

8. Persecution, politics and protection in the United States: finding refuge from organised crime in the Americas

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Maria reached the United States border with her daughter in March 2014. Her husband and son had already fled Michoacán, Mexico and had received asylum protection in the US. When Maria told a border guard she had fled her home because her brother had been killed by a cartel and her family continued to be threatened by them, she was detained for two months. Ultimately, she and her daughter were deported after an immigration judge found her experience not credible. I met Maria in Tijuana, at the border between the US and Mexico in June 2014. She could not return to Michoacán safely and she could not join her family in the US, so she was living in a women's shelter and didn't know what would happen next.¹ Her story is not an anomaly, and her experience of violence, displacement and an inability to secure protection are mirrored in the stories of tens of thousands of other Mexicans and Central Americans seeking refuge from violence meted out by organised criminal groups.

More than 60,000 unaccompanied children arrived at the US border in 2014, double the number of arrivals in 2013.² Although numbers were down as 2015 unfolded, 18,000 unaccompanied children had already arrived at the US border at the time of writing (mid 2015).³ The previous year had been the first in which Mexican children had not constituted the majority of arrivals, but because they are summarily turned around at the border, little has ever been known about their decision to undertake the journey alone, or the circumstances under which they travel.⁴ Children from Guatemala,

1 S. Reynolds, 'Mexico's hidden victims', *Refugees International*, 2 July 2014 [hereinafter Reynolds, 'Mexico'].

2 US Customs and Border Patrol, *Southwest Border Unaccompanied Alien Children* (2015), www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children (accessed 15 March 2016).

3 Ibid.

4 United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean (UNHCR), 'Children on the run: unaccompanied children leaving Central America and Mexico and the need for international protection', 14 March 2014, p. 5. See

El Salvador and Honduras (hereinafter ‘the Northern Triangle’) are detained upon arrival, as required by US law, so the office of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) have been able to interview many young people and publish analyses of the underlying circumstances that pushed them along this route.⁵

As well as children, increasing numbers of adults from Mexico and the Northern Triangle are filing for protection in the US.⁶ For example, Mexican asylum requests before the immigration courts almost quadrupled between 2009 and 2013, and Salvadoran applications doubled.⁷ At the same time, citizens of the Northern Triangle countries are filing asylum applications in Mexico, Panama, Nicaragua, Costa Rica and Belize. These latter countries have documented a 435 per cent increase in the number of asylum applications.⁸

Much of the flight taking place is in direct response to the absence of security in Mexico and the Northern Triangle, where murder, forced recruitment, kidnapping, extortion and other forms of violence by organised crime, gangs and other armed actors occur with almost complete impunity.⁹ And yet, applications for protection are being routinely denied by asylum officers, the Executive Office for Immigration Review, and the federal Circuit Courts across the United States. The US is by far the greatest recipient of asylum-seekers from the Northern Triangle and for this reason how the US adjudicates asylum cases from the Northern Triangle takes on great importance. The next section reviews US asylum law and the treatment of gang-based persecution claims in the courts.

International protection, non-State actors and new forms of displacement

Of course the violence and persecution that many experience in Mexico and Central America was not foreseen when the 1951 Convention relating to the

also UNHCR, ‘Arrancados de Raiz’, Aug. 2014; N. Pizzey, J. Frederick and Washington Office on Latin America (WOLA), ‘Forgotten on “La Frontera”’: Mexican children fleeing violence are rarely heard’, 22 Jan. 2015.

5 Ibid. See also E. Kennedy, ‘No childhood here: why Central American children are fleeing their homes’, *Immigration Policy Center: American Immigration Council*, 1 July 2014.

6 ‘US Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis and Technology, *Immigration Courts: Asylum Statistics, FY 2009–2013*’, April 2014.

7 Ibid.

8 UNHCR, ‘Children on the run’, p. 15.

9 S. Reynolds, ‘“It’s a suicide act to leave or stay”: internal displacement in El Salvador’, *Refugees International*, 29 July 2015 [hereinafter Reynolds, ‘El Salvador’]. See also D.J. Cantor, ‘The new wave: forced displacement caused by organised crime in Central America and Mexico’, *Refugee Survey Quarterly*, 33 (2014), 34–68 [hereinafter Cantor, ‘New wave’].

Status of Refugees (Refugee Convention) was developed. This creates challenges to pursuing protection through the Convention's framework, but it should not lead to the easy inference that the Refugee Convention and US asylum law do not apply. In fact, over the last 60 years the international community's understanding of almost every element of the Convention's framework has evolved, with individuals, nations, advocates and academics having identified preexisting and emerging persecution patterns, either overlooked originally or having emerged since.¹⁰

At the time of its creation the Refugee Convention reflected the experience of those who had recently survived genocide and other mass atrocities and crimes against humanity. Although it is an enlightened document, its limitations are perhaps most readily revealed by the fact that the rape of women was not originally considered to be an individual experience of persecution, but was instead viewed as a crime against 'honour', or a proxy crime against the men of a family or community.¹¹ It wasn't until 1993 that the international community formally acknowledged rape as a crime against humanity,¹² and it wasn't until 1995 that US asylum law explicitly recognised rape as an act of persecution by issuing 'Gender Guidelines'.¹³

To some, a request for protection based on persecution by organised criminal groups or other armed actors may seem far-fetched, and this assumption is certainly reflected in much of the case law. But in reality, a lot of the violence perpetrated against individuals and families in Mexico and the Northern Triangle is organised, purposeful and motivated by their particular characteristics.¹⁴ For example, in July 2015, the 18th Street gang in El Salvador ordered all bus drivers to go on strike or risk being killed. This action was taken to exert pressure on the El Salvador government to negotiate with the gang. Five bus drivers who ignored the ultimatum were killed on the first day of the forced strike, and two weeks into it, nine drivers had been killed. Although a non-State actor, the 18th Street gang (Barrio-18) had targeted for persecution a distinct group of workers and the government could not protect these people from being victimised, although it did try.¹⁵ The decision to resist their

10 W.T. Worster, 'The evolving definition of the refugee in contemporary international law', *Berkeley Journal of International Law*, 30 (2012), 94–160.

11 S. Reynolds, 'Deterring and preventing rape and sexual slavery during periods of armed conflict', *Journal of Law and Inequality*, 16 (1998), 601–5.

12 Ibid.

13 P. Coven, 'Considerations for asylum officers adjudicating asylum claims from women', United States Bureau of Citizenship and Immigration Services, 26 May 1995, p. 9.

14 See, e.g., Reynolds, 'Mexico'; Reynolds, 'El Salvador'; Cantor, 'New wave'; N. Rodríguez Serna, 'Fleeing cartels and maras: international protection considerations and profiles from the Northern Triangle', *International Journal of Refugee Law* (forthcoming 2016).

15 E. Izadi, 'Driving a bus is a "death sentence" in El Salvador's capital city', *Washington Post*, 31 July 2015.

demands should be properly viewed as a political opinion, and this population of drivers would also be a distinct social group within society. Adjudicators must look beyond the surface, fairly apply the elements of refugee law, and extend protection to those individuals who demonstrate a well-founded fear of persecution on account of a protected ground.¹⁶

Emergence of ‘gang-based’ persecution claims in the United States

In the US, practitioners, advocates and the Executive Office for Immigration Review (which houses the immigration courts and the Board of Immigration Appeals (BIA) refer to asylum claims based upon a fear of persecution by organised criminal groups and gangs as ‘gang-based asylum’ claims. This chapter will therefore adopt the term ‘gang-based asylum’ as a shorthand reference. Its usage, however, should not be construed as meaning that various groups act in similar ways, target the same types of individuals, or are motivated by the same set of considerations.

Indeed, individuals in Mexico, the Northern Triangle and other parts of the world may be targeted by transnational or national criminal organisations, state or locally-based gang operations, or a combination of them. This could be because of their age, gender or social status; actual or perceived access to wealth; or opposition to gangs in their communities or states for political or religious reasons. Or they could be targeted due to a combination of these factors or for an entirely different set of reasons. It is this dynamism that requires an individual analysis of each gang-based persecution case brought before an administrative body.¹⁷

Framework for US protection claims

The heart of US asylum law is the protection of refugees fleeing persecution. To be fairly administered, it is recognised that access to both administrative and independent judicial review is critical as ‘administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and

16 Indeed, in 1991, a class action lawsuit representing over 500,000 asylum-seekers from Guatemala and El Salvador was successfully brought against the Department of Justice. The case asserted that US asylum adjudication processes were biased against their claims and favoured decisions based on foreign policy and border security, which undermined the standards of the US Refugee Act of 1980. A ‘protected ground’ refers to the five grounds recognised in the Refugee Convention as a basis for protection via refugee status, i.e. race, religion, nationality, membership of a particular social group or political opinion.

17 Although the vast majority of gang-based asylum claims in the US arise out of Mexico and the Northern Triangle, they are not the only locations. For example, applications from Jamaica, Albania and the Russian Federation have also been made. Indeed, the author once successfully represented an Italian man who had fled mob persecution in Italy.

death.¹⁸ Administrative review occurs through the immigration courts and the BIA. Judicial review occurs through the 13 Federal Circuit Courts, also referred to as the Federal Courts of Appeal. The Circuit Courts will defer to the BIA's interpretations of statutory law unless they find them unreasonable, and a Circuit Court may put forth a new legal standard, but it will only apply to the circuit in the court's catchment area.

Making an application for asylum protection

An applicant may apply for asylum if he or she is 'physically present in the United States' or at the border. A person who is in the US, whether with or without permission, may apply 'affirmatively' for protection and will not necessarily be detained pending the adjudication of their claim. A person who requests protection at a port of entry, or who is apprehended inside the US and placed in removal proceedings is subject to detention, and may remain there pending defensive asylum proceedings unless an immigration judge issues a bond that the person can afford.¹⁹

Pursuant to US law, the Attorney General may grant asylum to any applicant who qualifies as a refugee. The Immigration and Nationality Act (INA) defines a refugee as:

any person who is outside any country of such person's nationality or, in the case of a person having no 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.²⁰

In enacting the Refugee Act of 1980, one of Congress's 'primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.'²¹ When interpreting the definition of refugee, the courts are supposed to be 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*.²²

18 *Rodriguez-Roman v. INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J. concurring).

19 J.A. Cabot, 'Problems faced by Mexican asylum seekers in the United States', *Journal on Migration and Human Security*, 2 (2014), 363–4.

20 *INS v. Cardoza-Fonseca*, 480 US 421, 428 (1987) (quoting 8 USC. § 1101(a)(42)(A)); see also: 8 C.F.R. § 1208.13.

21 *Cardoza-Fonseca*, 480 US pp. 436–7.

22 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees*, 1992; see also: *INS v. Aguirre-Aguirre*, 526 US 415, 427 (1999) (recognising the UNHCR Handbook as 'a useful interpretative aid' that is 'not binding on the Attorney General, the BIA, or United States courts'); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) ('We view the

Given the legal and geographical discrepancies in asylum adjudication among the BIA and Circuit Courts, the likelihood of achieving protection is necessarily related to the place where a person applies. The location of application, however, is not necessarily a decision made by the applicant. The vast majority of asylum-seekers in the US are detained at some point during their application process,²³ and where they file for asylum is likely determined by the state in which they are detained. This is a decision made by the immigration enforcement officer at the time of apprehension, and it is based primarily on the availability of bed space on any given day. The Fifth and Ninth Circuits sit alongside the border and include California, Arizona and Texas.²⁴ The vast majority of immigrant apprehensions occur in these states, and they host the majority of detention spaces. They are also places in which the two Circuit Courts have taken entirely different approaches to gang-based persecution claims.

Persecution

The term ‘persecution’ is not defined by the Immigration and Nationality Act, but ‘case law characterizes persecution as an extreme concept, marked by the infliction of suffering or harm ... in a way regarded as offensive.’²⁵ United States courts have found that physical violence, serious threats of violence and the cumulative effects of harm can all rise to the level of persecution, pursuant to an individual analysis.²⁶ Furthermore, past decisions have confirmed that ‘age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether [he

UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law.’ (internal quotation marks and citation omitted)).

- 23 ‘Detention of asylum seekers: seeking protection, finding prison’, *Human Rights First* (April 2009), pp. 1–3.
- 24 New Mexico, also a border state, is inside the 10th Circuit, but due to its harsh environment, neither receives as many refugees and migrants, nor hosts as many detention beds.
- 25 *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotation marks omitted). See also *Matter of Laipenieks*, 18 I & N Dec. 433 (BIA 1983).
- 26 *Canales-Vargas v. Gonzales*, 441 F.3d 739, 745 (9th Cir. 2006) (Peruvian national who received anonymous death threats 15 years ago demonstrated an at least one-in-ten chance of future persecution sufficient to establish a well-founded fear); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160-61 (9th Cir. 2002) (Guatemalan who faced multiple death threats at home and business, ‘closely confronted’ and actively chased); *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1295-96 (9th Cir. 1997) (suggesting that threats to life and business based on opposition to Shining Path constituted past persecution), as amended by 133 F.3d 726 (9th Cir. 1998); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (Nicaraguan threatened with death by Sandinistas, house marked, ration card appropriated, and family harassed).

or] she holds a well-founded fear of future persecution,²⁷ an important point given the number of young people, and particularly unaccompanied children, applying for asylum from Mexico and the Northern Triangle.

Substantial economic deprivation that constitutes a threat to life or freedom can rise to the level of persecution – the absolute inability to support one’s family is not required.²⁸ Extortion is practised on tens of thousands, if not more, individuals and families in Mexico and El Salvador, and as long as they pay up, they often suffer no further harm. But for those families who resist extortion, or cannot pay the required amount, the likelihood of persecution increases dramatically. I met many families in Mexico and El Salvador who could not afford to continue paying the amount requested by a cartel or gang. In a very short time these families received direct death threats, and some were murdered or badly beaten before fleeing their homes.

Based on my own experience representing individuals and families fleeing gang-based persecution, as well as a review of the case law over the last eight years, applicants who have suffered multiple beatings themselves, or are the siblings, parents or children of individuals murdered or kidnapped by organised crime or other armed actors will usually have met the criteria for being considered to have suffered persecution, as long as they are deemed credible.²⁹ However, cases in which an individual or family have fled direct threats and/or suffered extortion, but have not yet suffered physical harm, are not as likely to be able to establish a well-founded fear of persecution.³⁰ This conclusion should be

- 27 *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (internal quotation marks and citation omitted). ‘[A] child’s reaction to injuries to his family is different from an adult’s. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting.’ (Joining the Second, Sixth, and Seventh Circuits in affirming legal rule that injuries to a family must be considered in an asylum case where events that form the basis of the past persecution claim were perceived when petitioner was a child). See also *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1312-15 (9th Cir. 2012) (recognising that even an infant can be the victim of persecution even if he or she does not currently recall the events).
- 28 *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence and discrimination made it virtually impossible for Israeli Arab to earn a living). *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (threats by Sandinistas, violence against family, and seizure of family land, ration card, and ability to buy business inventory); *Desir v. Ilchert*, 840 F.2d 723, 727-29 (9th Cir. 1988) (considering impact of extortion by government security forces on Haitian fisherman’s ability to earn livelihood); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (seizure of land and livelihood could contribute to a finding of persecution).
- 29 US asylum law directs that a person who has suffered past persecution at the hands of a particular actor benefits from the presumption of a well-founded fear of persecution. See 8 C.F.R. §208.13(b)(1). If the past persecution suffered is severe enough, a person may be permitted ‘humanitarian’ asylum even if a well-founded fear of persecution may not exist. 8 C.F.R. §208.13(b)(1)(iii)(A)-(B).
- 30 *Martinez-Beltrand v. Attorney General*, 536 F. App’x 243, 245 (3rd Cir. 2013) (upholding a denial of asylum because of the ‘harassment’ suffered, through multiple encounters with a

strongly challenged. The receipt of direct death threats by cartels and gangs are not received as warnings. They are the predecessors to violence if an individual or family does not abide by the conditions placed on them by a gang or cartel. Death threats cause immediate and long-lasting trauma because they result in murders and further disrupt and displace families.

Source of persecution

While persecution by the State is commonly the basis upon which a person's fear originates in asylum claims, this is often not the case for gang-based asylum claims, but should it be the case that a non-State actor is the perpetrator the claim should not be undermined by this. In 2005, the then Attorney General John Ashcroft issued a decision stating, 'It is well established that non-governmental actors, such as terrorists, insurgents, guerrilla organizations, or other militant opposition groups, can be guilty of "persecution"'.³¹

While in cases of non-State persecution, the court should 'consider whether an applicant reported the incidents to police', affirmative State action is not necessary to establish a well-founded fear of persecution if the government is unable or unwilling to control the agents of persecution.³² This is a particularly important consideration in cases arising out of Mexico and the Northern Triangle. The infiltration of local and national police and military units is extensive and widely known in all of these countries, and I have documented many cases in which victims of violence were further persecuted because they reported their experience to the police or military.³³ In Mexico, collusion between cartels and police was exposed internationally in 2014, when the police caused 43 students to disappear, who were then murdered by a gang on the order of a local mayor in Guerrero state.³⁴

Alongside the corruption of many government actors at all levels, the level of impunity is exceptionally high in Mexico and the Northern Triangle – over 90 per cent in each country – and should also support a decision to forego reporting persecution to a local or national government before flight. 'A government's inability or unwillingness to control violence by private

gang at her family's business, requests for money and that she join their gang did not rise to the level of persecution). See also *Li v. Attorney General*, 400 F.3d 157, 164 (3rd Cir. 2005) ('Unfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution.').

31 *Matter of A-H-*, 23 I. & N. Dec. 774, 783-784 (AG 2005).

32 *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004); see also *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (failure to report non-governmental persecution due to belief that police would do nothing did not establish that the government was unwilling or unable to control agent of persecution).

33 See Reynolds, 'Mexico' and 'El Salvador'.

34 R.C. Archibold, 'Mexico officially declares missing students dead', *New York Times*, 27 Jan. 2015.

parties can be established in other ways – for example, by demonstrating that a country’s laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection.³⁵ The fact that economic capacity may account for the State’s inability to stop the persecution is not relevant.³⁶

These directives are clear and so the presence of a non-State actor may not be the primary stumbling block in many cases, and yet there are multiple examples of courts denying asylum claims because the persecution suffered is construed as generalised violence, rather than targeted persecution, something that the government cannot be reasonably expected to overcome completely.³⁷

Within Latin America, forced displacement by non-State actors was recognised as such a serious concern to the region that the 1984 Cartagena Declaration was adopted. This agreement defined ‘refugee’ as more inclusively acknowledging people whose freedom and security had been threatened by internal conflict, generalised violence and mass violations of human rights resulting in public order being disturbed.³⁸ Last December, the Cartagena Declaration was revisited at a meeting of regional governments in Brazil. It recognised flight caused by violence imposed by organised criminal groups as being within the refugee framework, and neighbouring states had an obligation to extend protection to those in need of it.³⁹

Nexus: ‘On account of’

For asylum applications filed on or after 11 May 11 2005, the REAL ID Act of 2005 created a new nexus standard, requiring that an applicant establish that ‘race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.’⁴⁰ The persecutor’s motivation may be established by direct or circumstantial evidence:

[A] motive is a ‘central reason’ if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a ‘central reason’ if that motive, standing alone, would have led the persecutor to harm the

35 *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010).

36 See *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196-1198 (9th Cir. 2000).

37 *Mendez-Barrera*, 602 F.3d at 25 (widespread violence, affecting all citizens, does not establish persecution on a protected ground); *Boci v. Gonzales*, 473 F.3d 762, 767 (7th Cir. 2007) (‘widespread lawlessness’); *Abdille*, 242 F.3d at 494 (‘[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum’); *Ulloa Santos*, 552 F. App’x. at 201 (‘[A]cts by criminals are not persecution’) (internal quotations omitted); *Perez-Perez v. Holder*, 500 F. App’x. 684 (9th Cir. 2012) (MS 13 gang ‘bothers everybody’, not just or primarily Christians).

38 UNHCR, ‘Cartagena Declaration on Refugees’, 22 Nov. 1984.

39 ACNUR, ‘Brazil Declaration and Plan of Action’, www.acnur.org/cartagena30/en/brazil-declaration-and-plan-of-action/ (accessed 15 March 2016).

40 8 USC. § 1158(b)(1)(B)(i) (emphasis added).

applicant ... [P]ersecution may be caused by more than one central reason, and an asylum applicant need not prove which reason was dominant. Nevertheless, to demonstrate that a protected ground was 'at least one central reason' for persecution, an applicant must prove that such ground was a cause of the persecutors' acts.⁴¹

Importantly, for gang-based persecution claims 'proof of particularized persecution is not required to establish past persecution.'⁴² Although widespread civil unrest does not, on its own, establish asylum eligibility, the existence of general civil strife does not preclude relief.⁴³ This point is sometimes overlooked in asylum cases arising out of Mexico and the Northern Triangle, as immigration judges and circuit courts have found that the presence of high levels of violence in a country demonstrates that the persecution suffered is not based on an individual's specific characteristics but rather his presence in a country wracked with crime. This is not an appropriate approach to these types of cases, and past case law has established that 'in certain contexts ... the existence of civil strife supports a finding that claimed persecution was on account of a protected ground'.⁴⁴

While the underlying facts may be similar in individual cases, gang-based asylum claims are legally positioned in different ways, and that often depends on whether counsel is available and how experienced it is at putting forth a strong asylum claim. While some applicants claim they were persecuted on account of their actual or imputed political opinion or religion, the vast majority of gang-based asylum claims in the US are argued through the lens of membership in a particular social group. The next section will consider some of the specific challenges associated with each of these approaches.

41 *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009); see also *Zetino v. Holder*, 622 F.3d 1007, 1015 (9th Cir. 2010) ('The REAL ID Act of 2005 places an additional burden on Zetino to demonstrate that one of the five protected grounds will be at least one central reason for his persecution'); *Sinha v. Holder*, 564 F.3d 1015, 1021 n.3 (9th Cir. 2009) (applying pre-REAL ID Act standard).

42 *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (Serb petitioners suffered past persecution because Croat military specifically targeted their town for bombing, invasion, occupation and ethnic cleansing).

43 *Sinha v. Holder*, 564 F.3d 1015, 1022-23 (9th Cir. 2009) (explaining that IJ's suggestion 'that the violence directed against one individual is somehow *less* "on account of" his race because many other individuals of his ethnic group are *also* being targeted on account of their race' was illogical and had no support in case law'); *Ahmed v. Keisler*, 504 F.3d 1183, 1194-95 n.9 (9th Cir. 2007) ('[E]ven though generalized violence as a result of civil strife does not necessarily qualify as persecution, neither does civil strife eliminate the possibility of persecution').

44 *Ndom*, 384 F.3d at 753 (armed conflict between Senegalese forces and secessionist rebels); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (widespread political violence in Bangladesh 'says very little about' whether applicant could demonstrate a persecutory motive).

Persecution on account of religion or political opinion

Even when present, it is often difficult in gang-based asylum claims to demonstrate that an individual was targeted on account of their religious⁴⁵ or political affiliations.⁴⁶ For example, asylum applicants persecuted by non-State actors including guerrillas and organised criminal groups, must demonstrate that their targeting was specifically due to a publicly declared political opinion, rather than because they refused to join the group – even when the political stances are self-evident.⁴⁷

From the viewpoint of the United States or other countries, persecution that occurs within the context of a civil war, an insurgency, or the sphere of organised crime may appear too general, even when clearly delineated for those who actually experience it. Asylum applicants and attorneys alike can find it difficult to counter this perspective held by ‘outsider’ countries, since it may seem reasonable on the surface. If affirmative statements from the persecutor clearly identifying a protected ground as the reason for persecution, and an asylum applicant who is able to distinctly and credibly articulate these assertions, it is particularly difficult to demonstrate that an individual was targeted specifically due to his/her religious or political belief.⁴⁸ Without the ability to make these sorts of assertions, those who fear gang-based persecution

- 45 *Tecun-Florian v. INS*, 207 F.3d 1107, 1110 (9th Cir. 2000) (past torture by Guatemalan guerillas had no nexus to applicant’s religious beliefs).
- 46 *Soriano v. Holder*, 569 F.3d 1162, 1165 (9th Cir. 2009) (concluding petitioner failed to establish persecution on account of political opinion where his ‘only act in opposition to organized crime was informing the police after his arrest about two individuals who had engaged in criminal activities’).
- 47 *INS v. Elias-Zacarias*, 502 US 478, 481-82 (1992) (refusing to join guerrilla military was not evident on grounds of political persecution, and could have been for economic or family reasons). See also *Tecun-Florian v. INS*, 207 F.3d 1107, 1109 (9th Cir. 2000) (Guatemalan not eligible when guerillas tortured him because he refused to join them); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 509 (9th Cir. 1999) (Guatemalan not eligible due to failure to show that guerillas beat and threatened him on account of imputed political opinion rather than for refusal to join them); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (granting petition where substantial evidence did not support BIA’s determination that Salvadoran guerillas’ threats were merely recruitment attempts); *Molina-Estrada v. INS*, 293 F.3d 1089, 1094-95 (9th Cir. 2002) (no evidence to compel finding that Guatemalan guerillas attacked petitioner’s family on account of actual or imputed political opinion); *Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (rape and murder of aunt by government politician in El Salvador was personal dispute); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (kidnapping by Guatemalan government soldiers and guerillas was not on account of political opinion, race or social group); *Rivera-Moreno v. INS*, 213 F.3d 481, 486 (9th Cir. 2000) (no nexus between bombing of home and refusal to join guerillas); *Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (criminal extortion and robbery in Russia).
- 48 *Barrios v. Holder*, 581 F.3d 849, 854-55 (9th Cir. 2009) (rejecting petitioner’s contention that he was persecuted on account of his political opinion based on his refusal to join a gang); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (petitioner’s refusal to join gang did not prove persecution on account of a protected ground); *Santos-Lemus v. Mukasey*,

must pursue protection through the most difficult and controversial ‘on account of’ category in refugee and asylum law – membership of a particular social group.

Persecution on account of membership in a particular social group

On 7 February 2014, the BIA issued two precedent decisions on gang-based asylum which clarified how a person might demonstrate persecution on account of being a member of a particular social group.⁴⁹ These decisions have thrown into flux both the approach that should be taken when putting forth an asylum claim pursuant to this theory, and the possibility of cases being reopened for applicants who had previously been denied asylum.

The first decision, *Matter of M-E-V-G-*, clarified the ‘social visibility’ element of ‘particular social group’ developed under BIA precedent.⁵⁰ It affirmed that in order to establish a ‘cognizable “particular social group”’, literal (‘ocular’) visibility is not required, and the actual analysis should centre on whether a group has ‘social distinction’, or is perceived by society as a specific group. The BIA acknowledged that establishing a ‘particular social group’ is difficult and put forth three criteria for establishing the existence for purposes of asylum law, including whether it is: ‘1) composed of members who share a common immutable characteristic; 2) defined with particularity; and 3) socially distinct within the society in question’.⁵¹

Although the BIA declined to make a ruling on whether Honduran youths who were actively recruited and refused to join a gang constituted a particular social group because further fact-finding was required, it clarified that there is no ‘blanket rejection of all factual scenarios involving gangs’ and that ‘[s]ocial group determinations are made on a case-by-case basis’.⁵² This was a substantial finding as it directly confronted an earlier BIA precedent decision holding that neither Salvadoran youth who had been subjected to recruitment efforts and had rejected or resisted membership in the gang based on their own personal, moral and religious opposition to the gang’s values and activities, nor the family members of such youth constituted a ‘particular social group’.⁵³

542 F.3d 738, 747 (9th Cir. 2008) (alien’s general aversion to gangs did not constitute a political opinion for asylum purposes).

49 *Matter of W-G-R-*, 26 I. & N. Dec. 208 (2014) and *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (2014).

50 Not based on international law, the BIA created this element of social group in a 2008 case. See *Matter of S-E-G-*, et al. 24 I. & N. Dec. 579 (BIA 2008).

51 *M-E-V-G-*, 26 I. & N. Dec., p. 227.

52 *Ibid.*, p. 251.

53 *Matter of S-E-G-*, et al., 24 I. & N. Dec. 579 (BIA 2008).

The second decision, *Matter of W-G-R-*, reiterated much of the above, but declined to extend asylum protection, finding that the respondent had failed to establish both that ‘former members of the Mara 18 gang in El Salvador who have renounced their gang membership’ constitute a ‘particular social group’, and that a nexus existed between his status as a former gang member and his fear of harm. According to the BIA, the record contained ‘documentary evidence describing gangs, gang violence, and the treatment of gang members but very little documentation discussing the treatment or status of former gang members’.⁵⁴ The ‘scant evidence’ was insufficient to meet the social distinction requirement.⁵⁵

In light of these decisions, in May 2014, the Ninth Circuit reviewed the case of an indigenous Guatemalan man who was recruited but refused to join the Mara Salvatrucha.⁵⁶ In a published case the court applied the standards as set forth in the BIA’s February decisions (and its own earlier decision, *Henriquez-Rivas*),⁵⁷ and reversed the BIA’s judgment, holding that an immigration judge had correctly ‘found that in openly opposing the Mara Salvatrucha in Guatemala, Pirir-Boc’ allied himself with a particular social group of persons directly in opposition to gang activities’.⁵⁸

Pursuant to the BIA’s new language of ‘social distinction’, an applicant for asylum should be able to demonstrate the presence of a social group through the provisions that have been enacted to specifically protect youth from gang recruitment, and victims of organised crime. For example, in 2013, Mexico enacted a General Law of Victims, which legally recognises victims of human rights violations as a unique group with specific vulnerabilities and the right to protection and reparations.⁵⁹ This year, five cases of victimisation due to internal displacement by organised crime were opened by the Commissioners of the Victims Law. Similarly, the Organization of American States has initiated a project to strengthen institutions that specialise in assistance and protection to victims of organised crime.⁶⁰ And, in 2006, USAID recognised the need to support programmes for victims and ex-gang members in Mexico and Central

54 Ibid.

55 The finding in this decision was based on a sparse record, as articulated by the BIA, and should not preclude a different finding in a better documented case.

56 *Pirir Boc v. Holder*, no. 09-73671 (9th Cir. 7 May 2014).

57 *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (2013). This decision came after cases before the Third and Seventh Circuits invalidated *W-G-R-/M-EV-G* as inconsistent with prior BIA precedent. See *Valdiviezo-Galdamez v. Att’y Gen. of US*, 663 F.3d 582, 604 (3rd Cir.2011); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir.2009).

58 *Pirir-Boc v. Holder*, p. 6.

59 L. Villagran, “‘We are millions’: victims of organized crime in Mexico seek justice in new law,” *The Christian Science Monitor*, 11 Jan. 2013.

60 *Organización de los Estados Americanos*, ‘Concluye taller de la OEA en Guatemala sobre asistencia y protección a víctimas de crimen organizado’, 12 Aug. 2015, available at www.oas.sam.gov.gt.

America.⁶¹ The recognition, through these programmes, of those vulnerable to recruitment as well as those who have been victims of gang violence demonstrates that local society does in fact deem these groups to be socially distinct in Mexico and the Northern Triangle.

What happens now?

Currently, the Third, Seventh and Ninth Circuit Courts have explicitly found that blanket conclusions on whether an individual is part of a social group qualifying for protection under US asylum law is not appropriate, and that an analysis of 'social distinction' rather than 'social visibility' is necessary, although it must be said the difference between these two standards needs to be better articulated.⁶² In line with these decisions, the BIA has now issued two decisions reinforcing these findings.

However, ten other Circuit Courts have yet to issue decisions since the BIA's 2014 findings were published, all of which have followed the BIA's earlier and extremely restrictive interpretation of a 'particular social group.' This includes the Fifth Circuit, which along with the Ninth Circuit holds the vast majority of detained asylum-seekers and which, because it includes Texas, also receives the vast majority of Central Americans and Mexicans who make gang-based asylum claims. The Fifth Circuit takes a particularly conservative approach to immigration relief, and in 2012 denied 95 per cent of asylum claims, whether based on a need for protection, a family relationship or a waiver of removability.⁶³

Even with these more positive decisions from the BIA and three Circuit Courts, it will likely remain exceptionally hard for individuals from Mexico and the Northern Triangle to be granted asylum, but this is no reason to give up. The Refugee Convention contemplated protection for those individuals fleeing persecution for many reasons, and some gang-based persecution claims, fairly adjudicated individually and in a non-discriminatory manner, will merit protection. Meanwhile, it is incumbent on advocates and academics to monitor the processing of claims, identify instances and patterns of discrimination, and challenge the US to fulfil its obligations to refugees from Mexico and Central America, regardless of their proximity.

oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-337/14 (accessed 15 March 2016).

61 'Central America and Mexico Gang Assessment', USAID Bureau for Latin America and the Caribbean Office of Regional Sustainable Development, April 2006.

62 'Particular social group practice advisory: applying for asylum matter of M-E-V-G- and matter of W-G-R', *The National Immigrant Justice Center*, Feb. 2014, p. 4.

63 A. Estevez, 'The biopolitics of asylum law in Texas', *North America: Immigration and Immigration Policy in the US Today*, 8 (2013), 66-7.

Withholding of removal and the Convention against Torture

In the US, individuals may simultaneously pursue 'Withholding of Removal' (withholding) and protection under the Convention against Torture (CAT) when they file their asylum applications under the terms of the Refugee Convention.⁶⁴ Withholding codifies the international norm of non-*refoulement* or non-return to a country where an applicant would face persecution or other serious violations of human rights.⁶⁵ As with asylum, a withholding application must be based on fear of persecution on account of a protected ground. A person must also demonstrate the higher standard that they are 'more likely than not' to face persecution if returned to their country of origin or last habitual residence.⁶⁶

An applicant who fails to satisfy the lower standard of proof for asylum necessarily does not meet the more stringent standard for withholding.⁶⁷ However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding, and it is mandatory if the legal elements are satisfied.⁶⁸ Article 3 of the CAT absolutely prohibits states from returning anyone to another state where he or she may be tortured.⁶⁹ The United States signed the CAT on 18 April 1988, and Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA) in 1988 to implement Article 3 of the Convention.⁷⁰

There are two forms of protection pursuant to CAT: 1) withholding of removal under 8 C.F.R. § 1208.16(c) for individuals who are not barred from

64 An application for asylum pursuant to 8 USC. § 1158 is generally considered an application for withholding of removal under 8 USC. § 1231(b)(3), (INA § 241(b)(3)), and an application for Convention Against Torture protection under 8 C.F.R. § 1208.13(c)(1).

65 *INS v. Aguirre-Aguirre*, 526 US 415, 427 (1999) ('The basic withholding provision ... parallels Article 33 [of the Refugee Convention], which provides that no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground]') (internal quotation marks and alterations omitted).

66 *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted); see also *INS v. Stevic*, 467 US 407, 430 (1984); *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010); *Hanna v. Keisler*, 506 F.3d 933, 940 (9th Cir. 2007); *Zehaty v. Gonzales*, 453 F.3d 1182, 1190 (9th Cir. 2006); 8 C.F.R. § 1208.16(b)(2).

67 *Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003); see also *Zehaty*, 453 F.3d at 1190.

68 *Huang v. INS*, 436 F.3d 89, 95 (9th Cir. 2006); *Osorio v. INS*, 18 F.3d 1017, 1032 (9th Cir. 1994).

69 *Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) ('Article 3 provides that a signatory nation will not expel, return ... or extradite a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture') (internal quotation marks omitted), amended by 355 F.3d 1140 (9th Cir. 2004).

70 Pub. L. no. 105-277, Div. G, Title XXII, 112 Stat. 2681-822 (codified as Note to 8 USC. § 1231).

eligibility for having been convicted of a 'particularly serious crime' or of an aggravated felony for which the term of imprisonment is at least five years; and 2) deferral of removal under 8 C.F.R. § 1208.17(a) for individuals entitled to protection but subject to mandatory denial of withholding.⁷¹

Although the forms of relief available through both withholding and CAT are extremely relevant to the discussion of claims arising out of persecution by organised criminal groups, gangs and other armed actors, the brevity of this chapter does not permit an in-depth look at the statutory, regulatory and jurisprudence that has taken shape. These forms of protection have been extended to both the victims of persecution, and to those victimised after leaving gangs who were found ineligible for asylum due to their previous gang activities.⁷²

The principle of non-discrimination and reality

Neither international law nor US law permits discrimination in the application of the Refugee Convention or asylum law but, historically and currently, Mexicans and Central Americans face heightened scrutiny in their applications for protection.⁷³ Discrimination in the adjudication of asylum applications from Central America was successfully challenged in the early 1990s, and there is no reason why it could not be challenged again.

As a result of the civil wars raging in El Salvador and Guatemala in the early 1980s, thousands of their citizens began seeking protection in the US. These asylum-seekers reported widespread repression targeted at indigenous communities and broad segments of society, including teachers, students, trade unionists, peasants who supported cooperatives, relatives of people supporting the opposition, and Catholics working in lay Christian communities. Their testimony was amply supported by credible human rights reports, which documented the massacring of families and villages, the pervasive use of torture and extra-judicial killings.⁷⁴

Rather than take up their asylum claims, the US detained these asylum-seekers and used coercive tactics, such as intimidation, to encourage voluntary

71 The United States Department of Justice (4 Feb. 2015) 'Asylum, withholding of removal, CAT' (Immigration Judge Benchbook), available at www.justice.gov/coir/immigration-judge-benchbook-section-241b (accessed 15 March 2016).

72 R. Germain, 'AILA's Asylum Primer', *American Immigration Lawyers Association* (AILA, 3rd edn., 2003), pp. 72–3.

73 M. Turck, 'Border patrol unlawfully deporting potential asylum seekers', *Al Jazeera*, 21 Nov. 2014.

74 Amnesty International (15 March 2013) 'El Salvador: no justice 20 years on from UN Truth Commission', available at www.amnesty.org/en/articles/news/2013/03/el-salvador-no-justice-years-un-truth-commission/ (accessed 15 March 2016).

return to their countries of origin.⁷⁵ Those who pursued protection were almost always denied. At the administrative level, less than three per cent of Salvadoran claims were granted asylum, and one per cent or less of Guatemalans received asylum.⁷⁶ These figures compared with asylum grant rates for all nationalities of approximately 30 per cent and considerably higher for some nationalities.

Responding to the utter disregard for these communities and their rights, a 'sanctuary' movement arose out of US churches and refugee communities, and some of the former affirmatively declared that they would provide refuge to these individuals regardless of law. Despite crackdowns on participants by the US Department of Justice, by the mid 1980s, over 300 churches and synagogues had declared 'public sanctuary'. In 1985, churches joined with legal counsel to file a historic class action challenging the US to uphold its obligations to refugees from Guatemala and Central America. *American Baptist Churches et al. v. Thornburgh* was filed in May 1985 on behalf of over 80 religious and refugee organisations, and refugee legal assistance groups.⁷⁷ The lawsuit alleged that the discriminatory adjudication of their requests for asylum and withholding of deportation violated the US Constitution's Fifth Amendment.

After three years, the Supreme Court allowed the plaintiffs to proceed on the claims regarding discriminatory treatment of Central American asylum-seekers. Citing the low approval rate for asylum applicants from El Salvador and Guatemala, despite the overwhelming evidence that persecution and torture was rife in their home countries, the Court ruled that each individual Salvadoran and Guatemalan would not be required to go through the administrative determination of his or her case before the Court could examine the pattern and practice of violations alleged by the plaintiffs.

In 1991, after six years of litigation, the US government settled the case with the plaintiffs, acknowledging in the settlement that discrimination based on nationality was improper. Further, it recognised that foreign policy and border enforcement considerations, the US government's views of the asylum applicant's political or ideological beliefs, and the fact the individual has arrived from a country supported politically by the US were not acceptable factors in determining statutory eligibility for asylum. Most importantly, the settlement provided all denied asylum applicants with the right to file a new request for protection.⁷⁸

75 L. Chavez and S. Riordan, 'Disappeared and departed', *American Civil Liberties Union*, 4 June 2013.

76 S. Gammage, 'El Salvador: despite end to civil war, emigration continues', *Migration Policy Institute*, 26 July 2007.

77 *American Baptist Church v. Thornburgh*, 760F. 796 (N.D. Cal. 1991).

78 T. Realmuto, 'ABC v. Thornburgh: 20 years later', *National Immigration Project of the National Lawyers Guild*, 31 Jan. 2011.

This stunning result should not be viewed as an anomaly. The circumstances facing refugees from Central America in the 1980s mirror both the current experiences of Mexican and Central Americans in their countries of origin, and their ability to achieve protection in the US now. Like then, it is most likely that discrimination based on nationality is playing a role in the evaluation of gang-based claims now, even if not explicit. Challenging decisions, however, will require an exceptional investment in strategic litigation and joint advocacy before the administration and federal courts. There is no reason to believe it could not ultimately be successful.

Conclusion

By the mid 2000s, gang-based asylum claims were not an anomaly in certain parts of the US, but their regularity of occurrence has not resulted in a pattern of predictable jurisprudence upon which advocates, attorneys or asylum-seekers themselves can rely. In fact, when a person may benefit from asylum and related protection in these circumstances remains greatly in flux. Out of 13 Circuit Courts, ten have followed the BIA's former precedent decisions on gang-based asylum, narrowly construing the availability of protection. Yet, in February 2014, the BIA issued two new decisions clarifying its earlier analysis,⁷⁹ and in May 2014, the Court of Appeals for the Ninth Circuit subsequently published a favourable decision referring directly to these new resolutions.⁸⁰ How these new determinations will be applied and what it means for those persecuted by organised criminal groups remains an open question.

Meanwhile, border patrol agents who make the first decision to refer people to be considered for entry into the US, and asylum officers who conduct reasonable and credible 'fear interviews' should be aware of the growing body of evidence supporting the assertion that organised criminal groups are persecuting individuals and families throughout Mexico and the Northern Triangle, and that their governments are unwilling or unable to protect them. Each individual and family presenting themselves at the border should be treated as a unique case, and no application should be assumed to be far-fetched by reason of the individual's origin. There is no reason to believe that the persecution and torture of Mexicans and Central Americans will stop any time in the near future, and the US has an obligation to provide those who fear serious human rights violations with protection.

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

80 *Pirir Boc v. Holder*, no. 09-73671 (9th Cir. 2014).