



## Gang and Cartel Violence: A Reason To Grant Political Asylum from Mexico and Central America

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### I. INTRODUCTION

In Cary Fukunaga's 2009 film, *Sin Nombre*, Central American immigrants ride through the Mexican countryside on top of slow-moving railroad cars with hopes of reaching the United States undetected.<sup>1</sup> Some of the film's characters are fleeing poverty, but others are running for their lives. These migrants fear persecution from violent, armed gangs in their home countries. *Sin Nombre* portrays a harsh reality experienced by many asylum-seekers from Central America and Mexico.

And the threat appears to be growing. According to the United Nations High Commissioner for Refugees (UNHCR), from 2009 to 2011, the number of asylum applications from Mexico in the United States more than tripled.<sup>2</sup> The number of applicants from El Salvador, Guatemala, and Honduras increased significantly as well.<sup>3</sup> Despite growing drug and gang violence in the region, U.S. immigration authorities have largely rejected these claims; only 1.1% of claims from Mexico were granted refugee status in 2011.<sup>4</sup> In comparison, 35% of the applications from China and 67% of the applications from Iraq were granted in the same year.<sup>5</sup>

The United States has not adopted coherent standards on the legal status and rights of asylum-seekers from Mexico and Central America. Individuals with

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1. *SIN NOMBRE* (Scion Films 2009).
2. In 2009, there were 2422 applications from Mexico, 2439 from El Salvador, 1891 from Guatemala, and 902 from Honduras. U.N. High Comm'r for Refugees, *Asylum Levels and Trends in Industrialized Countries*, 2010, at 35 (Mar. 28, 2011), <http://www.unhcr.org/4d8c5b109.html> [hereinafter UNHCR, *Asylum Report 2011*]. In 2010 there were 4225 applicants from Mexico, 2703 from El Salvador, 2235 from Guatemala, and 1036 from Honduras. *Id.* at 37. In 2011, there were 8186 applications from Mexico, 4011 from El Salvador, 3363 from Guatemala, and 1528 from Honduras. U.N. High Comm'r for Refugees, *Asylum Levels and Trends in Industrialized Countries*, 2011, at 45 (Mar. 27, 2012), <http://www.unhcr.org/4e9beaa19.html> [hereinafter UNHCR, *Asylum Report 2010*].
3. See UNHCR, *Asylum Report 2010*, *supra* note 2.
4. See Exec. Office for Immigration Review, *FY 2011 Statistical Year Book*, U.S. DEP'T OF JUST. (Feb. 2010), <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.
5. See *id.* app. at 2, 4.

potentially legitimate claims include those who resist gang and cartel recruitment, business owners unwilling to meet extortion demands, witnesses to crimes, law enforcement agents targeted by gangs and cartels, human rights activists, and other individuals who do not conform to gang and cartel practices because of their opposition to these groups.<sup>6</sup> Legal experts have commented that although such asylum-seekers have a significant fear of returning to their home countries, their experience does not fit neatly into the one contemplated by the 1951 Refugee Convention<sup>7</sup>—which set out the legal definition of “refugee” under international law—and so their claims are often denied.

This Essay argues that the United States should view the migrants fleeing violence in Mexico and Central America as refugees. This Essay will describe the nature of the threat from gangs and cartels, present the major arguments for granting gang-based asylum under international refugee law, and describe how the U.S. courts and government have interpreted those arguments. The final section of this Essay will offer an interpretation of refugee law that both bridges the gap between traditional interpretations of the Refugee Convention and also addresses a pressing need to adapt its original meaning to present-day conflicts in Latin America. This approach will establish a multifactor test for recognizing gang-based political asylum, including: the level of violence, the probability of harm, the state’s degree of sovereign control over its territory, the existence of a political conflict between the state and a nonstate actor, the asylum-seeker’s opposition to a political element, and the level of state protection. The test elements are drawn from a state’s obligations under international refugee law, combining political asylum, human rights, generalized violence, and *non-refoulement* principles.

## II. GANG AND CARTEL VIOLENCE IN MEXICO AND CENTRAL AMERICA

Although many Latin American nations face gang problems, today the largest, most violent, and most organized gangs operate in Central America and Mexico. The two principal gangs in Central America are the 18th Street gang (also known as “M-18”), and the *Mara Salvatrucha* (also known as “MS-13”).<sup>8</sup> Immigrants fleeing a bloody civil war in El Salvador formed these gangs in the 1980s in Los Angeles, initially, as a defense against already-established Chicano street gangs.<sup>9</sup>

In the 1990s, the U.S. government began deporting undocumented persons and non-citizens convicted of felonies to their countries of origin in large numbers. In 1997, after significant legal reforms designed to expel those

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6. U.N. High Comm’r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 4-5 (Mar. 31, 2010), <http://www.unhcr.org/refworld/docid/4bb21fa02.html> [hereinafter UNHCR, *Guidance Note*].

7. See U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The United States is not party to the 1951 Convention, but is party to the 1967 Protocol. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

8. CLARE RIBANDO, CONG. RESEARCH SERV., RS22141, GANGS IN CENTRAL AMERICA 4 (2005), <http://fpc.state.gov/documents/organization/47140.pdf>.

9. Victor J. Blue, *Gangs Without Borders*, SFGATE (Apr. 2, 2006, 4:00 AM), <http://www.sfgate.com/crime/article/Gangs-without-Borders-Violent-Central-American-2520854.php>.

individuals came into effect,<sup>10</sup> the number of deportations drastically increased. From 1998 to 2005, the U.S. deported more than 200,000 individuals to Central America.<sup>11</sup> More than 90% of the deportees were sent to El Salvador, Guatemala, and Honduras.<sup>12</sup> The criminal justice systems in these Central American countries were unable to handle migrants returning en masse. Many gang members reestablished former gang ties in Central America, giving birth to MS-13 and M-18 as they are known today.<sup>13</sup>

The main trafficking organizations operating in Mexico today are the Sinaloa cartel, the Gulf cartel, the Beltran Leyva Organization, the Arrellano Felix Organization/Tijuana cartel, the Vicente Carrillo Fuentes Organization/Juarez Cartel, and Los Zetas.<sup>14</sup> Drug trafficking organizations date back to the early twentieth century in Mexico and were already well established in the U.S. market by mid-century.<sup>15</sup> During a seventy-one-year period of one-party rule in Mexico (1929-2000) by the Institutional Revolution Party (PRI), the government was centralized and hierarchical, and it tolerated the drug trafficking organizations.<sup>16</sup> Through the 1990s, the policy of the Mexican government towards the drug cartels was one of accommodation facilitated by widespread corruption.<sup>17</sup>

The first modern change of political party power in Mexico occurred in 2000, with the election of Vicente Fox of the conservative National Action Party (PAN). In 2006, the second elected PAN president, Felipe Calderón, took office and began a massive crackdown on the cartels, deploying more than 45,000 troops and federal police to drug trafficking areas.<sup>18</sup> Calderón claimed the use of the Mexican military was necessary due to systematic corruption in the local and state police departments.<sup>19</sup> Watchdog organizations, however, allege that the Mexican military committed serious human rights violations during Calderón's campaign, including forced disappearances, killing, torture, and rape.<sup>20</sup> In July 2012, Mexico elected a new president from the PRI party, Enrique Peña Nieto, and his policy towards drug cartels is yet to be seen.<sup>21</sup>

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10. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
  11. *2011 World Development Report: Conflict, Security and Development*, WORLD BANK 78 (2011), [http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011\\_Full\\_Text.pdf](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf).
  12. *Id.*
  13. *Central American Gang-Related Asylum: A Resource Guide*, WASH. OFFICE ON LATIN AM. 2 (2008), <http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf>.
  14. JUNE S. BEITTEL, CONG. RESEARCH. SERV., R40582, MEXICO'S DRUG-RELATED VIOLENCE, 4 (2009).
  15. JUNE S. BEITTEL, CONG. RESEARCH. SERV., R41576, MEXICO'S DRUG-TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE RISING VIOLENCE 4 (2011).
  16. *Id.*
  17. *Id.* at 2.
  18. *Id.* at 1.
  19. Steve Fainaru & William Booth, *As Mexico Battles Cartels, the Army Becomes the Law*, WASH. POST, Apr. 2, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040104335.html>.
  20. Amnesty Int'l, *Amnesty Int'l Annual Report 2012*, POL 10/001/2012 (2012), at 234; *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs,"* HUMAN RIGHTS WATCH (Nov. 9, 2011), [http://www.hrw.org/sites/default/files/reports/mexico1111webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf); *Mexico: Thousands Missing in Drugs War Says CNDH*, BBC NEWS, Apr. 11, 2011, <http://www.bbc.co.uk/news/world-latin-america-12948840>.
  21. Ioan Grillo & Pablo Garibian, *Drug War Fury Awaits Mexico's Pena Nieto*, REUTERS, July 5, 2012, <http://www.reuters.com/article/2012/07/05/us-mexico-election-drugs-idUSBRE86418320120705>.

Despite government efforts, gang and drug cartel influence in Mexico and Central America is increasing. The U.S. Southern Command estimates that the groups have more than 70,000 members.<sup>22</sup> Other sources estimate that there are as many as 200,000 gang members in Central America.<sup>23</sup> Even the lower estimate indicates that there are more gang members than military personnel in the region.<sup>24</sup> Similarly, estimates of the number of people employed as “foot soldiers” by the two deadliest drug-trafficking organizations in Mexico are around 100,000—close to the number of Mexican military personnel.<sup>25</sup>

The resulting level of violence in Mexico and Central America has been extremely high. According to U.S. military officials, the conflict in Mexico and Central America has come to rival the conflicts in Iraq and Afghanistan in terms of the scale of violence, spending and weapons.<sup>26</sup> The United Nations reports that the “Northern Triangle (El Salvador, Honduras, and Guatemala) has the highest murder rate of any region in the world, and very high rates of other forms of violent crime.”<sup>27</sup> In Mexico, since Calderón’s campaign began in 2006, more than 50,000 people have been killed as a result of drug-related violence.<sup>28</sup>

### III. BASIS FOR PROTECTION FROM GANGS AND CARTELS UNDER U.S. LAW

The prevalence of gang violence in the region has been accompanied in recent year by a steadily growing number of asylum applications in the United States.<sup>29</sup> These applicants are individuals who resist gang demands, including young men who resist recruitment, women who are victims of sexual violence or intimidation, human rights and church activists, those who resist extortion, law-enforcement agents, gang members forced to join gangs and trying to leave, and others.<sup>30</sup>

These individuals fleeing persecution from gangs or drug-trafficking cartels in Mexico or Central America might claim refugee, *non-refoulement*, or Convention Against Torture (CAT) protection in the United States. The international legal definition of refugee is incorporated into United States law, with minor changes, in the Immigration and Nationality Act (INA), as amended by the Refugee Act of 1980.<sup>31</sup> The definition contains three core elements: (1) a

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22. RIBANDO, *supra* note 8, at 1.

23. *See, e.g.*, Oliver Jütersonke, Robert Muggah & Dennis Rodgers, *Gangs, Urban Violence, and Security Interventions in Central America*, 40 SECURITY DIALOGUE 373, 377 (2009).

24. *Id.*

25. Sara A. Carter, *100,000 Foot Soldiers in Cartels: Numbers Rival Mexican Army*, WASH. TIMES, Mar. 3, 2009, <http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels/>.

26. *Id.*; Anna Mulrine, *Pentagon: Central America “Deadliest” Non-War Zone in the World*, CHRISTIAN SCI. MONITOR, Apr. 11, 2011, <http://csmonitor.com/usa/military/2011/0411/pentagon-central-america-deadliest-non-war-zone-in-the-world>.

27. U.N. Office on Drugs and Crime, *Crime and Instability: Case Studies of Transnational Threats*, 22 (Feb. 2010), [http://www.unodc.org/documents/frontpage/Crime\\_and\\_instability\\_2010\\_final\\_low\\_res.pdf](http://www.unodc.org/documents/frontpage/Crime_and_instability_2010_final_low_res.pdf).

28. Randal C. Archibold & Damien Cave, *Candidates in Mexico Signal a New Tack in the Drug War*, N.Y. TIMES, June 10, 2012, <http://www.nytimes.com/2012/06/11/world/americas/us-braces-for-mexican-shift-in-drug-war-focus.html>.

29. UNHCR, *Asylum Report 2011*, *supra* note 2, at 43, 45; UNHCR, *Asylum Report 2010*, *supra* note 2, at 35, 37.

30. UNHCR, *Guidance Note*, *supra* note 6, at 4-5.

31. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 108 (codified as amended at 8 U.S.C. § 1158(a) (2008)).

well-founded fear of persecution; (2) a nexus between the persecution and a Convention ground including race, religion, nationality, membership in a particular social group, or political opinion; and (3) a lack of state protection.

Additionally, Article 33(1) of the Refugee Convention codifies the principle of *non-refoulement*, which forbids a state from rendering a victim of persecution to her persecutor.<sup>32</sup> States party to the Refugee Convention or the 1967 Protocol are under no obligation to grant asylum to refugees, however. Under Article 33(1), they are only prohibited from expelling or returning refugees to a country where they would face persecution on enumerated grounds.

Withholding of removal satisfies the obligation of *non-refoulement* under U.S. law.<sup>33</sup> An applicant for withholding of removal, however, must meet a higher burden of proof than for asylum—establishing that the applicant will “more likely than not”<sup>34</sup> be subjected to persecution or that there is a “clear probability of persecution.”<sup>35</sup> Refugees are given additional benefits such as employment authorization, an opportunity to naturalize, and various social services that are not available to those granted withholding of removal.

Finally, a person fleeing gang violence in Central America or Mexico might qualify for complimentary (outside of the Refugee Convention, and protected ground analysis) protection under the CAT. Article 3 of the CAT prohibits the removal of an individual to a state where substantial grounds exist for believing that he or she would be at risk of being tortured.<sup>36</sup>

#### A. *Protected Ground: Particular Social Group*

Recent gang-based asylum judicial decisions and scholarship focus heavily on the “particular social group” persecution ground.<sup>37</sup> The UNHCR definition of “particular social group” contains two important characterizations: immutability (members of the group share a trait that is innate) and social perception (society views members of the group as such).<sup>38</sup> The U.S. Board of Immigration Appeals (BIA) has held that immutability,<sup>39</sup> social perception or “visibility,”<sup>40</sup> and particularity (only a small subset of people belong to the group),<sup>41</sup> are all relevant factors in particular social group analysis.

32. Refugee Convention, *supra* note 7, art. 33(1).

33. 8 U.S.C. § 1231(b)(3) (2006).

34. *INS v. Stevic*, 467 U.S. 407, 424 (1984).

35. *Id.* at 430.

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

37. *See, e.g.*, Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5, 6 (2010); Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827 (2008); Michele A. Voss, *Young and Marked for Death: Expanding the Definition of ‘Particular Social Group’ in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235 (2005); Elyse Wilkinson, *Examining the Board of Immigration Appeals’ Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387 (2010).

38. U.N. High Comm’r for Refugees, *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,”* HCR/GIP/02/02 (May 7, 2002).

39. *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

40. *In re A-M-E and J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

41. *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006).



In an influential 2008 decision, *Matter of S-E-G-*, the BIA elevated “social visibility” from a factor in the determination of a particular social group to a requirement.<sup>42</sup> Therefore, those opposing gangs were found to not be eligible for asylum because it was impossible to distinguish them from others who did not, as society did not view them as belonging to a separate group. While the Sixth and Seventh Circuits have rejected social visibility as a requirement,<sup>43</sup> the First and Ninth Circuit upheld the BIA’s requirement,<sup>44</sup> and it still appears to be a serious impediment to gang-based asylum claims.

### B. *Protected Ground: Political Opinion*

A lesser-discussed ground for making gang-related asylum claims, and the ground this Essay will focus on, is the “political opinion” ground. This ground is often overlooked—perhaps because scholars believe it is settled—as compared to the more malleable ground of membership in a social group.<sup>45</sup> While the particular social group category has been defined by substantive factors (for example, visibility and particularity) the contours and elements of political opinion have not been as well defined.

Some favorable case law for political opinion gang-based asylum claims exists at the Immigration Judge (IJ) level,<sup>46</sup> although the BIA has yet to make a favorable ruling on such claims,<sup>47</sup> and the Eighth and Ninth Circuits recently rejected an anti-gang political opinion claim.<sup>48</sup> The BIA rejected the political opinion asylum claim in *Matter of S-E-G-*. However, it did not take into account historical, political, and social realities of the gang problem in Central America and Mexico today when interpreting the notion of political opinion. A cogent framework for analyzing this ground in greater depth is clearly warranted; this Essay will describe the elements of political opinion asylum using a holistic approach.

## IV. DEFINING AND UNDERSTANDING POLITICAL OPINION IN THE MEXICAN AND CENTRAL AMERICAN CONTEXT

The INA does not define “political opinion,” and so the BIA must give shape to the amorphous term through a process of case-by-case adjudication.<sup>49</sup> According to the UNHCR’s *Guidelines on Internal Protection*, the notion of

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42. *In re S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); see Harris & Weibel, *supra* note 37, at 5.

43. See, e.g., *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

44. *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010); *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010); *Ramos-Lopez v. Holder*, 563 F.3d 855, 858-62 (9th Cir. 2009).

45. Elizabeth James, *Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33 N.C. J. INT’L L. & COM. REG. 455, 457 (2008).

46. David L. Cleveland, *Two New Gang-Based Asylum Victories*, IMMIGRATION DAILY, Apr. 17, 2008, <http://www.ilw.com/articles/2008,0522-cleveland.shtm> (reporting a November 2007 Decision by IJ Klein in Boston in which respondent’s father “had expressed opposition to” the gang’s illegal activities and to “the system of impunity that exists in [El Salvador] . . . [which resulted in] Respondent [being] targeted on account of a political opinion, that of her father, imputed to the Respondent”).

47. See Jeffrey Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 418 (2006).

48. *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577-79 (8th Cir. 2009); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 746-47 (9th Cir. 2008).

49. *Ramos-Lopez*, 563 F.3d at 862.

“political opinion should be understood in the broad sense to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.”<sup>50</sup> Also, according to the UNHCR, the ground needs to be interpreted “to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin.”<sup>51</sup>

I argue that objecting to gang and cartel activities, or refusing to join a gang because one opposes their activities, may amount to a political opinion. This is because, in the context of Central America and Mexico, powerful gangs and cartels have de facto control over a significant amount of territory and directly influence state and government officials, competing with them for control of the state.<sup>52</sup> Furthermore, expressing opposition to a state’s gang-related policies could amount to a political opinion because states are involved in a battle for societal control with gangs.

Max Manwaring describes the political nature of gangs in his study, *Street Gangs: The New Urban Insurgency*. According to Manwaring:

We traditionally think of insurgency as primarily a military activity, and we think of gangs as a simple law enforcement problem. Yet insurgents and third generation gangs are engaged in a highly complex political act—political war. . . . [R]ather than directly competing with a nation-state, sophisticated and internationalized street gangs and their . . . allies can use a mix of complicity, indifference, corruption, and violent intimidation to co-opt and seize control of a state or a portion of a nation-state . . . .<sup>53</sup>

Strategic studies experts Robert J. Bunker and John P. Sullivan apply the political gang violence analysis to the Mexican drug war.<sup>54</sup> According to Bunker, the stages in cartel development are the following: aggressive competitor, subtle co-opter, and criminal state successor.<sup>55</sup> Bunker describes how the Mexican government has been co-opted by the cartels, and how the two groups are competing for sovereign control:

[A] dual sovereignty [is] arising along with varying mixtures of legitimate and illegitimate structures in the hundreds of “zones of

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50. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 32, U.N. Doc HCR/GIP/02/01 (May 7, 2002), <http://www.unhcr.org/refworld/docid/3d36f1c64.html>.

51. UNHCR, *Guidance Note*, ¶ 84 (citing No. 76044, slip op. (Refugee Status App. Auth. Sept. 11, 2008) (N.Z.)), <http://www.unhcr.org/refworld/pdfid/48d8a5832.pdf>.

52. Joint Policy and Research Forum, *The Hybrid Threat: Crime, Terrorism, and Insurgency in Mexico*, U.S. ARMY WAR COLLEGE (Oct. 20, 2011), <http://www.csl.army.mil/usacsl/publications/HybridThreatMonographInternetVersion.pdf>.

53. Max G. Manwaring, *Street Gangs: The New Urban Insurgency*, STRATEGIC STUDIES INSTITUTE (Mar. 2005), <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub597.pdf>.

54. Robert J. Bunker & John P. Sullivan, *Extreme Barbarism, a Death Cult, and Holy Warriors in Mexico: Societal Warfare South of the Border?*, SMALL WARS J. (2011), <http://smallwarsjournal.com/blog/journal/docs-temp/769-bunkersullivan.pdf>.

55. Robert J. Bunker, *Criminal (Cartel & Gang) Insurgencies in Mexico and the Americas: What You Need to Know, Not What You Want To Hear*, SMALL WARS J. BLOG 4-5 (Sept. 15 2011, 4:32 AM), <http://smallwarsjournal.com/blog/criminal-insurgencies-in-mexico-and-the-americas>.

impunity” found across Mexico. No one in these locales know [sic] who to trust. Many persons assume dual roles, seeming to representing [sic] the Federal government on the one hand and the cartel presently holding local power on the other. Narco (criminal) cities are emerging in Mexico with Nuevo Laredo the largest and most pronounced. In cities not as far gone such as Ciudad Juárez, anarchy reigns with tens of thousands of homes now left vacant and as many as 200,000 people having fled that city.<sup>56</sup>

The analysis by Manwaring, Bunker and Sullivan of the gang and cartel phenomenon is convincing because it captures the reality of war, insurgency and power struggles today. Modern warfare and political confrontation are increasingly asymmetrical, informal, and stem from a wide range of social issues, in particular the increased power of nonstate actors vis-à-vis the state. Basing the description of the political conception of asylum on a competition for control of the state, level of violence, and organization, as strategic international studies scholars do, also avoids granting preference to refugees escaping from certain types of regimes.

A. *Elias Zacarias, Gang Recruitment, and Political Asylum*

Instead of looking to social and political factors in making its determination on the nature of political asylum, the BIA hastily applies precedent to deny asylum to Central Americans who resist gang recruitment. The U.S. Supreme Court case *INS v. Elias-Zacarias* concerned an eighteen-year-old Guatemalan boy who refused to join a guerilla group that came to his home.<sup>57</sup> When the soldiers said they would return for him, he fled the country in fear and claimed political opinion asylum in the United States.<sup>58</sup> In *S-E-G-* the BIA explains that in *Elias-Zacarias*, the respondent “failed to show . . . a political motive in resisting recruitment by guerillas . . . Rather, he testified that he refused to join the guerillas because he was afraid that the Guatemalan Government would retaliate against him and his family.”<sup>59</sup> Therefore, the BIA reasoned that petitioners resisting MS-13 recruitment could not be considered refugees because they only resisted recruitment and “were [not] politically active [and did not make] any anti-gang political statements.”<sup>60</sup> The BIA thus ratcheted up the standard established in *Elias-Zacarias* from the requirement that one’s motivation for opposing recruitment be more than just fear, to the requirement that one had to make anti-gang political statements or actively oppose gangs to be eligible for asylum. The interpretation advanced by the BIA only allows asylum to be granted to those who openly put themselves and their families in danger to oppose gangs,<sup>61</sup> and would not be consistent with the protection afforded to people with other political opinions.

In *Martinez-Buendia v. Holder* the Seventh Circuit recently offered a different interpretation of *Elias-Zacarias*:

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56. *Id.* at 11.

57. *INS v. Elias-Zacarias*, 502 U.S. 478, 480 (1992).

58. *Id.*

59. *In re S-E-G-*, 24 I. & N. Dec. 579, 588-89 (B.I.A. 2008).

60. *Id.* at 589.

61. Harris & Weibel, *supra* note 37, at 9.



*Elias-Zacarias* does not stand for the proposition that attempted recruitment by a guerilla group will never constitute persecution on account of the asylum seeker's political beliefs. Rather, *Elias-Zacarias* instructs courts to carefully consider the factual record of each case when determining whether the petitioner's fear of future persecution due to his refusing recruitment attempts constitutes political persecution.<sup>62</sup>

Applying this reasoning to the Central American and Mexican context, one who avoids gang recruitment would not automatically be deemed to have done so for political reasons. If, however, review of the facts shows the asylum-seeker opposed gangs because he disagreed with a gang and its activities (as at least one of his motivations), then he might very well have a legitimate asylum claim. Furthermore, the Seventh Circuit's interpretation of *Elias-Zacarias* would not reduce the precedent to a mere tautology because the case would still stand for the proposition that resisting recruitment does not *automatically* demonstrate a political opinion or an imputed political opinion.

Even if the applicant does not make express statements about an anti-gang political opinion, gang members could nonetheless impute that opinion to the individual. This interpretation of political opinion is supported by the First Circuit's analysis in *Vazquez v. INS*.<sup>63</sup> According to the court, political opinion can be imputed to the applicant taking any action or making any particular statement himself.<sup>64</sup> A refusal to give into the demands of gangs could be viewed by the gangs as an act of defiance and general opposition to their power in the country.

#### B. *Anti-gang and Cartel Opinion as Political Opinion*

Even if victims of gang persecution organized and became politically active, or expressed opposition to gangs publicly, *S-E-G-* still suggests that a gang-based claim on the political opinion asylum ground would be denied because the BIA would not equate an anti-gang opinion with a political opinion.<sup>65</sup> In *S-E-G-*, the BIA did not address the view that an anti-gang opinion can be political, and often involves taking a stance towards a powerful actor in the country.<sup>66</sup>

Gang-based asylum advocates have argued that "gangs, through their illegal actions, can be assumed to be anti-government and against the rule of law . . . [T]herefore . . . those who oppose gangs may do so . . . based on . . . beliefs in the rule of law."<sup>67</sup> That argument characterizes the anti-crime opinion as a political opinion. Advocates likely advance this argument because immigration judges accepted it before *S-E-G-* was decided.<sup>68</sup> However, supporters of gang-based asylum claims do a disservice to their cause by claiming the political opinion of those opposing gangs is anti-crime. Characterizing an anti-

62. *Martinez-Buendia v. Holder*, 616 F.3d 711, 716 (7th Cir. 2010).

63. 177 F.3d 62, 65 (1st Cir. 1999).

64. *Id.*

65. *Harris & Weibel*, *supra* note 37, at 9.

66. *See Manwaring*, *supra* note 53.

67. *Harris & Weibel*, *supra* note 37, at 9-10.

68. *See In re Hessmir Sharon Orozco-Polanco*, File No. A75-244-012, Executive Office of Immigration Review of El Paso, TX, 123-23, (Dec. 18, 1997) (finding that "the respondent has the political opinion of believing in following the rule of law and earning an honest living and of opposing the gang life and its accompanying illegal activities, such as drug-trafficking and the use of violence").

gang opinion as an anti-crime opinion is more likely to lead to the perception that gang violence is still a largely criminal (domestic) issue, outside of the scope of international refugee and human rights law. Focusing on the modern political opinion approach more accurately characterizes the severe nature of gang and cartel violence today and takes the analysis outside of the domestic crime paradigm.

In a companion case to *S-E-G-*, *Matter of E-A-G-*, the BIA recognized the existence of a rivalry between gangs and the government, and that this rivalry could be considered political.<sup>69</sup> However, in *E-A-G-*, the board cited *Elias-Zacarias* again, this time for the proposition that “persecution or well-founded fear of persecution on account of political opinion refers to persecution on account of the victim’s political opinion, not *the persecutor’s* political opinion.”<sup>70</sup> The modern political opinion approach, however, does take into account the political opinion of the victim—the victim in a gang-based asylum claim holds an anti-gang political opinion and fears persecution because of it.

## V. GANG-BASED ASYLUM UNDER INTERNATIONAL LAW

So far this Essay has focused on the U.S. approach to refugee law, and gang and cartel violence claims under BIA, U.S. Circuit Court, and Supreme Court decisions. However, the international human rights movement has been moving, since the end of World War II, towards taking refugee law out of domestic immigration law and institutions, and bringing it into the realm of international law.<sup>71</sup> Although refugee law is interpreted by U.S. Courts and agencies, as refugee law scholar Deborah Anker points out, “refugee law *is* international law, grounded in an international treaty.”<sup>72</sup> Refugee law is a dynamic body of law that is informed by the “object and purpose”<sup>73</sup> of the Refugee Convention and Protocol and “by developments in related areas of international law, such as human rights and international humanitarian law.”<sup>74</sup> According to the UNHCR, “[h]uman rights principles . . . should inform the interpretation of the definition of who is owed . . . protection.”<sup>75</sup> Analysis of international law suggests adopting a modern and holistic view of political asylum.

International legal theorists advance various conceptions of a state’s refugee protection obligations. Matthew Price divides these into three categories:

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69. *In re E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008).

70. *Id.* at 597 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

71. Louis Sohn’s lecture at the Harvard Law School Human Rights Program provides a comprehensive discussion of the larger trend of the internationalization of various aspects of traditionally “domestic law” with the rise of the human rights movement. LOUIS B. SOHN, *THE HUMAN RIGHTS MOVEMENT: FROM ROOSEVELT’S FOUR FREEDOMS TO THE INTERDEPENDENCE OF PEACE, DEVELOPMENT AND HUMAN RIGHTS* (1995).

72. Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 *HARV. HUM. RTS. J.* 133, 135 (2002).

73. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1151 U.N.T.S. 331.

74. UNHCR EXEC. COMM., *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI) (Oct. 7, 2005), <http://www.unhcr.org/refworld/docid/43576e292.html>.

75. *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, UNHCR (Apr. 2001), <http://www.unhcr.org/refworld/pdfid/3b20a3914.pdf>.

humanitarian-, political-, and human-rights-based approaches.<sup>76</sup> Each theoretical approach implies a different outcome for gang or cartel-based asylum claims. A holistic political opinion asylum model is justified by combining the most persuasive elements of each approach.

#### A. Humanitarian Theory

Under the humanitarian theory of international refugee law the migrant's *need* for protection, regardless of how that need came about, is the most compelling ground for asylum.<sup>77</sup> According to humanitarian theorists Aristide Zolberg, Astri Suhrke, and Sergio Aguayo, "the central ranking principle [among refugee candidates] must be the immediacy and degree of life-threatening violence."<sup>78</sup>

Under this theory, granting asylum to victims of gang-based violence would be justified in many cases. The most relevant factor for refugee determination would be the harm the asylum-seeker faces, which is a serious probability of death in many gang-related cases, making the need for protection substantial. Also, considering the high levels of violence in Mexico and Central America, protection might even be justified on a general level, without a specific threat from a gang, or other insurgent group, to an individual.

The humanitarian approach is persuasive. Eliminating suffering was clearly a goal of the Refugee Convention; both the 1951 Convention and 1967 Protocol specifically call for protection of those seeking asylum due to "a *well-founded fear of being persecuted*."<sup>79</sup> The potential harm, as well as the probability of that harm coming to pass, were significant factors in a state's obligations. Furthermore, the duty of *non-refoulement* suggests a serious concern for the harm an asylum-seeker would face if he were returned to his country of origin.<sup>80</sup>

Since the Refugee Convention was signed, international refugee law has evolved to put an even greater emphasis on the harm an individual would face in his home country, including widespread violence. For example, in the context of Latin America, the Cartagena Declaration, ratified in 1984, considers refugees persons "who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."<sup>81</sup>

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76. Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 417-18 (2006).

77. *Id.* at 421.

78. ARISTIDE R. ZOLBERG, ASTRI SUHRKE & SERGIO AGUAYO, *ESCAPE FROM VIOLENCE* 270 (1989).

79. Refugee Convention, *supra* note 7; Protocol, *supra* note 7.

80. For a modern interpretation and discussion of the *non-refoulement* obligation, see generally Elihu Lauterpacht & Daniel Bathlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in UNHCR, *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 87, 177 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

81. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93. For discussion and analysis of the Cartagena Declaration, see Hector Gros Espiell, Sonia Picado & Leo Valladares Lanza, *Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*, 2 INT'L J. REFUGEE L. 83 (1990).

Despite the importance of placing a greater emphasis on the actual harm, as well as a probability of suffering harm, humanitarian concerns should not be the only guiding principle for refugee protection. The reason for the persecution or harm suffered by the asylum-seeker is relevant under the 1951 Convention, and linking persecution to a protected ground is still important to protect against a *certain type* of harm. The political conception of international refugees explains why protecting against a certain kind of harm, even if less severe, is important.

### B. Political Theory

Under the political conception (the theory of legal interpretation, distinct from the political opinion asylum ground in the Convention), asylum is reserved for those “who are exposed to harm illegitimately inflicted by authoritative agents . . . . And the persecution criterion codifies the substantive moral judgment that underlies a decision to grant asylum—namely, the judgment that a state has harmed its citizen illegitimately.”<sup>82</sup> Theorists who hold this view, including Matthew Price, argue that while the humanitarian goal is noble, asylum should not be the vehicle for solving all humanitarian problems. Some other type of aid, military intervention, or complementary protection would be more fitting for many cases.<sup>83</sup> Price distinguishes asylum from other legal or policy tools by its expressive power to condemn an outlaw regime for the actions it takes against its citizens.<sup>84</sup>

Under this theory, gang-based asylum claims would largely be rejected. Such cases involve persecution of individuals by gangs, which are nonstate actors. According to adherents of the political interpretive approach, asylum would not be appropriate for dealing with victims of gang persecution because granting asylum would not have the power to expressively condemn a state. Central American states, they would argue, are *unable* to protect their citizens, but not *unwilling* to do so.

This approach, however, is problematic for several reasons. First, asylum should remain a peaceful legal act, rather than a condemnatory foreign policy-style act. The condemnatory characterization would discourage states from granting asylum to people from states they do not want to openly confront because of any number of unrelated foreign policy issues. Also, this conception conflates policy (a goal such as condemnation) with law (a standing obligation to protect), and could lead to asylum being linked to the international politics of the time, rather than rooted in stable and universal international law principles.

Furthermore, the membership principle does not address the importance and rise of nonstate actors in world conflicts today. While the membership principle may have been more persuasive sixty years ago, ensuring the same level of human rights protection in the modern world requires an expansion of the concept to non-authoritarian states and nonstate actors.

### C. Human Rights Theory

A third conception of refugee law, the human rights approach, advanced by scholar James Hathaway, holds that persecution ought to be defined as the “sustained or systematic violation of basic human rights demonstrative of a failure

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82. Price, *supra* note 76, at 425.

83. *See id.* at 426.

84. *See id.* at 425.

of state protection.”<sup>85</sup> This conception defines persecution as a violation of rights or a harm, which is accompanied by a lack of state protection. Gang-based claims would likely be accepted under this theory. Victims of gang-based violence are likely to experience a high level of harm, deprivation of life, and liberty, and the state cannot provide these individuals protection.

Although U.S. courts have yet to embrace a human rights conception, over the last two decades this approach has been accepted in Europe, Australia, New Zealand, and Canada. In 1993, the Canadian Supreme Court adopted Hathaway’s view of refugee law, stating that “underlying the [Refugee] Convention is the international community’s commitment to the assurance of basic human rights without discrimination.”<sup>86</sup> Following the Canadian Supreme Court decision, the U.K. House of Lords found that persecution was comprised of a serious harm plus a failure of state protection.<sup>87</sup> New Zealand and Australian courts also utilized the human rights approach to define persecution in their decisions.<sup>88</sup>

The human rights approach offers a compelling argument for the expansion of rights guaranteed in the Refugee Convention. The Convention must adapt to changing world circumstances, and modern human rights law offers a cogent way to incorporate new interpretations into the Convention.

However, the greatest weakness of this approach is that it might not sufficiently capture the nexus clause—that persecution be based on one of the protected grounds. The Refugee Convention was specifically formulated to protect against a certain type of harm. The human rights approach can help to inform the principles of the Convention, but should not replace the Convention, which explicitly states a nexus requirement and a ground requirement as key elements of the definition of refugee status. An appropriate interpretation balances the humanitarian, political, and human rights approaches.

## VI. A UNIVERSAL POLITICAL AND GANG-BASED ASYLUM CLAIM FRAMEWORK

### A. A Protection Gap?

Legal scholars identify a “protection gap” between non-returnable non-refugees (protected under the duty of *non-refoulement* or CAT) and those identified as refugees (protected under the Refugee Convention).<sup>89</sup> According to refugee law scholar Jane McAdam, states have been reluctant to grant *non-refoulement* beneficiaries the same rights and entitlements as Convention refugees.<sup>90</sup>

This Essay does not advocate eliminating the distinctions between these categories. However, this Essay does advocate collapsing them to a certain extent in order to reach a fuller understanding of a state’s obligations to asylum-seekers. This might be achieved by embracing legal interpretations that incorporate various aspects of the different categories. For example, humanitarian and human

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85. JAMES C. HATHAWAY, *LAW OF REFUGEE STATUS* 104-05 (1991) (internal citations omitted).

86. *Canada v. Ward*, [1993] 2 S.C.R. 689, 733.

87. *Islam v. Sec’y of State of the Home Dep’t; Regina v. Immigr. App. Trib., ex parte Shah*, [1999] 2 A.C. 629 at 635 (H.L.) (U.K.) (Conjoined App.).

88. *See, e.g.*, Australian High Court in *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] 210 C.L.R. 40; No. 74665/03, slip op., ¶ 53 (Refugee Status App. Auth. July 7, 2004) (N.Z.), <http://www.unhcr.org/refworld/pdfid/42234ca54.pdf>.

89. *See* JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* 5 (2007).

90. *Id.*



rights values, deeply rooted in international law and other protected statuses, can inform interpretation of the Refugee Convention and can be used to establish definitions of political opinion and refugee.

*B. Bridging the Gap: A Holistic Political Asylum Approach*

A holistic political opinion asylum approach combines the most persuasive aspects of each theory of international refugee law discussed in this Essay, and also mitigates the “protection gap” dilemma. According to the UNHCR, although the “Article 1 definition of refugee can . . . be broken down into its constituent element . . . it comprises only *one* holistic test.”<sup>91</sup> The key to the characterization of a person as a refugee is their risk of persecution on one of the grounds stipulated in the Convention.<sup>92</sup>

The holistic political asylum approach advanced in this Essay combines the level, type, and probability of harm (humanitarian), with lack of sovereign control, political conflict, and opposition to a political element (political), with the failure of state protection (human rights).

This multifactor, holistic test draws its elements from the U.S. approach to gang-based asylum that focuses on grounds analysis, and the humanitarian and human rights approaches that focus on level of harm and lack of state protection. Several of these determinative factors overlap with the various requirements of the Refugee Convention. For example, a high level of violence suggests not only that the asylum-seeker has a high probability of persecution, but also that the state is being challenged, and that it cannot protect its citizens. However, a high level of violence alone is not determinative of refugee status. The other factors—such as evidence that the asylum-seeker opposes the influence of a political actor, thereby undermining the state—are also relevant to fulfill the requirements of the Refugee Convention. State confrontation by a nonstate actor also suggests that the state is not able to protect its citizens, but it is not determinative of that fact alone. Many of these factor tests, justified by international refugee law, reinforce each other to support a singular, holistic political opinion test.

Using this holistic test, many gang-based asylum claims would be recognized, but the immigration flood gates would not be opened to just any claim. Furthermore, the framework offers a set of concrete criteria for decision makers and judges to ensure that rulings are neither *ad hoc* nor arbitrary, and it legally and normatively justifies refugee protection using the most salient concepts in international law.

Central America is a highly violent region and has been so for many years. The situation satisfies the humanitarian requirement, grounded in the Refugee Convention, *non-refoulement*, and the Cartagena Declaration. It is also suggestive, though not conclusive, of a state breakdown or failure of state protection. Beyond the level of violence in the region, there is substantial evidence that the state has been co-opted and corrupted by highly organized nonstate actors (gangs and cartels) in many areas. This fact satisfies part of the nexus requirement (protected ground) found in the Refugee Convention, and is supported by the political theory of refugee law. The particular applicant would

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91. U.N. High Comm’r for Refugees, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, 20 REFUGEE SURV. Q. 77, 78 (2001).

92. See Refugee Convention, *supra* note 7; Protocol, *supra* note 7.

have to show his opposition to that political element and demonstrate that he feared persecution because of that opposition.

Finally, government programs to fight gangs have so far been largely ineffective. According to the UNHCR, “[a]n assessment of the availability of State protection [in gang-based asylum cases] will require detailed and reliable country of origin information, including information about existing programmes, to address the gang phenomenon and their effectiveness.”<sup>93</sup> The fact that the state cannot or will not provide protection satisfies the human rights requirement of the holistic framework.

## VII. CONCLUSION

People fleeing gang violence in Mexico and Central America have been, for the most part, denied asylum in the U.S. Nonetheless, modern interpretations of refugee and international law suggest that there is more merit to these claims for asylum than is currently accepted. U.S. courts have focused on the “particular social group” protected ground analysis in relation to asylum claims from Mexico and Central America, while international courts have looked at human rights interpretations of the Refugee Convention. A combination of these approaches, focusing on the “political opinion” protected ground and incorporating humanitarian and human rights principles, creates the most persuasive argument in favor of gang-based asylum claims. Hopefully jurists will expand their understanding of international refugee law, and embrace new conceptions of persecution to recognize asylum-seekers fleeing gang-based violence in Mexico and Central America.

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93. UNHCR, *Guidance Note*, *supra* note 6, ¶ 27.