. ("A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'").

of an asylum claim. Even though the Supreme Court remanded and vacated *Gao*, the Court has left open the possibility that the "Lost Girls" who were subjected to forced marriages could file for asylum in the United States on that basis. If, and until, the specific issue of basing an asylum claim on the fear of being subjected to a forced marriage reaches the United States Supreme Court, this avenue remains a viable option for the "Lost Girls" to adjust their status in the United States and relocate permanently.

III. ASYLUM CLAIM FOR GIRLS FROM KAKUMA WHO HAVE BEEN SOLD INTO MARRIAGE

This section of the note applies the reasoning in *Gao* to the girls in Kakuma Refugee Camp who were forced into marriage, and evaluates the likely success of a similar claim for asylum. The path to seek asylum is certainly not easy. Even if an applicant meets all of the requirements, it is within the Attorney General's discretion whether to grant the applicant's asylum claim.¹⁶⁶ Daunting practical concerns further limit the availability of this avenue of relief. As one scholar has noted

[i]f the Girls came to the United States, they would join the approximately 14,000 children already languishing in detention centers across the United States To the extent that they relied on gender-specific claims, such as the fear of forced marriage, the likelihood of success is an open question.¹⁶⁷

Forced marriage is still an open question as to whether it is a gender-specific claim.¹⁶⁸ The

recent holding in *Gao*, however, indicates a willingness of some courts to consider it a basis on which to rest a claim for asylum. This approach requires a claim of membership in a particular social group similar to that of the petitioner in *Gao*: women at Kakuma Refugee Camp who have been sold into marriage in a country in which forced marriage is considered valid and enforceable. The claim would further require a showing of both an objective and a subjective fear of persecution.¹⁶⁹ In addition, the "Lost Girls" would need to establish that relocation within the country was not possible¹⁷⁰ and that their home government would not protect them from the persecution.¹⁷¹

A. Well-Founded Fear Based on a Particular Social Group

This section of the note compares the situation of the Lost Girls to the findings of the court in *Gao* to consider whether they may be able to establish objective and subjective fear, as well as membership in a particular social group.

1. Establishing an Objective Basis for Fear

The "Lost Girls" could probably meet their burden of establishing an objective basis for their fear of persecution, even though the Country Report for Sudan's grim picture of women's rights does not mention forced marriage.¹⁷² The Country Report for Kenya, however, provides the relevant background information for the exact refugee population in question here.¹⁷³ It states, in part, "[s]ecurity problems in refugee camps also resulted from . . . forced marriages particularly of young Sudanese girls."¹⁷⁴ The report mentions that

166. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) ("It is important to note that the Attorney General is *not* required to grant asylum to everyone who meets the definition of refugee.").

167. Stark, *supra* note 53, at 277, 284-85 (discussing the difficulties the girls of Kakuma would face in seeking asylum).

168. Goeller, *supra* note 20, at 174 ("This was the first court of appeals to assess whether forced marriage could be cited as a basis for asylum.").

169. *Cardoza-Fonseca*, 480 U.S. at 430, 440 (discussing the requirement for subjective fear and the proper interpretation of the objective standard). "[A] moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in

persecution, but it is enough that persecution is a reasonable possibility.'" *Id.* (quoting *INS v. Stevic*, 476 U.S. 407, 424-25 (1984)).

170. 8 C.F.R. § 208.13(b)(1)(i)(B) (2007).

171. *Id.* § 208.13(b)(1).

172. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SUDAN, *supra* note 80.

173. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: KENYA (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78740.htm> [hereinafter U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: KENYA] (specifically addressing security at Kakuma Camp and the forced marriage of young Sudanese girls).

174. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: KENYA, *supra* note 173.

forced marriages are also common beyond the borders of the refugee camps and throughout Kenya.¹⁷⁵ In addition to this report, the "Lost Girls" could use other sources to bolster their argument for asylum regarding their objective fear of persecution. A report from the Refugee Women's Resource Project, for example, notes, "Kenya's domestic law does not protect Kenyan girls from forced marriages, nor does it forbid marriage of a minor if 'permission' from the parents is provided."¹⁷⁶ Therefore, the "Lost Girls" objective basis for their fear of persecution is analogous to that of the petitioner in *Gao*.

2. Establishing a Subjective Basis for Fear

Simply establishing that forced marriage is a problem in the refugee camp does not suffice to form a well-founded fear of persecution. The "Lost Girls" would also have the burden of establishing that they had a subjective basis for their fear.¹⁷⁷ The Court in *Gao* highlighted this requirement by limiting a particular social group to women who had actually been sold into marriage, whether or not the marriage had taken place.¹⁷⁸ "We do not reach here, for example, whether young, unmarried women in rural China comprise a 'particular social group' under asylum law such that, if they have a well-founded fear of being forced into marriage, they are eligible for asylum."¹⁷⁹ Therefore, the "Lost Girls" would need to establish that they had been sold into marriage as a threshold requirement for a subjective fear.

The holding in *Gao* also indicates that the "Lost Girls" would need to show additional factors to establish a subjective fear.¹⁸⁰ Being sold into marriage would not suffice for an asylum claim, for example, if the girl ceased to object to the forced marriage.¹⁸¹ The "Lost Girls" would be required to show they had reason to fear

persecution on account of their status in this particular social group.¹⁸² This might include threats to them and/or to their families. Credible testimony that a "Lost Girl" tried to escape a forced marriage might raise an inference that she had a subjective fear. The Second Circuit relied on the following facts to find that *Gao* had established a credible subjective fear: petitioner's groom threatened her physically and verbally;¹⁸³ when he failed to locate her after she fled the area, he vandalized her parents' home;¹⁸⁴ he eventually found the petitioner, which forced her to flee to the United States.¹⁸⁵ It is unclear from the holding whether the Second Circuit considered these facts to have set a minimum standard for establishing a subjective fear or if a lesser showing could be sufficient.

3. Establishing Membership in a Particular Social Group

The "Lost Girls" would next need to establish the existence of a particular social group of women who have been sold into marriage, their membership within that group, and either their persecution on account of their membership or "a well-founded fear of persecution based on [their] membership" in that group. This subsection will analyze whether some "Lost Girls" might be able to meet these requirements for an asylum claim under the approaches of both the *Acosta* and the *Gomez* courts.

The analysis in *Acosta* focuses on an immutable characteristic of the particular social group, specifying that "it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."¹⁸⁶ Sex may serve as an immutable characteristic within the meaning of *Acosta*, but it will only act as a basis for asylum if a woman's fear of persecution is well-founded and is on ac-

175. *Id.*

176. ASYLUM AID, REFUGEE WOMEN'S RES. PROJECT, 'NO UPRIGHT WORDS'-THE HUMAN RIGHTS OF WOMEN IN KENYA 19 (2001), available at http://www.asylumaid.org.uk/data/files/publications/44/No_Upright_Words.pdf.

177. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987) ("[T]he reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien").

178. *Gao*, 440 F.3d at 70.

179. *Id.* at 70 n.6.

180. *Id.* at 70.

181. *Id.*

182. Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(a)(42) (2000) (requiring that for an individual to fall within the definition of refugee, and therefore be eligible for asylum pursuant to Section 208 of the INA, an applicant must show "persecution or a well-founded fear of persecution on account of [one of five enumerated grounds]").

183. *Gao*, 440 F.3d at 64.

184. *Id.*

185. *Id.*

186. *In re Acosta*, 19 I. & N. Dec. 211, 233 (1985).

count of her sex.¹⁸⁷ In the case of the "Lost Girls," sex is only half of the description for the particular social group. The "Lost Girls" would not be claiming they feared persecution not only because they were female, but because they were females who had been sold into marriages they opposed. Under the *Acosta* analysis, the "Lost Girls" would have a basis for an asylum claim similar to that of the petitioner in *Gao*, and they might, therefore, be able to establish membership in this particular group.

However, the "Lost Girls" would not be able to establish a similar claim under the analysis used in *Gomez*. The *Gomez* approach focused on external indications that a person was a member of a particular social group.¹⁸⁸ Just as the petitioner in *Gomez* gave no outward indication that she had been raped by guerillas,¹⁸⁹ an outsider would not be aware that the "Lost Girls" had been forced into marriage. That holding also rested on the fact that "there is no indication that Gomez will be singled out for further brutalization on [the basis of her past victimization]."¹⁹⁰ Hence, under the evidentiary *Gomez* standard, the "Lost Girls" would not be able to establish membership in a particular social group.

B. Lack of Protection from Authorities

The petitioner in *Gao* corroborated her testimony regarding the practice of forced marriage in rural China with the United States Department of State's Country Report on Human Rights Practices for China.¹⁹¹ The Second Circuit considered the information the report pro-

vided when determining that petitioner's claim; they found that her belief that she could not seek the authorities' protection was not speculative.¹⁹²

If an Immigration Judge were to find that the "Lost Girls" could seek protection from persecution from their government, the petitions would necessarily be denied. The INA specifies that in order to gain asylum, a refugee must be "unable or unwilling to avail himself or herself of the protection of, that country."¹⁹³ In this case, the "Lost Girls" could not seek protection from the government of their country of origin; attacks by the Sudanese government had driven them out of their country in the first place. Additionally, the "Lost Girls" would not receive protection from the Kenyan government regarding forced marriage. As noted above, the Country Report on Human Rights in Kenya indicates that forced marriage is a problem not only in the refugee camps but elsewhere in Kenya as well.¹⁹⁴ The "Lost Girls" therefore would probably be able to establish that they could not seek protection, thereby bolstering their claims for asylum.

C. Possibility of Relocation

In addition, the "Lost Girls" would need to address the issue of whether they could have relocated before seeking asylum.¹⁹⁵ The ongoing strife in Sudan makes voluntary repatriation to Sudan an impracticable option. That leaves the question of whether relocation in Kenya was a possibility. The petitioner in *Gao* left no room for the Court to wonder; she had tried to

187. *Id.* at 233, 235 ("The shared characteristic might be an innate one such as sex This construction is consistent with the other grounds of persecution enumerated in the Act such as 'race,' 'religion,' 'nationality,' and 'membership in a particular social group,' each of which specifies a characteristic an individual possesses that causes him to be subject to persecution.").

188. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete.").

189. *Id.* ("As the BIA noted, Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics—other than gender and youth—such that would-be persecutors could identify them as members of the purported group.").

190. *Id.*

191. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN

RIGHTS PRACTICES: CHINA (2002), <http://www.state.gov/gdrl/rls/hrrpt/2001/eap/8289.htm> (last visited Apr. 8, 2008).

192. *Gao v. Gonzales*, 440 F.3d 62, 71 (2d Cir. 2006), *vacated*, *Keisler v. Gao*, 128 S. Ct. 345 (2007) (mem.) ("Given this evidence, together with the testimony that Zhi threatened to have his uncle, a powerful government official, arrest Gao and with the lack of any evidence that the local officials in Gao's village would protect her, Gao's contention was not the least bit speculative.").

193. Immigration and Nationality Act of 1952 § 101, 8 U.S.C. § 1101(a)(27)(M)(42) (2000).

194. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: KENYA, *supra* note 173.

195. *Gao*, 440 F.3d at 71 ("We remind the BIA that to deny a claim based on the availability of internal refuge, the BIA must find not only that Gao could avoid persecution by relocating, but *also* that 'under all circumstances it would be reasonable to expect the applicant to do so . . .'").

relocate elsewhere but her persecutor followed her.¹⁹⁶ Without trying to leave the refugee camp, the "Lost Girls" would face a more difficult challenge in establishing that relocation was impossible. The "Lost Girls" might, however, be able to argue that local integration beyond the borders of the refugee camps was not an option for two reasons: 1) the standing of living in the areas surrounding the refugee camps was equal to or worse than that within the camps; and 2) the Kenyan government resisted the idea of the refugees integrating.¹⁹⁷

IV. RECOMMENDATIONS

The girls at Kakuma Refugee Camp slipped through the cracks of the U.S. State Department's relocation program. However, some might be able to seek asylum in the United States successfully. That would first, and perhaps unrealistically, require that the girls travel to the United States in order to initiate asylum proceedings. Thus, it is unlikely that they would be able to seek recourse in significant numbers, if at all. Accordingly, measures should be taken to amend refugee admissions policies in order to prevent future failures for refugee populations.

Sudan currently has six million people who have been displaced from their homes.¹⁹⁸ "[I]n the coming 2-3 years, a multi-year resettlement programme is envisaged as a strategic complementary solution for a larger group (20,000 persons) of refugees from the eastern camps, particularly those whose prospects for local integration are limited and voluntary repatria-

tion is not an option."¹⁹⁹ The current crisis in Darfur, and the gender-related persecution facing girls there,²⁰⁰ highlights the importance of taking measures now to ensure that the girls will not slip through the cracks again, as they did during the "Lost Boys" program.²⁰¹

In addition to the difficulties in administering a resettlement program effectively, there remains the threshold question of whether relocation is desirable. Refugee agencies face a zero-sum game in which money spent to relocate one refugee comes at the expense of those who remain behind.²⁰² Whether or not more girls should be relocated is well beyond the scope of this paper. Instead, the focus here is merely on the idea that gender should not effectively dictate who will and who will not receive the benefits of relocation.

By changing the definition of the children targeted for help, refugee agencies might be able to extend protection to some who have previously been ignored. An "unaccompanied" child has been separated "from both parents and is not being cared for by an adult who by law or custom has responsibility to do so."²⁰³ A "separated child," on the other hand, has lost both parents but is theoretically being cared for by another adult.²⁰⁴ By limiting the program in Kakuma to unaccompanied children,²⁰⁵ the UNHCR and the Department of State overlooked many children who disappeared into foster families. The UNHCR has acknowledged that separated children are often not in a better situation than those who are unaccompa-

196. *Id.* ("Gao testified that, six months before she fled China, she attempted to escape Zhi by moving an hour away. She further testified that Zhi continued to harass her family, vandalized their home, and even followed her when she returned home to visit and thereby succeeded in figuring out that she had moved to Mawei.").

197. Jeff Crisp, *supra* note 24, at 63, 68.

198. United Nations Development Programme, Strengthening Human Security for Vulnerable Groups in Khartoum IDP Camps and Squatter Areas, <http://www.sd.undp.org/projects/dg5.htm> (last visited Apr. 26, 2008).

199. UNHCR, *Country Operations Plan Sudan* 8 (Sep. 1, 2006) <http://www.unhcr.org/home/RSDCOI/4524fcb82.pdf>.

200. See generally SARAH MARTIN, REFUGEES INT'L, ENDING SEXUAL VIOLENCE IN DARFUR: AN ADVOCACY AGENDA (2007), available at http://www.refugeesinternational.org/files/10331_file_Darfur_Agenda.pdf (describing the nature and extent that sexual violence in the conflict in Sudan and its local and international impact).

201. This paper is not arguing that relocation is the best solution for the Sudanese. Professor Martin highlights the inherent difficulty in formulating refugee policy. MARTIN, *supra* note 5, at 35. "In fact, refugee migrations and refugee resettlement represent highly complex phenomena. Refugee admissions cannot be based solely on any single-factored analysis. Instead, resettlement decisions must take careful account of the inherent dynamics of refugee situations, which vary greatly from place to place." *Id.* at 2.

202. *Id.* at 10-11.

203. UNHCR, GUIDELINES ON DEALING WITH UNACCOMPANIED CHILDREN, *supra* note 71, at 5.

204. UNHCR, Population Data Unit/PGDS Div. of Operational Support, TRENDS IN UNACCOMPANIED AND SEPARATED CHILDREN SEEKING ASYLUM IN INDUSTRIALIZED COUNTRIES, 2001-2003, at 2 (2004), available at <http://www.unhcr.org/statistics/STATISTICS/40f646444.pdf>.

205. Sudan's "Lost Boys' Head for US, *supra* note 70.

nied.²⁰⁶ According to cultural tradition, many of the girls at Kakuma Refugee Camp were adopted into foster families, thereby fulfilling the status of "separated," but not "unaccompanied."²⁰⁷ By opening benefit programs to separated children, instead of focusing on those who are unaccompanied, refugee agencies can reach more children who are facing difficult circumstances such as the Sudanese girls at Kakuma.

Many organizations extending relief to Sudanese refugees recommend focusing attention on the acute vulnerability of women and children refugees.²⁰⁸ Refugee workers and their resources are limited, but more energy should be spent on identifying the members of the refugee populations who are especially defenseless. Groups in the most need might be inured to their problems and not seek help. Efforts should be made to acculturate the refugee workers so that they are able to understand the cultural factors informing life in the refugee camps and better assist the population.

V. CONCLUSION

U.S. refugee policy and the manner in which it was implemented contributed to the under-representation of girls in the Lost Boys program. Some girls who were overlooked might be able to establish an asylum claim. The situation of the "Lost Girls" of Kakuma Refu-

gee Camp is similar in several ways to that of the petitioner in *Gao*. As such, they should be able to establish an objective fear of persecution, membership in a particular social group, and lack of government protection. The "Lost Girls" will face additional challenges in meeting the burden for establishing a subjective fear, as *Gao* established a high, but not insurmountable, bar. In light of *Gonzales v. Thomas*, the issue of whether the "Lost Girls" were members of a particular social group would need to be addressed at the agency level. If the "Lost Girls" were to seek asylum before an Immigration Judge that applied the same reasoning as the *Gao* court, assuming that they were able to establish the subjective requirements credibly, they might succeed on their claims.

The many hurdles inherent in the asylum process and the question of whether courts would follow *Gao* make this inquiry more hypothetical than realistic. Although the practical application of this sort of claim might be limited, its tenets could be used to support the notion of gender-based persecution as a basis for an asylum claim. Instead of trying to right a wrong after it has happened, the focus should be on changing the implementation of refugee admissions policy prospectively to avoid a similar inequality in relocation programs in the future.

206. See UNHCR, GUIDELINES ON DEALING WITH UNACCOMPANIED CHILDREN, *supra* note 71, at 2.

207. Matheson, *supra* note 16 ("Refugee workers from international agencies assumed that the girls were safe, because they were being sheltered by their own people . . . Most no longer meet the strict resettlement criteria demanded by host countries, for single, unaccompanied minors.").

208. E.g., AMNESTY INT'L, *supra* note 87, at 22 (urging the UNHCR to "[e]nsure that these staff members have gender expertise and are tasked to pay particular attention to the specific protection needs of vulnerable groups, especially women and children.").