

# To Group or Not To Group? Refugee Status for Central American Victims of Gang Violence

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## I. INTRODUCTION

In early March of this year, former gang member Giovanni Morales was gunned down in front of Saint Francis of Assisi Church in Mejicanos, El Salvador.<sup>1</sup> After having left his gang life behind four years earlier,

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1. Diana Escalante Insy Mendoza, *Matan a un expandillero que trabajaba con el padre Toño [Former Gang Member Who Worked with Father Toño Was Killed]*, ELSALVADOR.COM (Mar. 5, 2013), [http://www.elsalvador.com/mwedh/nota/nota\\_completa.asp?idCat=47859&idArt=7733792](http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=47859&idArt=7733792) (author’s translation).

Giovanni worked alongside Antonio Rodriguez, known as Father Toño, a vocal figure against gang violence, to help at-risk youth through gang member rehabilitation programs that he personally coordinated.<sup>2</sup> The day he was shot, Giovanni was returning from a meeting where he had been planning the grand opening of a bakery that would employ rehabilitated gang members.<sup>3</sup> Giovanni was shot on the one-year anniversary of the truce between El Salvador's two main gangs, the Mara Salvatrucha (MS-13) and the Mara 18 (M-18).<sup>4</sup> Father Toño stated, "His death is symbolic, because Giovanni, with his actions and his work, was an example of how to curb the violence."<sup>5</sup> Giovanni, like many others, suffered the ultimate penalty for having left his former life behind.<sup>6</sup>

Central America has the highest homicide rate in the world.<sup>7</sup> Between 1995 and 2011, deaths in the region totaled 44,997, averaging a death rate of 28.5 individuals for every 100,000 inhabitants.<sup>8</sup> Much of the carnage is attributable to escalating gang violence.<sup>9</sup> These organized Central American gangs are known as *maras* and serve as conduits for criminal activity ranging from drug trafficking to extortion, threatening the stability of nations where they reside, the safety of their fellow citizens, and international security.<sup>10</sup>

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2. *Id.*

3. *Id.*

4. *Id.* MS-13 and M-18 are the most notorious Central American gangs. U.N. High Comm'r for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, REFWORLD ¶7 n.8 (Mar. 2010), [www.refworld.org/docid/4bb21f902.html](http://www.refworld.org/docid/4bb21f902.html) [hereinafter *UNHCR Guidance Note*].

5. Mendoza, *supra* note 1 (author's translation).

6. See *UNHCR Guidance Note, supra* note 4, ¶7 ("Membership of a gang is usually seen as a life-long commitment. Thus, any desertion carries heavy consequences; gangs tend to punish defectors severely, including through intimidation, death threats and/or physical revenge . . ."). For example, in *Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009), the petitioner sought withholding from removal, claiming that if the court removed him to El Salvador, his former gang would kill him on account of his refusal to rejoin. Despite not having been in his country of origin for many years, the gang would easily recognize him because he had MS-13 tattoos on both his face and body. *Id.*

7. *International Homicide Statistics*, U.N. OFFICE ON DRUGS & CRIME (UNODC) (2012), [http://www.unodc.org/documents/data-and-analysis/statistics/crime/Homicide\\_statistics2012.xls](http://www.unodc.org/documents/data-and-analysis/statistics/crime/Homicide_statistics2012.xls).

8. *Id.*

9. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 437 (2011).

10. Lynne F. Maxwell, Book Review, 18 LIBR. J. 88 (2011) (reviewing THOMAS BRUNEAU ET AL., *MARAS: GANG VIOLENCE AND SECURITY IN CENTRAL AMERICA* (2011)); *UNHCR Guidance Note, supra* note 4, ¶8.

Despite the fact that many flee from this violence, there is a lack of consistency in how nations treat gang-related asylum claims.<sup>11</sup> This Comment analyzes the current legal status of gang-related asylum seekers under international and domestic law. The scope of this analysis is limited to Central American victims because an increasing number of young people in Central America who fear gang-related persecution in their countries of origin are making asylum claims relating to protection against gang violence.<sup>12</sup>

First, the Comment provides an overview of the organization and behavior of gangs, establishing a clearer understanding of the obstacles faced when combatting gang activity. The focus then shifts to gang-related violence in Central America, forming the context for the increasing number of gang-related asylum claims and illustrating the magnitude of the problem. The background provided by these two Parts explains why the situation is dire for victims, national governments, and the international community and consequently why gang-related asylum claims have become more prevalent. The Comment then shifts to the legal analysis of assessing gang-related asylum claims by first focusing on how those claims fit into interpretations of the 1951 Refugee Convention relating to the Status of Refugees (1951 Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Refugee Protocol). The discussion then focuses on the most controversial area of the law: the different interpretations under domestic law regarding the legal status of gang-related asylum seekers claiming protection under the ground of membership of a particular social group. Lastly, this Comment concludes that given the magnitude of the problem, the requirements for refugee status should be loosened for individuals fleeing from gang violence, and there should be increased legal uniformity by courts hearing gang-related asylum claims.

## II. THE CHARACTERISTICS OF GANGS

### A. *What Is a Gang?*

Regardless of their origin, gangs share common characteristics that allow them to be distinguished from other criminal groups.<sup>13</sup> There is no universally recognized definition of a gang in international law, but the

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11. *UNHCR Guidance Note, supra* note 4, ¶ 18; see Galya Ruffer, *Gang-Based Asylum Claims*, FAHAMU REFUGEE PROGRAMME, <http://www.refugeelegalaidinformation.org/gang-based-asylum-claims> (last visited Nov. 22, 2013).

12. *UNHCR Guidance Note, supra* note 4, ¶ 2; see Ruffer, *supra* note 11.

13. *UNHCR Guidance Note, supra* note 4, ¶ 5.

United Nations High Commissioner on Refugees (UNHCR) provides a definitional benchmark.<sup>14</sup> A “gang” can be broadly defined as “a group of two or more members which carries out criminal activities as its primary or secondary objective.”<sup>15</sup> When specifically discussing gangs in the context of Central America, the UNHCR defines “gang” as “the relatively durable, predominantly *street-based groups of young people* for whom crime and violence is integral to the group’s identity.”<sup>16</sup>

Members of gangs usually share common characteristics.<sup>17</sup> They are often members of marginalized segments of society and come from a low socioeconomic class.<sup>18</sup> They share a common mentality centered on perceived respect (or disrespect), which plays an important role in gang culture.<sup>19</sup> Gangs form an identity by establishing a degree of exclusivity and by establishing rivalries.<sup>20</sup> Although gangs provide their members with a sense of community and identity, a gang’s main function is criminal activity.<sup>21</sup> The UNHCR Guidance Note states, “Extortion, robbery, murder, prostitution, kidnapping, smuggling and trafficking in people, drugs and arms are common practices employed by gangs to raise funds and to maintain control over their respective territories.”<sup>22</sup> Two notorious Central American gangs, MS-13 and M-18, are better organized than most and are becoming increasingly violent, using criminal activities in order to increase their economic profit.<sup>23</sup>

Despite the similarities shared by all gangs, there are also notable distinctions between transnational gangs and domestic street gangs.<sup>24</sup> These distinctions, like the definition of a gang, are not universally recognized.<sup>25</sup> However, they do provide guidance in understanding a gang’s *modus operandi*.<sup>26</sup>

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14. *Id.* ¶ 4; Ruffer, *supra* note 11.

15. *UNHCR Guidance Note, supra* note 4, ¶ 4.

16. *Id.*

17. *Id.*; United Nations, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights on El Salvador, ¶ 22, U.N. Doc. E/C.12/SLV/CO/2 (June 27, 2007).

18. *UNHCR Guidance Note, supra* note 4, ¶ 4.

19. *Id.* ¶ 6.

20. *Id.* ¶ 5.

21. *Id.* ¶ 8.

22. *Id.*

23. *Id.*; Beatriz Manz, *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations*, REFWORLD 4 (Aug. 2008), [www.refworld.org/docid/48ad1eb72.html](http://www.refworld.org/docid/48ad1eb72.html).

24. CELINDA FRANCO, CONG. RESEARCH SERV., RL34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 6 (2008).

25. *Id.* at 2, 6.

26. *See id.* at 6.

Gangs can be categorized according to their level of organization and the sophistication of their criminal activities.<sup>27</sup> Most street gangs are first- or second-generation gangs.<sup>28</sup> First-generation gangs are crude structures.<sup>29</sup> They tend to be turf-oriented and localized, engage in unsophisticated criminal activities, and have a decentralized leadership structure.<sup>30</sup> These less organized gangs participate in “opportunistic criminal activity and intergang rivalry.”<sup>31</sup> By contrast, second-generation gangs are characterized as having an organized structure similar to a business and “assume a market rather than a turf orientation.”<sup>32</sup> Their activities tend to be drug-centered, requiring more centralized leadership.<sup>33</sup> Street gangs falling under this category are generally horizontally organized, comprised of multiple, small cliques, each with independent leadership.<sup>34</sup>

Third-generation gangs are the most sophisticated of all gangs.<sup>35</sup> They are “mercenary type group[s] with goals of power or financial acquisition and a set of fully evolved political aims.”<sup>36</sup> “Third-generation gangs tend to operate in a global environment and ‘may embrace quasi-terrorism or true terrorism.’”<sup>37</sup> Not only have these gangs been analogized to terrorist groups, but they have also been compared to organized criminal enterprises.<sup>38</sup> This is because they have a hierarchical leadership and organizational structure, concentrated capital, and sufficient power over members to engage in sophisticated criminal enterprises.<sup>39</sup> Some researchers believe that the MS-13 gang present in certain Central American nations has third-generation characteristics.<sup>40</sup> Transnational gangs, such as MS-13, are defined as criminally active gangs, which are operational in more than one country and are

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27. *Id.* at 5.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*; see John P. Sullivan, *Third Generation Street Gangs: Turf, Cartels and Net Warriors*, CRIME & JUST. INT’L (Oct./Nov. 1997), <http://www.cjimagazine.com/archives/cjica76.html?id=543>.

32. Sullivan, *supra* note 31.

33. *Id.*

34. FRANCO, *supra* note 24, at 5, 7.

35. *Id.* at 5; Gary I. Wilson & John P. Sullivan, *On Gangs, Crime, and Terrorism*, DRACO SECURITY 6 (Feb. 28, 2007), [http://www.dracosecurityconsultants.com/draco\\_docs/GANGS%20CRIME%20TERRORISM.pdf](http://www.dracosecurityconsultants.com/draco_docs/GANGS%20CRIME%20TERRORISM.pdf).

36. Sullivan, *supra* note 31.

37. *Id.*

38. FRANCO, *supra* note 24, at 7.

39. *Id.*

40. Transnational gangs often share many characteristics with third generation gangs. *Id.* at 5; Wilson & Sullivan, *supra* note 35, at 9.

characterized as “very mobile, highly adaptable to new geographic areas, and [maintaining] connections in their native countries.”<sup>41</sup>

*B. Who Are the Victims of Gang Violence?*

Although gang violence can be widespread and affect large segments of a population,<sup>42</sup> gangs specifically target young people who are marginalized by society.<sup>43</sup> The UNHCR Guidance Note identifies four primary applicant groups in gang-related asylum claims.<sup>44</sup> The first group is comprised of individuals who have resisted or opposed gang activity.<sup>45</sup> Individuals falling under this category are further grouped into subcategories.<sup>46</sup> The second group of applicants consists of former and current gang members who fear retaliation for their desertion or who fear persecution from enforcement agents.<sup>47</sup> The third group includes victims of a state’s unlawful or arbitrary measures to combat gang activity.<sup>48</sup> The

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41. Claude Arnold, *Immigration Authorities and Gang Enforcement*, U.S. ATT’Y BULL., May 2006, at 42, 42.

42. For example, individuals who live in a community that is controlled by gang members may be victims of violence because there is a general lack of rule of law and the state is incapable of protecting them. *UNHCR Guidance Note*, *supra* note 4, ¶ 10.

43. *Id.* ¶ 11; see Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum to the Mission to Honduras*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2003/3/Add.2 (June 14, 2002) (by Asma Jahangir).

44. *UNHCR Guidance Note*, *supra* note 4, ¶ 11.

45. *Id.* ¶ 12.

46. They include:

- a. individuals at risk of, or who refuse, recruitment, such as young men and adolescent boys of a certain social status;
- b. individuals, such as young women and adolescent girls, who refuse sexual demands by gangs, including for prostitution and trafficking purposes, or to become sexual property of gangs;
- c. business owners and others unable or unwilling to meet extortion or other unlawful demands for money or services by gangs;
- d. witnesses of crimes committed by gangs, or individuals who have reported such incidents to the authorities who subsequently become vulnerable to violence as a form of deterrence or retribution;
- e. law enforcement agents may become targets because of their efforts to combat gangs;
- f. NGO [nongovernmental organization] workers, human rights activists, lawyers and participants in community- or church-based groups who oppose gangs, thus becoming the targets of intimidation tactics and violence by gangs;
- g. other individuals who are, or are perceived to be, a threat to gangs or as not conforming with their practices, including ethnic and sexual minorities.

*Id.*

47. *Id.* ¶ 13.

48. For example, *Mano Dura*-type policies have occasionally “targeted groups that have no association with gangs but who may be considered ‘undesirable’ in society, e.g. drug addicts, street children, sexual minorities and sex workers.” *Id.* ¶ 15.

last group of applicants consists of family members of individuals in the above groups.<sup>49</sup>

### III. GANG-RELATED VIOLENCE IN CENTRAL AMERICA

#### A. *The Origin of Gangs in Central America*

Gangs in Central America were born in the United States and imported from the neighborhoods of Los Angeles, California.<sup>50</sup> The largest gangs in Central America are M-18 and MS-13.<sup>51</sup> Both of these gangs were formed in the Rampart neighborhood of Los Angeles.<sup>52</sup> Mexican-Americans formed M-18 because other gangs excluded them from memberships.<sup>53</sup> Ultimately, the gang grew by incorporating a large number of Central Americans arriving in the 1980s who had fled the civil unrest and violence in their nations.<sup>54</sup> Young Salvadorians who fled from the civil war formed MS-13 in the early 1980s as a means of protection against the Mexican-American and African-American gangs.<sup>55</sup> Like M-18, over time MS-13 began to incorporate other Spanish speakers of different nationalities.<sup>56</sup>

In the 1990s, these gangs began their transplantation into Central America.<sup>57</sup> Following the end of the Guatemalan and Salvadorian civil wars, the United States passed the Illegal Immigration Reform and Immigrant Responsibility Act, signaling a change in U.S. immigration policy and increasing the number of criminal charges for which the United States could deport a foreign-born resident.<sup>58</sup> This legislation resulted in the removal of many gang members, and it was these deportees who created the MS-13 and M-18 gang cells in Central America.<sup>59</sup> While other gangs operate in Central America, such as the Mao Mao, Máquina, Pandilla 14, Mirada Loca, Muro, Familia Unida, Los Cholos, Los Nicas, Los Batos Locos, and Los Rockeros, there is less information available on these gangs,<sup>60</sup> and international concern tends to

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49. *Id.* ¶ 17 (“[F]amilies could be subjected to threats and violence as an act of retaliation or to exert pressure on other [family] members . . . to succumb to recruitment attempts or extortion demands.”).

50. Maxwell, *supra* note 10, at 88.

51. *UNHCR Guidance Note*, *supra* note 4, ¶ 7 n.8.

52. Fogelbach, *supra* note 9, at 420.

53. FRANCO, *supra* note 24, at 4.

54. *See id.*

55. *Id.* at 3.

56. *Id.*

57. *Id.* at 9.

58. Ruffer, *supra* note 11; Fogelbach, *supra* note 9, at 421.

59. Ruffer, *supra* note 11; Fogelbach, *supra* note 9, at 421.

60. Fogelbach, *supra* note 9, at 421-22.

focus on the two largest gangs, MS-13 and M-18, because they frequently raise international security issues.<sup>61</sup>

“U.S. security agencies estimate that the *maras* now have more than 170,000 members” around the world.<sup>62</sup> They engage in criminal enterprises normally seen with more sophisticated and better organized crime syndicates, and they act as facilitators for the drug cartels.<sup>63</sup> MS-13 and M-18, specifically, have become a transnational threat, with cells not only in Central America, but also in Mexico and the United States.<sup>64</sup>

### *B. The Inability of Central American Governments To Respond*

The rise in gang violence in Central America has not gone unnoticed by the region’s national governments.<sup>65</sup> Although Central American nations differ in their legal responses to the escalating violence, the region has largely embraced gang-prevention programs as well as efforts to rehabilitate and reintegrate gang members into society.<sup>66</sup> Government, international organizations, and civil society have supported these efforts.<sup>67</sup> However, these programs are generally perceived as not doing enough because of their small scale and underfunding.<sup>68</sup> Despite these measures to reduce gang activity, Central American nations have not had much success curbing the violence.<sup>69</sup>

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61. See *id.*; FRANCO, *supra* note 24, at 1.

62. Montserrat Nicolás, *A History of Violence: Gangs, Drugs and “Mano Dura” in Central America*, WORLD CRUNCH (Apr. 14, 2012, 12:32 PM), [www.worldcrunch.com/history-of-violence-gangs-drugs-and-mano-dura-in-central-america/c1s5084/#.un3uxak1alj](http://www.worldcrunch.com/history-of-violence-gangs-drugs-and-mano-dura-in-central-america/c1s5084/#.un3uxak1alj).

63. “Police in El Salvador say traffickers are cultivating ties to street gangs such as MS-13 and [M-18], building alliances that could eventually help those groups mature into international syndicates.” Nick Miroff & William Booth, *Mexico’s Narco Plague Spreads South*, STATESMAN.COM (July 31, 2010, 10:52 AM), <http://www.statesman.com/news/news/opinion/mexicos-narco-plague-spreads-south-1/nRwhz/>; see also Steven S. Dudley, *Drug Trafficking Organizations in Central America: Transportistas, Mexican Cartels and Maras 20* (May 2010) (unpublished working paper) (on file with the Mexico Institute at the Woodrow Wilson International Center for Scholars).

64. See CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL 34112, *GANGS IN CENTRAL AMERICA I* (2013).

65. *Latin America Politics: Anti-Gang Warfare*, VIEWS WIRE (Dec. 27, 2007), [http://views.wire.eiu.com/index.asp?layout=VWPrintVW3&article\\_id=1492900734&printer=printer](http://views.wire.eiu.com/index.asp?layout=VWPrintVW3&article_id=1492900734&printer=printer); see *Barrio 18 (M-18)*, INSIGHT CRIME, <http://www.insightcrime.org/groups-guatemala/barrio-18#startOfPageId1100> (last visited Nov. 22, 2013).

66. Fogelbach, *supra* note 9, at 446.

67. *Id.* at 449. For example, the United States Agency of International Development (USAID) assisted in opening outreach centers in El Salvador and Guatemala. See Bureau for Latin Am. & Caribbean Affairs, *Central America and Mexico Gang Assessment*, USAID (Apr. 2006), [http://pdf.usaid.gov/pdf\\_docs/PNADG834.pdf](http://pdf.usaid.gov/pdf_docs/PNADG834.pdf).

68. SEELKE, *supra* note 64, at 15. Church groups and NGOs, rather than the government, often fund rehabilitation programs. See *id.* at 80-82.

69. See *International Homicide Statistics*, *supra* note 7.



Legislation enacted specifically to combat gang-related violence has been ineffective.<sup>70</sup> El Salvador has enacted a significant amount of legislation to target gang activity and violence.<sup>71</sup> In October 2003, Nationalist Republican Alliance (ARENA) President Francisco Flores enacted the Plan *Mano Dura*, or “strict hand,” specifically aimed at abating the criminal activities of MS-13 and M-18.<sup>72</sup> The Plan *Mano Dura* was later modified and reenacted in April 2004.<sup>73</sup> After the Flores Administration, ARENA President Tony Saca enacted the Organized and Complex Crimes Law in 2007, and Farabundo Marti National Liberation Front (FMNL) President Mauricio Funes signed into law additional antigang legislation in 2010.<sup>74</sup> Policies such as this, however, only encouraged the gangs’ growth by concentrating members in prisons, which promoted their reorganization.<sup>75</sup> The multiple laws enacted in less than a decade show the ineffectiveness of these efforts. It was not until 2012, when MS-13 and M-18 agreed upon a truce, that homicide rates dropped.<sup>76</sup>

Unlike El Salvador, Honduras did not enact specific legislation to combat gang activities. Instead, it amended article 332 of the Penal Code, which enabled law enforcement to arrest gang members on the basis of association and raised the sentences for those involved at every level of the gang organization.<sup>77</sup> Following this amendment, homicide rates actually increased by 17%.<sup>78</sup> In contrast to its Central American neighbors, Guatemala did not enact or amend legislation, but rather, law enforcement took matters into their own hands.<sup>79</sup> This, too, has failed to stop the violence.<sup>80</sup>

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70. UNHCR *Guidance Note*, *supra* note 4, ¶ 9 n.13; *Latin America Politics: Anti-Gang Warfare*, *supra* note 65.

71. Decreto No. 158, 10 octubre 2003, DIARIO OFICIAL [D.O.] 2-10 (El Sal.); Decreto No. 305, 2 abril 2004, D.O. 3-7 (El. Sal.); Decreto No. 190, 22 enero 2007, D.O. 4-7 (El Sal.); Decreto No. 458, 10 septiembre 2010, D.O. 23-26 (El Sal.).

72. Decreto No. 158 of 10 octubre 2003 (El Sal.); Fogelbach, *supra* note 9, at 447.

73. Decreto No. 305 of 2 abril 2004 (El Sal.).

74. Decreto No. 190 of 22 enero 2007 (El Sal.); Fogelbach, *supra* note 9, at 448-49.

75. *Barrio 18 (M-18)*, *supra* note 65.

76. The truce cut the murder rate by two-thirds. *A Meeting of the Maras*, ECONOMIST (May 12, 2012), <http://www.economist.com/node/21554521>.

77. Decreto No. 30645, 12 marzo 2005, D.O. 223-2004 (Hond.); see Fogelbach, *supra* note 9, at 452-53.

78. Heather Berkman, *The Politicization of the Judicial System of Honduras and the Proliferation of Las Maras*, 4 J. INT’L POL’Y STUD. 5, 6 (2006).

79. Fogelbach, *supra* note 9, at 450-51; *Latin America Politics: Anti-Gang Warfare*, *supra* note 65.

80. Bureau for Latin Am. & Caribbean Affairs, *supra* note 67, at 79.

These countries' initiatives have resulted in international scrutiny.<sup>81</sup> Particularly, the *mano dura* approach to curbing gang violence has received much criticism.<sup>82</sup> Some observers have accused nations in the region of social cleansing practices, which include accusations of "extrajudicial killings, police violence, arbitrary or unlawful arrests and detention as well as inhumane prison conditions."<sup>83</sup> These practices often target not only gang members, but also those merely suspected of being gang members.<sup>84</sup> There is evidence that these states support or, at a minimum, passively allow such measures.<sup>85</sup> The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions clearly states the severity of the situation: "The evidence shows that social cleansing is more than the actions of a few rogue officers. This does not mean that it has risen to the level of officially-sanctioned policy, but the frequency and regularity of social cleansing does indicate that it presents an issue of institutional responsibility."<sup>86</sup>

Thus, in many cases, not only have the national responses insufficiently protected the public from violent gang-related crimes, but these responses have also raised questions regarding the humaneness of the policies.<sup>87</sup> Gangs have become more violent and have forged ties with Mexican drug cartels, which makes it difficult for nations to respond to the endemic.<sup>88</sup> Many believe that these nations cannot unilaterally stop the violence and that international help is needed.<sup>89</sup> The public has lost confidence in their governments' ability to protect them, making it more attractive to flee from the violence.<sup>90</sup>

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81. See UNHCR Guidance Note, *supra* note 4, ¶ 9 n.13.

82. *Id.*

83. *Id.* ¶ 9.

84. *Id.*

85. *Id.*

86. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum to the Mission to Guatemala*, Human Rights Council, U.N. Doc. A/HRC/4/20/Add.2 (Feb. 19, 2007) (by Philip Alston).

87. UNHCR Guidance Note, *supra* note 4, ¶ 9 n.13.

88. See Romina Ruiz-Goiriena, *Mara Salvatrucha, Zetas Joining Forces? Guatemala Authorities See Disturbing Evidence*, HUFFINGTON POST (Apr. 7, 2012, 10:58 AM), [http://www.huffingtonpost.com/2012/04/07/mara-salvatrucha-zetas\\_n\\_1409814.html](http://www.huffingtonpost.com/2012/04/07/mara-salvatrucha-zetas_n_1409814.html); see also Jason Beaubien, *El Salvador Fears Ties Between Cartels, Street Gangs*, NPR (June 1, 2011, 12:01 AM), <http://www.npr.org/2011/06/01/136829224/el-salvador-fears-ties-between-cartels-street-gangs> ("As the Mexicans move south, it's led to huge cartel massacres in Guatemala, a skyrocketing murder rate in Honduras and more drugs on the street in El Salvador.").

89. See Nicolás, *supra* note 62.

90. Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 415 (2006).

IV. AN OVERVIEW OF THE 1951 REFUGEE CONVENTION AS APPLIED TO GANG-RELATED ASYLUM SEEKERS

Individuals seeking asylum from gang violence usually claim protection as refugees under the 1951 Refugee Convention.<sup>91</sup> Although an individual can pray for withholding of removal or invoke the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,<sup>92</sup> asylum provides the most protection and requires a lower burden of proof.<sup>93</sup> The 1951 Refugee Convention read with the 1967 Refugee Protocol sets out the legal definition of a refugee and the rights and entitlements that a refugee is owed.<sup>94</sup> The 1951 Refugee Convention defines a refugee as someone who,

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.<sup>95</sup>

In order for individuals to qualify as refugees under the 1951 Refugee Convention, they must satisfy the criteria delineated in this definition.<sup>96</sup> The states parties' inconsistent application of the 1951 Refugee Convention to those fleeing from gang violence results from the different interpretations of the necessary requirements for determining refugee status.<sup>97</sup>

Persecution by state actors is widely accepted as conferring refugee status.<sup>98</sup> However, in most gang-related asylum claims, the persecution involves nonstate actors.<sup>99</sup> The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states that persecution may “emanate from sections of the population that do not respect the

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91. Ruffer, *supra* note 11.

92. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

93. *See* Ruffer, *supra* note 11.

94. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]; Protocol Relating to the Status of Refugees art. I, *done* Oct. 4, 1967, 606 U.N.T.S. 267.

95. 1951 Refugee Convention, *supra* note 94, art. 1(A)(2).

96. *Id.*; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 28, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter *UNHCR Handbook*].

97. Ruffer, *supra* note 11.

98. *Id.*

99. *Id.*; *UNHCR Guidance Note*, *supra* note 4, ¶ 24.

standards established by the laws of the country concerned.”<sup>100</sup> It further states, “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”<sup>101</sup> Thus, for victims of gang-related violence, it is often necessary to establish that the state is unwilling or unable to provide protection to these individuals.<sup>102</sup> Protection needs to be real and effective, but the state is not expected to guarantee the highest possible standard.<sup>103</sup> In the case of Central America, the UNHCR explicitly states that *mano dura*-type policies are not automatically indicative of effective state protection, especially because these policies have been criticized for failing to deal effectively with gang violence.<sup>104</sup>

In addition to proving that nonstate actors are the appropriate agents of persecution for the purpose of the 1951 Refugee Convention, an individual seeking gang-related asylum must also show a well-founded fear of persecution as a result of being targeted on the basis of a protected ground.<sup>105</sup> Usually it is not difficult for an individual fearing gang-related violence to show that there is a well-founded fear of persecution.<sup>106</sup> It is difficult, though, for an individual to prove that their fear of persecution is related to one of the protected grounds.<sup>107</sup> This causal link is the most

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100. *UNHCR Handbook*, *supra* note 96, ¶ 65.

101. *Id.*

102. *UNHCR Guidance Note*, *supra* note 4, ¶ 25; 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*, ¶ 21, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Guidelines on Membership of a Particular Social Group*].

103. *UNHCR Guidance Note*, *supra* note 4, ¶ 27.

Factors that may be indicative of available State protection and may help adjudicators analyse claims include: efforts to reform and expand the criminal justice system; attempts to end the practice of social cleansing; and the establishment of witness protection programmes. Conversely, the following factors are indicative of a lack of effective State protection: lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs; a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.

*Id.* ¶ 28.

104. *Id.* ¶ 27 n.41; *see also supra* notes 82-87 and accompanying text.

105. Ruffer, *supra* note 11.

106. *Id.*; *see UNHCR Guidance Note*, *supra* note 4, ¶ 21.

107. Ruffer, *supra* note 11; *see UNHCR Guidance Note*, *supra* note 4, ¶ 29.

complex legal question in gang-related asylum claims and is the main cause of lack of uniformity in asylum jurisprudence worldwide.<sup>108</sup>

In cases where there is a risk of being persecuted at the hands of a non-State actor . . . for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.<sup>109</sup>

There are five protected grounds: race, religion, nationality, membership of a particular social group, and political opinion.<sup>110</sup> Gang-related asylum claims are most often brought under the grounds of membership of a particular social group, political opinion, or both, but the real controversy has been the different interpretations of what constitutes a particular social group.<sup>111</sup>

Thus, those seeking gang-related asylum generally must prove that “(1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control.”<sup>112</sup> States parties should assess gang-related asylum claims on a case-by-case basis, and their judicial bodies should take into consideration

the risks faced by the applicant, the severity and nature of the violence/human rights abuses suffered or feared, the causal link with one of the grounds enumerated in the refugee definition of the 1951 Convention, his/her involvement with gang activities as well as the level of available State protection in the country concerned.<sup>113</sup>

Although international law provides a space for recognition of gang-related asylum claims, ultimately, the decision to grant refugee status to a

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108. *UNHCR Guidance Note*, *supra* note 4, ¶ 64; Ruffer, *supra* note 11.

109. UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees*, ¶ 21, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter *UNHCR Guidelines on International Protection*].

110. 1951 Refugee Convention, *supra* note 94, art. 1(A)(2).

111. *UNHCR Guidance Note*, *supra* note 4, ¶ 31; see Ruffer, *supra* note 11. In recent years, the number and variety of refugee claims based on the “membership of a particular social group” ground set out in the 1951 Refugee Convention have increased dramatically. The social-group cases push the boundaries of refugee law. *UNHCR Guidelines on International Protection*, *supra* note 109, ¶ 21.

112. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013).

113. *UNHCR Guidance Note*, *supra* note 4, ¶ 18.

victim of gang-related violence lies in the hands of the state party adjudicating an individual's claim.<sup>114</sup>

V. PROTECTION OFFERED UNDER U.S. LAW FOR GANG-RELATED  
ASYLUM SEEKERS AS MEMBERS OF A PARTICULAR SOCIAL GROUP

It is not surprising that most of the gang-related asylum claims occur in the Western Hemisphere because the gang epidemic has such a strong foothold in Central America.<sup>115</sup> In recent years, Central Americans are increasingly making claims in the United States, where the greatest number of gang-related asylum claims have been tried.<sup>116</sup> Because of the volume and inconsistency of U.S. case law regarding gang-related asylum claims, using U.S. jurisprudence as a point of comparison with other nations' approaches will shed light on the lack of uniformity in gang-related asylum jurisprudence worldwide.<sup>117</sup> This Part focuses on the most problematic legal issue for these types of claims: how to establish a link between a fear of persecution and the protected ground of membership of a particular social group.

A. *Membership of a Particular Social Group*

Most individuals bring gang-related asylum claims on the ground that they will face gang violence based upon their membership of a particular social group.<sup>118</sup> The UNHCR defines "particular social group" as

a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>119</sup>

The UNHCR is also clear that a social group cannot be "defined exclusively by the persecution that the members of the group suffer or by a common fear of being persecuted."<sup>120</sup> The UNHCR defines social groups for the purposes of protection by their characteristics or social

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114. *Id.* ¶ 29.

115. Ruffer, *supra* note 11.

116. *Id.*

117. *Id.*

118. *UNHCR Guidance Note, supra* note 4, ¶ 31; *see* Ruffer, *supra* note 11.

119. *UNHCR Guidance Note, supra* note 4, ¶ 34.

120. *Id.* ¶ 35 (quoting *UNHCR Guidelines on Membership of a Particular Social Group, supra* note 102, ¶ 18).

perceptions.<sup>121</sup> Under the characteristics approach, an individual is a member of a particular social group if they share protected characteristics with that group, such as those that are immutable or fundamental to one's exercise of human rights.<sup>122</sup> The alternative approach is the social perception approach, whereby an individual is a member of a particular social group if society perceives that individual as a member of a "social group by reason of their origin, social background, or class."<sup>123</sup>

The UNHCR does provide some legal analysis regarding the states parties' application of these approaches to gang-related asylum claims.<sup>124</sup> Using the characteristics approach, the UNHCR notes that young people within a particular socioeconomic status are generally more susceptible to forcible recruitment and violent approaches by gangs because of characteristics that distinguish them from the rest of their community, such as their "young age, impressionability, dependency, poverty and lack of parental guidance."<sup>125</sup> In Central America, forcible recruitment of young people by gangs is especially prevalent.<sup>126</sup> Because of this, "age-based identification of a particular social group, combined with social status," should be relevant in the analysis.<sup>127</sup>

Past actions or experiences are also characteristics that can define a particular social group.<sup>128</sup> The UNHCR provides the example of refusal to join a gang, noting that it can be considered an "irreversible and thus immutable" characteristic sufficient for defining a particular social group.<sup>129</sup> Noting that this is a particularly relevant consideration in the case of individuals who have been forcibly recruited, the UNHCR Guidelines cite language used by the United States Board of Immigration Appeals (BIA): "[Y]outh who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed."<sup>130</sup>

The UNHCR also gives illustrative examples of when characteristics fundamental to one's conscience and exercise of human rights can be sufficient to establish membership in a particular social

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121. *Id.* ¶ 34.

122. *Id.* ¶¶ 36-40.

123. *Id.* ¶ 41.

124. *See id.* ¶¶ 34-35.

125. *Id.* ¶ 36.

126. *Id.*

127. *Id.* ("The immutable character of 'age' or 'youth' is in effect, unchangeable at any given point in time.").

128. *Id.* ¶ 37.

129. *Id.*

130. *Id.*

group.<sup>131</sup> One example is applicants who claim a fear of persecution as a result of pursuing their occupation.<sup>132</sup> In Central America, there are many cases of business owners and public transportation staff who suffer from extortion by gangs and have been the targets of violence.<sup>133</sup> The UNHCR notes, "Requiring an applicant to abandon his or her occupation in order to avoid persecution amounts to a violation of the right not to be arbitrarily deprived of the right to work."<sup>134</sup> Thus, the particular social group may be based on the applicant's occupation in cases "where disassociation from the profession is not possible or . . . would entail a renunciation of basic human rights."<sup>135</sup>

In applying the social perception approach, the UNHCR uses the example of imputed gang membership, which "may amount to being a member of a relevant social group in the case of youth or others who are erroneously perceived to be gang members but who, in fact, have no affiliation with a gang."<sup>136</sup> For example, when gangs exercise control over neighborhoods where the rule of law is weak, gangs are known to target young persons simply because they have a tie to that neighborhood.<sup>137</sup> Another example is when a gang targets a youth for being friends with a gang member.<sup>138</sup>

Although these definitions and examples provide some guidance, there is still a lack of consistent jurisprudence regarding gang-related asylum claims because domestic courts provide different interpretations of what constitutes a particular social group.<sup>139</sup> The most detailed discussions on this issue occur in cases decided in common law jurisdictions.<sup>140</sup> These cases display many different approaches used for defining "particular social group," which lead to conflicting

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131. *See id.* ¶¶ 38-40.

132. *Id.* ¶ 39.

133. *Id.*

134. *Id.*

135. *Id.* More controversial has been the UNHCR's analysis of family members in this context. The UNHCR Guidelines state:

An applicant who is a family member of a "gang resister" (or gang member) could also be persecuted for reasons of his/her family membership, for example, where the family has a known record of being opposed to a gang. In such cases, the applicant's "family" may be regarded as a relevant particular social group.

*Id.* ¶ 40.

136. *Id.* ¶ 42.

137. *Id.*

138. *Id.*

139. *Id.* ¶ 18; Ruffer, *supra* note 11.

140. Ruffer, *supra* note 11.



interpretations of gang-related asylum claims under the 1951 Refugee Convention.<sup>141</sup>

*B. U.S. Jurisprudence Defining “Particular Social Group”*

Under U.S. jurisprudence, in order for a court to consider an individual as part of a particular social group, the court must find both immutable or fundamental characteristics and social visibility.<sup>142</sup> This is in direct conflict with the stance taken by the UNHCR, which states that a group need only be identifiable through one of two alternative approaches.<sup>143</sup> The foundational decision for gang-related asylum claims based on membership of a particular social group, is *Matter of Acosta*.<sup>144</sup> In *Acosta*, the BIA defined “particular social group” as a “group of persons all of whom share a common, immutable characteristic . . . 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.”<sup>145</sup> Despite this definition, U.S. courts have been inconsistent when adjudicating gang-related asylum claims based on membership of a particular social group.<sup>146</sup> This inconsistency is evident in the conflicting interpretations of what constitutes a particular social group in cases decided by the United States Courts of Appeals for the Seventh and Ninth Circuits.<sup>147</sup>

The leading Seventh Circuit case regarding the issue is *Ramos v. Holder*.<sup>148</sup> In that case, the petitioner was a former gang member who had joined MS-13 at the age of fourteen and claimed that if the court deported him to El Salvador, the gang would kill him for refusing to rejoin the gang and that the police would be unable or unwilling to protect him.<sup>149</sup> Although, as a general principle, membership in a criminal gang does not constitute membership in a particular social group because public policy bars protection of such criminals, the court held that former gang membership was a cognizable social group for

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141. *Id.*

142. *Id.*

143. *UNHCR Guidance Note, supra* note 4, ¶ 34.

144. 19 I.& N. Dec. 211 (B.I.A. 1985).

145. *Id.* at 233.

146. Ruffer, *supra* note 11.

147. Memorandum from Joseph E. Langlois, Chief, Asylum Div., U.S. Citizenship & Immigration Serv., to All Asylum Office Staff, Notification of *Ramos v. Holder*: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit (Mar. 2, 2010), <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf>.

148. 589 F.3d 426 (7th Cir. 2009).

149. *Id.* at 428.

asylum purposes.<sup>150</sup> The court noted that if the petitioner could change those characteristics that identified him with a group, without significant hardship, then he should be required to do so rather than be allowed to stay in the United States.<sup>151</sup> However, the court found that the gang was a group and being a former member of a group was “a characteristic impossible to change, except perhaps by rejoining the group.”<sup>152</sup>

The Ninth Circuit, by contrast, has denied asylum to individuals fearing gang-related persecution in a string of decisions.<sup>153</sup> In *Santos-Lemus v. Mukasey*, the court found that the claimed social group of “a young man in El Salvador resisting gang violence unstoppable by the police” did not have sufficient social visibility and particularity to allow for relief.<sup>154</sup> In *Herrera-Escobar v. Holder*, the court held that resistance of criminal gang extortion by the petitioner, a bus employee, did not make her eligible for asylum based on her membership in a particular social group.<sup>155</sup> In *Ramos-Lopez v. Holder*, the court also held that “young Honduran men who resisted recruitment into Central American gang[s] did not ‘constitute a particular social group.’”<sup>156</sup>

The most recent Ninth Circuit case on the issue is *Henriquez-Rivas v. Holder*, the holding of which seems to indicate that there has been a shift toward more flexibility in defining “particular social group.”<sup>157</sup> That case involved a claim by a woman in El Salvador who sought asylum because she had been a witness who testified against gang members and feared death at the hands of the *maras*.<sup>158</sup> The court held that the petitioner was part of a particular social group.<sup>159</sup> The court reasoned, “When a particular social group is not visible to society in general, [such as in this case,] social visibility may be demonstrated by looking to the perceptions of persecutors.”<sup>160</sup> The court also noted that on an application of asylum, the particularity requirement is separate from the requirement of social visibility and focused ultimately on whether the court could accurately describe the group in a manner sufficiently distinct such that the society in question would recognize the group as a discrete class of

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150. *Id.* at 429, 431.

151. *Id.* at 428.

152. *Id.* at 429.

153. Memorandum from Joseph E. Langlois to All Asylum Office Staff, *supra* note 147, at 2.

154. 542 F.3d 738, 741 (9th Cir. 2008).

155. 361 F. App'x 781, 782 (9th Cir. 2010).

156. 563 F.3d 855, 855 (9th Cir. 2009).

157. 707 F.3d 1081 (9th Cir. 2013).

158. *Id.* at 1083.

159. *Id.*

160. *Id.* at 1090.

persons.<sup>161</sup> Thus, witnesses who testify against gang members may constitute a particular social group despite a lack of social visibility.<sup>162</sup>

The case law in other U.S. circuits also illustrates the courts' struggle in defining "particular social group" in the context of gang-related asylum claims. In *Orellana-Monson v. Holder*, two sibling petitioners sought asylum, claiming that the law protected them as a particular social group because of their young age and opposition to gang membership.<sup>163</sup> The United States Court of Appeals for the Fifth Circuit rejected their claim, finding that Salvadorian males between the ages of eight and fifteen who gangs recruited but who refused to join and younger siblings of members of that proposed group did not constitute a particular social group.<sup>164</sup> The court reasoned that because the proposed group lacked particularity and social visibility, they did not fall under the umbrella of the protected ground.<sup>165</sup> The facts cited in support of this conclusion were that gangs targeted a broad swath of young men in society without any particular "political orientation, interests, lifestyle, or other identifying factors" and that the proposed group of family members was even less narrow of a group.<sup>166</sup> The court reasoned that although gangs often recruited young men, young men who refused to join a gang did not constitute a distinctive group perceived by society.<sup>167</sup> The court reiterated:

In order to establish persecution based on membership in a particular group, the petitioners must show that they are members "of a group of persons that share a common immutable characteristic that they either cannot change or should not be required to change because it is 'fundamental to their individual identities or consciences.'"<sup>168</sup>

One case decided by the United States Court of Appeals for the Sixth Circuit is particularly interesting because it directly mentions the

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161. *Id.* at 1091.

162. *Id.* at 1081, 1092.

163. 685 F.3d 511, 515-16 (5th Cir. 2012).

164. *Id.* at 522.

165. *Id.* at 521-22.

166. *Id.*

167. *Id.* at 522.

168. *Id.* at 518 (quoting *Mwembie v. Gonzales*, 443 F.3d 405, 414-15 (5th Cir. 2006) (internal quotation marks omitted)). *But see* *Matter of S-E-G*, 24 I. & N. Dec. 579 (B.I.A. 2008) ("Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities nor the family members of such Salvadoran youth constitute a 'particular social group.'").

UNHCR Guidelines.<sup>169</sup> When assessing the gang-related asylum claim of a Guatemalan petitioner, the court noted that the UNHCR Guidelines are not binding<sup>170</sup> and that it should defer to the BIA, which has occasionally distinguished its interpretation of the 1951 Refugee Convention and the 1967 Refugee Protocol from that of the UNHCR.<sup>171</sup>

This consideration was important to the court's analysis because the UNHCR takes the United States Court of Appeals for the Second Circuit's approach of considering the external perception of the group as an additional factor in the overall calculus of what makes up a particular social group.<sup>172</sup> The Sixth Circuit ultimately held that tattooed youth did not constitute a social group, despite the fact that the applicant argued that youths with gang tattoos were being extrajudicially executed in Honduras.<sup>173</sup> The court noted that although the definition of "particular social group" is a flexible one, it is also not without limits.<sup>174</sup>

*C. Approaches Adopted by Other Nations To Define "Particular Social Group"*

U.S. jurisprudence illustrates the difficulty that courts face in determining whether an individual belongs to a particular social group and the constant shifting standard for making those findings. The United States' neighbor, Canada, has not had the same volume of Central American gang-related asylum claims, but it has developed a judicial standard in analogous contexts for defining a particular social group.<sup>175</sup> The Canadian approach focuses on characteristics of a group, rather than social visibility.<sup>176</sup> In contrast to the Canadian courts, Australian courts focus on social perception to define a particular social group, looking to external factors, namely, whether society perceives the group as distinct, rather than identifying some protected characteristic that defines the group.<sup>177</sup> Applying this approach to a Central American gang-related asylum claim, an Australian Tribunal held, in contrast to the Ninth Circuit,

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169. *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 547 (6th Cir. 2003), *modified*, *Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006).

170. *Id.* at 578.

171. *Id.*

172. *Id.*

173. *Id.* at 539.

174. *Id.* at 549.

175. Ruffer, *supra* note 11.

176. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group,'* in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 263, 268-69 (Erika Feller et al. eds., 2003).

177. *Id.* at 271.

that the Salvadorian applicant for asylum was a member of a particular social group: “bus, public transport and truck drivers.”<sup>178</sup> The bus driver had applied for asylum because he feared the *maras*, whom he claimed targeted him for robberies and criminal activity primarily because he was a bus driver.<sup>179</sup>

Despite these nations’ differing approaches, their adjudicatory bodies all grapple with the same legal issue presented by gang-related asylum cases: how to establish a link between a fear of persecution and the protected ground.<sup>180</sup>

## VI. CONCLUSION

In conclusion, given the volume and the severity of gang-related violence in Central America, there should be more flexibility and uniformity in the standard for analyzing gang-related asylum claims in order to allow the 1951 Refugee Convention to extend to these victims. Although there is reluctance to extend the 1951 Refugee Convention to other groups, in the case of Central American gang-related asylum seekers, the extension is appropriate. The seemingly complete failure of Central American nations to curb the violence, the accusations against them of being complicit with gang members, and the new links these gangs have formed with the drug cartels leave these nations powerless to help their people and undermine the public’s confidence in the government’s ability to protect them.

In this climate, the requirements for asylum as a member of a particular social group should encompass those segments of the population most vulnerable to gang violence. The international community should respond to this gang epidemic and the security threat it poses, especially because some consider gangs such as MS-13 and M-18 to be terrorist groups.<sup>181</sup> The United States in particular should move toward uniformity in its laws, so that individuals seeking asylum have a better understanding of their expectations.

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178. Compare *RRT Case No. 0906782* [2009] RRTA 1063, ¶ 84 (Refugee Review Trib. (Austl.)), with *Herrera-Escobar v. Holder*, 361 F. App’x 781, 782 (9th Cir. 2010).

179. *RRT Case No. 0906782* [2009] RRTA 1063, ¶ 32.

180. Ruffer, *supra* note 11.

181. FRANCO, *supra* note 24, at 5.