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# Tearing Down the Wall Between Refugee and Gang-Based-Asylum Seekers: Why the United States Should Reconsider Its Stance on Central-American Gang-Based Asylum Claims

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# TEARING DOWN THE WALL BETWEEN REFUGE AND GANG-BASED ASYLUM SEEKERS: WHY THE UNITED STATES SHOULD RECONSIDER ITS STANCE ON CENTRAL AMERICAN GANG-BASED ASYLUM CLAIMS

*Katelyn Masetta-Alvarez\**

*Gang violence is plaguing El Salvador, Guatemala, and Honduras. Murder, sexual violence, and other major human rights violations committed by gang members has forced countless people to seek protection in surrounding countries. While other nations have recognized and addressed the problem by modifying their immigration policies, the United States continues to deport its most vulnerable migrants because they do not meet its stringent social group requirements. Despite the United States' stringent asylum-policy application, the history of asylum law shows that the "social group" category should adapt to meet the situation of the ever-changing refugee. The United States recently applied its social group analysis flexibly to accommodate domestic-violence-asylum applicants, even though it historically denied such claims. Domestic-violence-asylum claims and many gang-based-asylum claims share social-group characteristics and contain the same underlying human-rights violations, yet the United States continues to reject gang-based-asylum claims under its social group analysis. Because the United States' recently accepted domestic-violence-asylum claims, and in order to accommodate our world's current needs, the United States should apply asylum law flexibly to grant humanitarian relief to Central American victims of gang violence.*

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## I. INTRODUCTION

The image of a refugee looks very different today than it did in 1951, when World War II ended, and the international community came together to craft the U.N. Convention on the Status of Refugees.<sup>1</sup> When Americans thought of refugees, they immediately imagined European Jews whom Hitler oppressed, enslaved, and tortured under his reign.<sup>2</sup> As the years progressed, however, this distinct refugee image began to fade as the United States saw an influx of refugees from all over the world, not just Europe. This happened because the face of the refugee constantly changes depending on current events. The United States, as a generous and powerful country, has a moral obligation to refine its refugee policy to accommodate these new faces. This obligation includes not only accommodating the faces of distant lands, but also those of our neighbors.

Because the world's needs constantly fluctuate, asylum is a gray area in immigration law. One particularly cloudy area is gang-based asylum. Under current U.S. policy, most gang-based-asylum claims do not qualify for protection because they do not fall under the Department of Justice's narrow interpretation of "particular social group," or because the applicant did not seek protection from their country's law enforcement agency.<sup>3</sup> Yet these asylum claims tug at one's heart. Many gang-based claims involve children fleeing physical or sexual abuse at the hands of gang members—stories that would

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1. See Radley Balko, *The United States also denied refuge to Jews fleeing Hitler, fearing they might be Nazis*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/01/25/the-united-states-also-denied-refuge-to-jews-fleeing-hitler-fearing-they-might-be-nazi> [https://perma.cc/NXG8-NYRN] (discussing United States' views of Jewish refugees in 1930s-1940s).
  2. See Jonathan Greenblatt, *Closing the Borders to Refugees: Wrong in the 1930s, and Wrong Today*, HUFFINGTON POST, <https://www.huffingtonpost.com/jonathan-greenblatt/closing-the-borders-to-refugees-in-the-1930s-and-wrong-today> [https://perma.cc/ZHU5-MSE9] ("They will say that Jews in the 1930s were innocent victims, but what we take for granted today only became apparent in hindsight. 'Of all the groups in the 20th Century, refugees from Nazism are now widely and popularly perceived as 'genuine,' but at the time German, Austrian and Czechoslovakian Jews were treated with ambivalence and outright hostility as well as sympathy...").
  3. See *Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R*, NATIONAL IMMIGRANT JUSTICE CENTER (Jan. 2016), <https://www.immigrantjustice.org/sites/default/files/PSG%2520Practice%2520Advisory%2520and%2520Appendices-Final-1.22.16.pdf> [https://perma.cc/S84A-9BW9] (critiquing BIA's interpretation of gang-based asylum decisions).

touch the hearts of even the toughest immigration judges.<sup>4</sup> So, immigration attorneys invent detailed social groups to meet the protected ground element of asylum, such as “Young Salvadoran males who grew up in San Salvador and attended private school” to try to pass through the eye-of-the-needle toward a successful asylum claim.<sup>5</sup> Such elaborate social groups are unnecessary considering that other BIA-recognized-asylum claims based solely on gender and nationality pass the test.<sup>6</sup> Yet, gang-based-asylum seekers still apply despite their low chances of winning in hopes that they may catch the attention of a particularly sympathetic immigration judge, or at least buy enough time to go through the appeal process and pray that there is a change in asylum law in the meantime. Eventually, though, many applicants are deported to their country of origin and return to the fear that they fled.<sup>7</sup> It is time for the United States to change its asylum policy to reflect the current needs of our world, especially the needs of our southern neighbors in Central America.

This note argues that the United States should accept the new refugees fleeing from gang violence in Central America because asylum law is supposed to be applied flexibly to meet the current needs of our world.<sup>8</sup> Not only does the text of the U.N. Convention on

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4. See Kirk Semple, *Fleeing Gangs, Central American Families Surge Toward U.S.*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/world/americas/fleeing-gangs-central-american-families-surge-toward-us.html> [https://perma.cc/V694-UDDM] (discussing the threats to children from gangs in Latin America).
  5. See also Gayla Ruffer, *Gang-Based Asylum Claims*, INTERNATIONAL REFUGEE RIGHTS INITIATIVE, <http://www.refugeegalaidinformation.org/gang-based-asylum-claims> [https://perma.cc/Z78B-YQE6] (outlining methods of arguing gang-based asylum claims).
  6. See *BIA Precedent Chart AI-CA*, U.S. DEP’T OF JUS., <https://www.justice.gov/eoir/bia-precedent-chart-ai-ca> [https://perma.cc/7JR9-DMWW] (last visited Mar. 7, 2018) [hereinafter *BIA Precedent Chart*] (highlighting and summarizing cases such as *Matter of Kasinga*, *Matter of A-R-C-G-*, and *Matter of R-A-* where gender and nationality were sufficient consideration as a particular social group).
  7. See *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. July 30, 2008) (finding that gang-based asylum claim was inadequate under BIA precedent, applicant denied asylum and withhold on removal).
  8. See United Nations High Commissioner for Refugees [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*, at 2, HCR/GIP/02/02 (May 7, 2002), <http://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> [https://perma.cc/3GA8-GK4K] (explaining that there is “no closed list” of what social groups

the Status of Refugees from 1951 indicate that the international community should be flexible in its asylum policy, but the United States' own recent asylum-policy changes show that the United States should adapt its policy to the growing needs of the international community.<sup>9</sup> Because of the gang-violence crisis crippling our neighbors in Honduras, El Salvador, and Guatemala, the United States should refine its refugee interpretation to accommodate this new wave of refugees.

To demonstrate why the United States should change its refugee policy in favor of gang-based asylum, this note will discuss the history of asylum law, the crisis in Central America, and the United States' historically responsive approach to our world's ever-changing refugee. In Section II, this note will consider the history of asylum law in the United States as well as how the international community shaped its asylum policy. It will also discuss how international human rights law influences asylum law, and why asylum policy should protect internationally recognized human rights. Section III will explore the current spike in gang violence in Central America's northern triangle<sup>10</sup> and the mass exodus it has caused. In light of this tremendous migration, Section IV looks into how the international community is responding to the Central American crisis by adapting humanitarian immigration policy. Section V delves into the elements of and bars to asylum, Withholding of Removal, and Convention against Torture relief. Section VI explains why Central American gang victims do not qualify for asylum under the United States' current policy.

Although the United States has not yet adapted its policy to accommodate gang-based-asylum claims, Section VII discusses how the United States has flexibly accommodated certain refugees in the past, particularly those with gender-based-asylum claims. Finally, in

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may constitute for purposes of asylum. "Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.").

9. See generally *In re A- R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. August 26, 2014) (changing previous U.S. precedent on the "particular social group" analysis); Meghan McGinnis, *Post Matter of A-R-C-G-: An Expansion of American Compassion For International Domestic Violence Victims*, 121 PENN. STATE. L. REV. 579 ("In addition to Matter of A-R-C-G-'s impact on domestic violence victims, further expansion of asylum law under the Board's groundbreaking decision also implicates important practical, political, and social policy considerations.").
10. See Douglas Farah, *Central America's Northern Triangle: A time for turmoil and transitions*, 3 PRISM 89 (2008), [http://cco.ndu.edu/Portals/96/Documents/prism/prism\\_4-3/PRISM\\_4-3\\_88-109\\_Farah.pdf](http://cco.ndu.edu/Portals/96/Documents/prism/prism_4-3/PRISM_4-3_88-109_Farah.pdf) [<https://perma.cc/NKM9-LT5H>] (defining the "northern triangle" as three of Central America's northern bordering countries: Honduras, El Salvador, and Guatemala).

consideration of the history of asylum policy in the United States, the crisis in Central America, and the United States' recent asylum-policy changes to accommodate incoming refugees, Section VIII argues why the United States should adapt its current policy to aid the thousands of Central Americans fleeing gang violence.

II. THE HISTORY OF UNITED STATES ASYLUM LAW  
DEMONSTRATES THAT ASYLUM LAW MUST BE ABLE TO ADAPT  
TO THE WORLD'S CURRENT NEEDS IN ORDER TO HELP  
INDIVIDUALS FLEEING FROM PERSECUTION.

A. *The origins of United States asylum law come from international law, which indicates that countries should adopt a flexible approach to asylum adjudications.*

United States asylum law is firmly rooted in international law.<sup>11</sup> One “pillar of international law” is that every state has territorial integrity, which gives sovereign states authority to grant asylum to whomever they choose, notwithstanding treaty obligations.<sup>12</sup> Originally, the United States limited its refugee intake to persons who were displaced after World War II, focusing especially on individuals of Jewish decent.<sup>13</sup> In the mid-1960s, however, the United States

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11. See Convention and Protocol Relating to the Status of Refugees preamble, Jul. 28, 1951, 189 U.N.T.S. 137 [hereinafter *Convention on the Status of Refugees*] (“Considering that the Charter of the United Nations and the Universal Declaration of Human Rights...have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination...”); see also Deborah Anker & Josh Vitor, *International Human Rights and US Refugee Law: Synergies and Contradictions in HUMAN RIGHTS AND THE REFUGEE DEFINITION: COMPARATIVE LEGAL PRACTICE AND THEORY* 116 (eds., Bruce Burson & David James Cantor, 2016) (“Reference to international law may assist in determining whether an applicant meets the definition of refugee, if there is not United States law addressing the specific legal issue at hand” (citing US Citizenship and Immigration Services [USCIS], *Asylum Officer Basic Training Course (AOBTC)*, *International Human Rights Law* (Mar. 1, 2005))).
  12. ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 23 (1980).
  13. See *History Unfolded US. Newspapers and the Holocaust: President Truman Orders Quota Preference for Displaced Persons*, U.S. HOLOCAUST MEMORIAL MUSEUM (last visited Mar. 10, 2018), <https://newspapers.ushmm.org/events/president-truman-orders-quota-preference-for-displaced-persons> [https://perma.cc/F37D-ML6Q] (stating, “President Harry S. Truman favored a liberal immigration policy toward [displaced persons]. Faced with congressional inaction, he issued an executive order, the ‘Truman Directive,’ on December 22, 1945. The directive required that existing immigration quotas be designated for displaced persons... more DPs were admitted than before. About 22,950 DPs, of whom two-thirds were Jewish, entered the United

began admitting refugees from communist countries and the Middle East.<sup>14</sup> The shift in asylum policy occurred in response to the threat of communism and embraced an ideological definition of “refugee.”<sup>15</sup> Refugee status, then, was based on the applicant’s country of origin rather than a genuine fear of persecution, even though the Refugee Convention defines refugees as individuals who are unwilling or unable to return to their country on account of fear of persecution.<sup>16</sup> A decade and a half later, the United States enacted The Refugee Act of 1980, which adopts the exact language used in the 1951 U.N. Convention Relating to the Status of Refugees.<sup>17</sup> Even though Congress intended the newly adopted refugee definition as “a standard applied equally to all applicants regardless of country of origin,”<sup>18</sup> the United States favors certain countries over others to promote its foreign policy initiatives.<sup>19</sup>

Yet, in making its decisions on what groups of people it should admit, the U.S. often looks to international trends. Most recently, international pressure to recognize asylum for women who fear

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States between December 22, 1945, and 1947 under provisions of the Truman Directive.”).

14. Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 259 (1992).
15. *Id.*
16. *See id.* (explaining that the refugee definition adopted from 1957 to 1965 “allowed for a rather easy adjudication. In order to determine eligibility for refugee status, the adjudicator merely had to ascertain someone’s country of origin.”).
17. *Compare* Immigration and Nationality Act of 1965 § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2014) [hereinafter *INA*] (“The term ‘refugee’ means...any person who is outside any country of such person’s nationality...and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”) *with* Convention on the Status of Refugees at art. 1, (“For the purposes of the present Convention, the term “refugee” shall apply to any person 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...”).
18. CHRIS KELLEY & FELIBERTO PEREIRA, *I WAS A STRANGER: HOPE FOR A HIDDEN WORLD* 254 (2008).
19. *See* David North, *The “Most Favored Nation” Approach in America’s Immigration Policy*, CTR. FOR IMMIGR. STUD. (Nov. 25, 2014), <https://cis.org/Report/Most-Favored-Nation-Approach-Americas-Immigration-Policy> [<https://perma.cc/395Y-JMZX>] (analyzing of United States immigration policy and migrant acceptance based on economic and policy factors).



persecution on account of their gender shaped current asylum policy toward accepting asylum claims based on fear of female-genital mutilation (FGM) and domestic violence.<sup>20</sup> In 2001—before the United States Department of Justice formally recognized domestic-violence-asylum claims from Central America—the legacy Immigration and Nationality Services (INS)<sup>21</sup> distributed Guidelines to its asylum officers highlighting the growing international importance of asylum based—at least partially—on gender.<sup>22</sup> Even though the United States still does not formally recognize asylum claims based *solely* on gender, it has at least granted claims with gender as a significant factor, such as claims based on fear of FGM and domestic violence.<sup>23</sup>

One international instrument that likely nudged U.S. asylum policy toward accepting gender-based asylum was the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW),<sup>24</sup> which resulted from the growing international trend toward recognizing women’s rights that began in the early 1970s.<sup>25</sup> CEDAW gave a backdrop for the United Nations High

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20. See *BIA Precedent Chart AI-CA*, *supra* note 6 (discussing cases involving domestic violence and genital mutilation claims for asylum).
  21. The Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135) dismantled the former Immigration and Naturalization Service (INS) and separated the former agency into three components within the Department of Homeland Security (DHS). See *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/62YY-QP5U>].
  22. Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN’S L.J. 263, 268 (1997) (“As the asylum application process continued to evolve, developments in both the international and North American spheres contributed to the formulation and issuance of the *INS Guidelines*. Common to both spheres was the growing recognition that women’s rights are human rights and its corollary, violations of women’s rights are violations of human rights. Existing international human rights instruments and the interpretation of these instruments by international organizations provide an appropriate and instructive framework in which gender-based claims can be evaluated.”).
  23. See *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (women at risk of genital mutilation can be members of a particular social group); see also *In re R-A-*, 22 I & N Dec. 906 (B.I.A. 2001) (original immigration judge concluded women living under male domination could be a particular social group).
  24. Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1542 U.N.T.S. 560, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> [<https://perma.cc/S7G5-5AWZ>].
  25. Saso, *supra* note 22, at 268-69.

Commissioner for Refugees (UNHCR)<sup>26</sup> to adopt the Conclusion of Refugee Women in 1985 (“the Conclusion”), which recognized that “women and girls constitute the majority of the world refugee population with many exposed to special problems due to their gender.”<sup>27</sup> The Conclusion also encouraged countries to grant admission to women asylum-seekers who face harsh and inhumane treatment due to their transgression of social mores as a ‘particular social group’ within U.N. Convention on Refugees, Article 1A(2).<sup>28</sup>

Following the Conclusion, the UNHCR issued Guidelines on the Protection of Refugee Women in 1991,<sup>29</sup> emphasizing the need to promote international awareness and refuge for women persecuted because of their gender.<sup>30</sup> In 1993, Canada became the first country to set comprehensive guidelines for gender-based asylum claims, which prompted U.S. asylum advocates to propose guidelines for gender-based asylum in the United States.<sup>31</sup> In response, the legacy INS issued guidelines for gender-related and gender-specific asylum claims.<sup>32</sup> These guidelines eventually led the Board of Immigration Appeals, which is the administrative office that reviews immigration-judge decisions, to recognize women fleeing from female-genital mutilation as a cognizable social group for asylum in *Matter of Kasinga*<sup>33</sup> in 1996.<sup>34</sup> Beyond the Department of Justice, United States courts—including The United States Supreme Court—refer to international law when adjudicating asylum cases as well.<sup>35</sup> Thus, U.S.

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26. The United Nations created the UNHCR in 1950 to protect and assist refugees throughout the world. UNHCR advocates for policy changes to help resettle displaced persons. *History of UNHCR*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/en-us/history-of-unhcr.html> [<https://perma.cc/GV5L-MCAH>].
27. Saso, *supra* note 22, at 269.
28. *Id.*
29. United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, U.N. Doc. EC/SCP/67 (July 1991), available at <http://www.unhcr.org/en-us/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html> [<https://perma.cc/T67B-UMY4>].
30. Saso, *supra* note 22, at 269.
31. *Id.* at 270.
32. *Id.* at 306.
33. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).
34. Saso, *supra* note 22, at 306.
35. See *Negusie v. Holder*, 555 U.S. 511, 518 (2009) (stating that “concepts of international law ... may be persuasive in determining whether a particular agency interpretation [of the asylum statute] is reasonable”); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (“If one thing is clear from the legislative history of the new definition of

asylum law has historically allowed some flexibility regarding what groups it recognizes as refugees and asylees based on international advocacy for at-risk groups of people.

*B. United States asylum policy is supposed to protect individuals against current and evolving human rights abuses.*

The United States bases its asylum policy on protecting individuals from human rights abuses as recognized in the International Bill of Human Rights.<sup>36</sup> The Bill of Human Rights includes the Universal Declaration of Human Rights,<sup>37</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>38</sup> and the International Covenant on Civil and Political Rights.<sup>39</sup> Circuit courts have referred to the protection of human rights to determine whether an applicant's claim falls within the realm of asylum protection.<sup>40</sup> In fact, the Sixth Circuit stated that the intended effect of our nation's asylum laws is to protect the exercise of internationally recognized human rights.<sup>41</sup> The Board of Immigration Appeals (BIA)—the immigration-adjudications-review board under

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'refugee' and indeed the entire 1980 Act,...Congress' primary purpose was to bring the United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees...".

36. G.A. Res. 217 (III), International Bill of Human Rights, (Dec. 10, 1948), *available at* <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf> [<https://perma.cc/2X38-AT3L>].
37. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), *available at* <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf> [<https://perma.cc/2X38-AT3L>].
38. G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966), *available at* <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf> [<https://perma.cc/2X38-AT3L>].
39. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, (Dec. 16, 1966), *available at* <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf> [<https://perma.cc/2X38-AT3L>].
40. *See* *Mirdita v. Gonzales*, 237 Fed. Appx. 691, 693 (2nd Cir. 2007) (denying asylum because "human rights were generally respected" in the applicant's country of citizenship); *see also* *Pieschacon-Villegas v. A.G. of the United States*, 671 F.3d 303, 313 (3d Cir. 2011) (stating that one consideration in determining the possibility of future torture is "evidence of gross, flagrant, or mass violations of human rights within the country of removal."); *see also* *Galina v. I.N.S.*, 213 F.3d 955, 957 (7th Cir. 2000) (reversing the BIA's asylum denial because there was no evidence that the human-rights situation in Latvia had improved since the applicant left).
41. *Perkovic v. I.N.S.* 33 F.3d 615, 623 (6th Cir. 1994).

the United States Attorney General<sup>42</sup>—also referred to international human-rights instruments and the framework they provide in adjudicating gender-based claims.<sup>43</sup> Because gender-based asylum claims were new developments in refugee protection in the 1990s, the BIA recognized that international human-rights guidelines may provide a framework for how to adjudicate gender-based asylum claims.<sup>44</sup> Moreover, the BIA and circuit courts look to the U.S. Department of State human rights reports to corroborate an applicant's asylum claim or to determine whether a claim merits asylum.<sup>45</sup> The Department of State also bases its country reports on human rights on the Universal Declaration of Human Rights and other international instruments promoting civil, political, and worker rights.<sup>46</sup>

The BIA, however, is not the only government entity that cites to international human-rights law when determining whether asylum claims are legitimate. The U.S. Citizenship and Immigration Services (USCIS) also uses international human-rights law as a tool for adjudicating asylum applications.<sup>47</sup> In fact, the Attorney General mandated that USCIS provide all of its asylum officers training in

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42. See *Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir> [<https://perma.cc/MJZ4-S984>] (discussing the Board of Immigration Appeals' involvement in interpreting and applying immigration laws).
  43. *In re Kasinga*, 21 I. & N. Dec. 357, 377 (B.I.A. 1996) (discussing the development of gender guidelines that recognize the importance of considering gender-based claims).
  44. *In re Kasinga*, 21 I. & N. Dec. at 377 (discussing the role of the guidelines in the development of refugee protection).
  45. See *In re A-R-C-G- et al.*, 26 I. & N. Dec. 388, 393–94 (B.I.A. 2014) (citing to the United States Department of State's country report on Guatemala as evidence of domestic-violence-human-rights abuses); see also *Sadik v. Gonzales*, 172 Fed. Appx. 694 (8th Cir. 2006) (holding that the Department of State's country report on human rights practices rebutted the applicant's presumption of well-founded fear of future persecution).
  46. See *Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2016—Secretary's Preface*, U.S. DEP'T OF STATE DIPLOMACY IN ACTION (last visited March 16, 2017), <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> [<https://perma.cc/MUH3-PR98>] (providing background on the Department of State's annual human rights reports).
  47. *USCIS to Take Action to Address Asylum Backlog*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 31, 2018), <https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog> [<https://perma.cc/VM33-VQ8E>].

international human-rights-law.<sup>48</sup> In its training manual, USCIS states, “international human rights and humanitarian law may provide guidance in evaluating whether particular acts constitute persecution (serious human rights violations).”<sup>49</sup> Particularly, USCIS lists “freedom from arbitrary or unlawful interference with privacy, family, home, or correspondence” and “the right to freedom of association” as human-rights violations that often arise in the asylum context.<sup>50</sup> Thus, several United States administrative agencies recognize that asylum is a mechanism for protecting against internationally recognized human-rights abuses.

*C. The United States’ has a narrower asylum policy than the 1951 United Nations Convention on the Status of Refugees calls for asylum to be inclusive of individuals from diverse situations fleeing human-rights abuses.*

The 1951 Convention laid out five different protected grounds, or reasons for persecution, under which individuals could qualify for asylum.<sup>51</sup> These grounds include race, religion, nationality, membership in a particular social group, and political opinion.<sup>53</sup> Interestingly, the 1951 Convention drafters intended the term “particular social group” to protect groups and individuals who did not fall within the categories of race, religion, and political opinion.<sup>54</sup> Thus, the Convention likely envisioned that the term “particular social group” would be flexible and inclusive, rather than preclude asylum seekers who did not fit into the four other categories.<sup>55</sup>

Currently, the UNHCR asylum handbook defines a particular social group as “compris[ing] persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other

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48. 8 C.F.R. § 208.1(b) (2011); *see also* Anker, *supra* note 11, at 116 (citing US Citizenship and Immigration Services, *Asylum Officer Basic Training Course, International Human Rights Law* (Mar. 1, 2005)).

49. *See also* Anker, *supra* note 11, at 116 (citing US Citizenship and Immigration Services, *Asylum Officer Basic Training Course, International Human Rights Law* (Mar. 1, 2005)).

50. *Id.*

51. Convention and Protocol Relating to the Status of Refugees art. I, July 28, 1951, 189 U.N.T.S. 137; INA, *supra* note 17, at § 101(a)(42).

52. Convention on the Status of Refugees, *supra* note 51, at art. I (discussing the social groups that are protected from discrimination under human rights standards).

53. David Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as a Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 228–229 (1998).

54. Convention on the Status of Refugees, *supra* note 51.

grounds, i.e. race, religion or nationality.”<sup>56</sup> Because the term “social group” is broad and frequently used in modern asylum claims,<sup>57</sup> the UNHCR created guidelines to help signatory states determine what constitutes a social group.<sup>58</sup> These guidelines define a 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.”<sup>59</sup> The UNHCR guidelines further explain, “[t]he [common] 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>60</sup> According to UNHCR, then, applicants must prove either that they belong to a group of individuals who share fundamental characteristics or that society perceives them as being part of a group of people.

The United States, however, has generally held a narrower view of the term “protected social group” than the UNHCR. In 1985, the BIA drafted a decision, *Matter of Acosta*,<sup>61</sup> in which the BIA decided that members of a ‘particular social group’ must share an immutable characteristic.<sup>62</sup> Immutable characteristics—like the “common characteristics” in the UNHCR guidelines—are traits that a person cannot change, such as sex or race, or characteristics that are so personally tied to personhood that an applicant should not be forced to change them, such as religion, political opinion, or familial affiliation.<sup>63</sup> Because an applicant’s occupation is something that they are able to change without fundamentally changing their identity, the BIA held in *Matter of Acosta* that “taxi drivers from Central America” did not share an immutable characteristic and thus did not

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55. U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 77, U.N. Doc. HCR/1P/4/ENG/REV/3 (Dec. 2011).

56. *Id.*

57. U.N. High Commissioner 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, 2001) [hereinafter *UNHCR Guidelines*].

58. *Id.*

59. *Id.*

60. *In re Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985).

61. *Id.* at 233.

62. *Id.* For an example of a non-gender-based social group based on familial affiliation that has been upheld, see *Tchoukhrova v. Gonzales*, 549 U.S. 801 (2006) (holding that parents of severely disabled Russian children constitute a social group).

qualify as a particular social group.<sup>64</sup> The immutable characteristic requirement for applicants claiming fear of persecution on account of their particular social group remains in effect today.<sup>65</sup>

Not only do social-group-asylum applicants have the burden to prove the members of their group share an immutable characteristic, but the BIA also requires them to demonstrate that their social groups meet two other criteria: social distinction and particularity.<sup>66</sup> In *Matter of W-G-R*,<sup>67</sup> the BIA explained the particularity requirement as the need to delineate groups in society that may share an immutable characteristic but are not sufficiently particular.<sup>68</sup> Under the third recent requirement, “social distinction,” applicants bear the burden of proving that their group is socially distinct in society,<sup>69</sup> meaning that the applicant’s society perceives individuals in the applicant’s social group as sharing a particular characteristic.<sup>70</sup> In comparison to the UNHCR’s flexible social-group definition as persons sharing similar background, habits, or social status,<sup>71</sup> the BIA’s social-group interpretation is significantly narrower and more exclusive. Because the United States requires applicants not only to show that their social groups share an immutable characteristic, but also that they are socially distinct and are sufficiently particular within their society, the United States’ social-group application runs contrary to international standards.

### III. GANG-BASED-ASYLUM APPLICATIONS HAVE SPIKED IN THE UNITED STATES SINCE THE 1990S AS A RESULT OF INCREASED GANG VIOLENCE AND IMPUNITY IN HONDURAS, EL SALVADOR, AND GUATEMALA.

After the end of the Cold War in the 1990s, the United States grew hostile toward immigration due to widespread economic

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63. *In re Acosta*, 19 I. & N. Dec. at 234.

64. BIA Precedent Chart, *supra* note 6, (citing to *Acosta*’s immutable characteristic standard under its ‘particular social group’ precedent).

65. *In re W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

66. *Id.*

67. *Id.* at 213-14.

68. The BIA formerly used “social visibility” which some circuit courts interpreted as an ocular visibility requirement. The Seventh Circuit, in particular, rejected this requirement. *See In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014) (BIA renaming this requirement as “social distinction” to avoid courts from interpreting the requirement as physical, actual visibility).

69. *Id.* at 242.

70. UNHCR Guidelines, *supra* note 57.

recession and mass refugee migration.<sup>72</sup> In response, the Clinton administration revised asylum regulations to greatly limit access to asylum in the United States.<sup>73</sup> In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which restricted asylum eligibility.<sup>74</sup> IIRIRA placed a one-year time limit on applying for asylum, restricted judicial review of asylum, precluded persons convicted of aggravated felonies and other serious crimes from relief, and limited the ability to apply for asylum for individuals who entered the United States unlawfully.<sup>75</sup>

A decade prior to the Clinton immigration reform, mass groups of Central Americans fled to the United States to escape civil war, poverty, and natural disasters.<sup>76</sup> In the late 1980s, approximately one million Salvadorans fled to the United States to escape the violent civil war in El Salvador in the 1980s between the Salvadoran government and the leftist guerilla groups.<sup>77</sup> MS-13 and the 18<sup>th</sup> Street gangs—two of the major gangs currently plaguing the Northern Triangle—began as a defense against the rival Chicano gangs in Los Angeles in the 1980s.<sup>78</sup> In the aftermath of IIRIRA, the United

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71. See Herbert Dittgen, *The American Debate About Immigration in the 1990s: A New Nationalism After the End of the Cold War?*, STANFORD ELECTRONIC HUMANITIES REVIEW, (Last updated March 15, 1999) <https://web.stanford.edu/group/SHR/5-2/dittgen.html> [<https://perma.cc/REX6-W2XM>] (discussing the change in migration after the end of the Cold War era).
  72. See Mary Waltermire, *An Analysis of the Clinton Administration’s Proposed Asylum Reform Regulations*, 1 U. C. DAVIS J. INT’L L. & POL’Y 1, 3 (1995) (discussing the changes the Clinton Administration proposed regarding asylum application).
  73. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009-546.
  74. *IIRIRA 96- A Summary of the New Immigration Bill*, SISKIND SUSSER PC (Nov. 30, 1996), <http://www.visalaw.com/iirira-96-a-summary-of-the-new-immigration-bill/> [<https://perma.cc/BP87-8EL4>].
  75. *Central American Gang-Related Asylum Guide*, WASHINGTON OFFICE ON LATIN AMERICA (May 2008), 2008, <http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf> [<https://perma.cc/V5NA-MGJG>].
  76. See Jennifer J. Adams & Jesenia M. Pizarro, *MS-13: A Gang Profile*, 16 J. OF GANG RESEARCH 1, 3 (2009), <http://www.ngrc.com/journalofgangresearch/jour.v16n4.art1.ms13.pdf> [<https://perma.cc/VT23-WXEG>] (discussing the Salvadorian immigrants flight to the United States after the Enemies of War 2001).
  77. See Victor J. Blue, *Gangs Without Borders/ Violent Central American Gangs Were Born in the USA, Returned to Their Homeland and Now Migrate Back and Forth Between Here and There*, SFGATE (Apr. 2, 2006), <http://www.sfgate.com/crime/article/Gangs-without-Borders-Violent-Central-American-2520854.php> [<https://perma.cc/XY94-N2ZG>] (discussing the formation of the Central American gangs).



States deported many undocumented Central American youth in the mid-1990s.<sup>79</sup> These mass deportations fueled gang violence in El Salvador and eventually spread to Honduras and Guatemala.<sup>80</sup>

This surge in gang violence caused a mass exodus from El Salvador, Honduras, and Guatemala: nearly 10 percent of these countries' populations fled their homes in search of safety.<sup>81</sup> Almost 2.7 million natives of the Northern Triangle resided in the United States in 2010, compared to 1.5 million in 2000.<sup>82</sup> Gangs will sometimes target businesses and families for extortion by using death threats or by putting a "rape tax" on the parents of young girls to ensure that the parents pay the extortion.<sup>83</sup> Due to gang violence, these three countries "consistently rank among the most violent countries in the world,"<sup>84</sup> with higher homicide rates than countries to which the U.S. tends to grant asylum, such as China.<sup>85</sup>

Despite the massive spike in gang-based asylum applications from Central America, the BIA continues to reject these claims because applicants cannot prove either that gang members will persecute them on account of a protected ground or that their government is unable or unwilling to prosecute gang members.<sup>86</sup> Often, the BIA's stringent

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78. *Id.*

79. *Id.*

80. Guy Taylor & Stephen Dinan, *Violence Surges in Central America, Threatening New Refugee Flood*, WASH. TIMES (Jan. 10, 2016), <https://www.washingtontimes.com/news/2016/jan/10/el-salvador-honduras-guatemala-violence-surges-thr/> [https://perma.cc/Y478-4RR8].

81. *Id.*

82. Blue, *supra* note 77.

83. Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL OF FOREIGN RELATIONS (Jan. 18, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle> [https://perma.cc/DVU9-Q72D].

84. The country that receives the most grants of asylum is China, which comprised 43.78% of all asylum grants, followed by Guatemala, which received 4.4% of all asylum grants. EOIR, FY 2015 STATISTICS YEARBOOK, U.S. DEPT. OF JUSTICE (2015). China, however, only comprised 4.4% of the total cases received by EOIR, whereas Honduras, El Salvador, and Guatemala each comprised between 14–15% of the total cases EOIR received. *Id.* Honduras and El Salvador had the two highest homicide rates in the world in 2016, whereas China was not listed. Kuang Keng Kuek Ser, *Map: Here are countries with the world's highest murder rates*, PUBLIC RADIO INTERNATIONAL, June 27, 2016, <http://www.pri.org/stories/2016-06-27/map-here-are-countries-worlds-highest-murder-rates> [https://perma.cc/JRM3-PUDF].

85. *See In re S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008) (Salvadoran youth who have resisted recruitment to MS-13 based on their personal, moral, and religious opposition to the gang's activity is not a cognizable social

social-group requirements prevent asylum applicants from achieving asylum or other humanitarian relief, even if they have suffered persecution at the hands of gang members in the past.<sup>87</sup> To date, the BIA does not have any precedent decision affirming a gang-based asylum claim from Central America.<sup>88</sup>

IV. MEXICO, AUSTRALIA, AND SEVERAL OTHER COUNTRIES  
HAVE RECENTLY UPDATED THEIR HUMANITARIAN IMMIGRATION  
POLICIES TO MEET THE NEEDS OF THE CURRENT REFUGEE  
CRISIS IN CENTRAL AMERICA.

Refugees from the Northern Triangle are not just making their way to the United States; they are also fleeing to bordering countries, as well as countries across the globe.<sup>89</sup> According to UNHCR, asylum applicants in Mexico, Panama, Nicaragua, Costa Rica, and Belize climbed 1,185 percent between 2008 and 2014.<sup>90</sup> In response to the spike in asylum applications and the crisis in Central America, Mexico changed its asylum law too, making it easier for persons fleeing general violence to find refuge within its borders.<sup>91</sup> To qualify, applicants must show that their lives have been threatened or that they have a legitimate fear of torture upon return to their country of

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group); *see also In re E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008) (holding that “persons resistant to gang membership” was not socially distinct because there was no evidence that Honduran society or gang members perceive those opposed to gangs as a social group); *see also In re W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014) (holding that “former gang members who have renounced their membership” is not a social group because there is no nexus between the persecution the applicant fears and his former gang membership).

86. *See In re S-E-G-*, 24 I. & N. Dec.; *see also In re E-A-G-*, 24 I. & N. Dec.; *see also In re W-G-R-*, 26 I. & N. Dec.
87. BIA Precedent Chart, *supra* note 6, (showing that none of the BIA’s precedent decisions regarding gang-based asylum find that the applicant definitively qualified for asylum).
88. U.N. High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, (Mar. 13, 2014), available at <http://www.unhcr.org/en-us/children-on-the-run.html> [<https://perma.cc/6CUS-FAEC>].
89. *Id.*
90. Ley Sobre Refugiados y Protección Complementaria Mexico [Law on Refugee and Complementary Protection] [LRPC], Diario Oficial de la Federación [[DOF] 05-12-2010. *See also* Esmeralda Lopez & Melissa Hastings, *Overlooked and Unprotected: Central American Indigenous Migrant Women in Mexico*, 48 N.Y.U. J. INT’L L. & POL. 1105, 1111 (2016) (noting the change and use of a broader definition of “refugee” than previously used.)

citizenship, even if they do not fall into a particular protected ground.<sup>92</sup> So, Mexico accepts Central American asylees who fear future harm, but not necessarily because of their social group membership or affiliation to other protected grounds.<sup>93</sup>

Mexico is not alone in addressing the refugee crisis in Central America. Australia now offers humanitarian asylum to victims of gang violence from the Northern Triangle.<sup>94</sup> Neighboring Costa Rica has also opened its doors to Central Americans fleeing gang violence by granting temporary humanitarian visas, which give Central Americans work authorization and permission to reside in Costa Rica, but not necessarily permanent residence.<sup>95</sup> Thus, other countries are adapting their humanitarian immigration laws to conform to the world's current refugee needs. Despite other countries in the Americas and even across the globe offering assistance to those fleeing gang violence in the Northern Triangle, the U.S. has not followed suit.

V. THE ELEMENTS OF ASYLUM, WITHHOLDING OF REMOVAL,  
AND CONVENTION AGAINST TORTURE OFTEN BAR GANG-  
BASED-ASYLUM APPLICANTS FROM HUMANITARIAN RELIEF IN  
THE UNITED STATES.

The United States provides three main avenues of humanitarian immigration relief: asylum, Withholding of Removal, and relief under the Convention against Torture.<sup>96</sup> As mentioned earlier, United States asylum policy is founded on a narrow interpretation of the U.N. Refugee Convention of 1954 and its 1967 Protocol.<sup>97</sup> Despite having

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91. *Id.*

92. *Id.*

93. Stephanie Anderson & Dan Conifer, *UN refugee summit: Australia to take in Central Americans and maintain annual intake*, ABC NEWS (Sept. 21, 2016), <http://www.abc.net.au/news/2016-09-21/un-refugee-summit-australia-intake-upped-to-19,000-per-year/7863712> [<https://perma.cc/43GF-ZAQ6>].

94. Gerardo Ruiz Ramón, *Costa Rica Dará Visa Humanitarian a 200 Refugiados de Honduras, Guatemala y El Salvador* [Costa Rica Will Give Humanitarian Visa to 200 Refugees from Honduras, Guatemala and El Salvador], LA NACIÓN (Jul 26, 2016), [http://www.nacion.com/nacional/politica/Costa-Rica-Honduras-Guatemala-Salvador\\_0\\_1575242506.html](http://www.nacion.com/nacional/politica/Costa-Rica-Honduras-Guatemala-Salvador_0_1575242506.html) [<https://perma.cc/8XJE-5FBZ>].

95. 8 U.S.C. § 1158 (2017); 8 U.S.C. § 1231(b)(3) (2017); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

96. See comparison of INA § 101(a)(42) with Convention on the Status of Refugees at art. 1, *supra* note 17 (comparing the definition of “refugee” used in each).

three forms of protection, asylum is the most desirable as individuals granted asylum may apply for permanent residency one year after they receive asylum status and may apply for immediate family members once they receive asylee status.<sup>98</sup> Withholding of Removal<sup>99</sup> recipients and those who qualify under the Convention against Torture<sup>100</sup> do not have permanent relief and do not enjoy the benefit of applying for immediate family members.<sup>52</sup>

A. *To qualify for asylum, applicants must show that they fear persecution based on one of the five protected grounds.*

To qualify for asylum in the United States, one must first qualify as a refugee.<sup>53</sup> To meet the “refugee” definition, asylum applicants must prove by a preponderance of evidence that they have a legitimate fear of persecution in their country of nationality, for which their protected ground provides at least one central reason.<sup>103</sup> Protected grounds for asylum include race, religion, nationality, membership in a particular social group, or political opinion.<sup>104</sup> To show fear of persecution, applicants may provide evidence that they have suffered persecution in the past or that they have a well-founded fear of future persecution.<sup>105</sup> Moreover, applicants are ineligible for asylum if they apply for asylum more than a year after entering the United States, unless extenuating circumstances excuse their delay. Thus, to prove asylum eligibility, one must not only prove that they fall into one of the five protected grounds, but also that they have been persecuted or have a well-founded fear of persecution, as well as a nexus between their protected ground and the persecution.

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97. 8 U.S.C. § 1158(b)(3) (2018); 8 U.S.C. § 1159(b) (2018).

98. Withholding of Removal derives from the U.N. Convention of Refugees’ non-refoulement clause, which states that persons who will face persecution in the country of nationality shall not be returned. But, this does not prevent the country granting withholding of removal from returning the individual when they no longer face persecution. 8 C.F.R. § 208.16 (2018); *see also In re Lam*, 181 I. & N. Dec. 15, 18 (B.I.A. 1981) (holding that an alien granted withholding of deportation cannot request adjustment of status).

99. Relief under the Convention against Torture is similar to withholding of removal in that the country granting relief may return the individual once the individual no longer is at risk of torture or other inhumane treatment in his or her country of nationality. Countries may also send persons granted withholding of removal or relief under the Convention against Torture to safe third countries. 8 C.F.R. § 208.16 (2018).

100. 8 C.F.R. § 208.16(e) (2018).

101. 8 U.S.C § 1158 (2018).

102. *Id.*

103. *Id.*

104. INA § 1208.13; 8 C.F.R. § 1208.13 (2018).

B. *Applicants who are ineligible for asylum may apply for Withholding of Removal or for relief under the Convention against Torture.*

Even if applicants meet the “refugee” definition, some do not qualify for asylum because of their criminal history, or because they failed to file within one year of entering the United States.<sup>106</sup> Nevertheless, they may qualify for Withholding of Removal (Withholding) or temporary relief under the Convention against Torture (CAT). To qualify under Withholding, applicants must still establish a protected ground, nexus, and fear of persecution, like asylum, but they do not need to file within one year of entering and may have other unfavorable discretionary factors.<sup>107</sup> CAT, unlike asylum and Withholding, does not require applicants to demonstrate a protected ground or nexus to persecution.<sup>108</sup> Nevertheless, applicants do need to show a higher probability of torture than asylum applicants do.<sup>109</sup> While CAT and Withholding do not provide applicants permanent relief or the ability to bring over immediate relatives, they do provide temporary permission to reside in the United States and work authorization.<sup>110</sup>

VI. CENTRAL AMERICANS FLEEING GANG VIOLENCE DO NOT QUALIFY FOR ASYLUM, WITHHOLDING OF REMOVAL OR CAT BECAUSE THEY CANNOT ESTABLISH A PROTECTED GROUND OR EVIDENCE THAT THEIR GOVERNMENT IS UNWILLING OR UNABLE TO ASSIST THEM.

Central Americans fleeing gang violence typically have difficulty in three areas of asylum law: establishing a cognizable social group, a nexus to their fear of persecution, and establishing that their government is unwilling or unable to assist them.

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105. INA § 208(a)(2)(B); 8 C.F.R. § 208(a)(2)(B) (2018).

106. Unlike asylum, persons convicted of aggravated felonies may still qualify under the Convention Against Torture. Also, persons who perhaps committed immigration fraud in the past and are now ineligible for immigration benefits may still qualify under Withholding of Removal even though they would not qualify for asylum. *See* 8 C.F.R. § 208.16(d)(2) (2018) (stating that serious offenses do not result in automatic denials of withholding under the Convention).

107. 8 C.F.R. 208.16 (2018).

108. Withholding of Removal and CAT applicants must show that it is more likely than not that they will be persecuted under 8 C.F.R. § 208.16, whereas asylum applicants only need to show that there is a ten percent chance that they will be persecuted under INA § 101(a)(42)(A).

109. 8 C.F.R. § 1208.7 (2018).

A. *Gang-based-asylum applicants struggle to create a social group and nexus under current asylum policy.*

Gang-based asylum applications typically do not qualify for relief because the applicants cannot demonstrate a sufficient social group or a nexus to their fear of persecution.<sup>111</sup> In 2008, the BIA issued a precedent decision rejecting as invalid the social group, “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their personal, moral and religious opposition to the gang’s values and activities” because the group was not socially visible or particular.<sup>112</sup> The BIA determined that “youth” is not an immutable characteristic since it is temporary in nature.<sup>113</sup> It also found that the group was defined circularly, because it based membership on the persecution itself.<sup>114</sup> The BIA further held that the group did not meet the particularity requirement because of its amorphous characteristics.<sup>115</sup> Even though the applicants attempted to limit their social group by their socio-economic status and residence in a gang-controlled neighborhood, the BIA found this insufficient because “people’s ideas of what those terms mean can vary.”<sup>116</sup> Overall, the BIA considered the applicant’s social group to be a “large and diffuse segment of society,” and therefore too inchoate to meet the particularity requirement.<sup>117</sup>

The Board distinguished the applicant’s protected ground from “Somali women,” which is a social group that the Board recognizes.<sup>118</sup> The Board noted that—despite how broad and diffuse ‘Somali women’ is—being female and subject to female genital mutilation (FGM)<sup>119</sup> are distinct in Somali culture.<sup>120</sup> It cited *Hassan v.*

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110. See *In re S-E-G-*, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (creating the precedent that rejection or resistance to gang recruitment did not constitute a social group).

111. *Id.* at 585.

112. *Id.*

113. *Id.* at 584.

114. *Id.*

115. *Id.* at 585.

116. *Id.*

117. *Id.* at 586.

118. FGM has consistently been held to be a form of persecution by the BIA and by circuit courts. See *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) for a discussion as to why FGM is a form of persecution (stating in its opening paragraph that “[t]he practice of female genital mutilation, which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution.”).

*Gonzalez*,<sup>121</sup> in which the Eighth Circuit found that Somali women was a sufficient social group because Somalia has a 98% prevalence of FGM, so a reasonable fact-finder could conclude that all Somali females have a reasonable fear of persecution in Somalia.<sup>122</sup> Because Salvadoran youth who resisted gang membership had “no unifying relationship or characteristic to narrow this diverse and disconnected group,” the BIA determined that *Hassan’s* ‘broad and diffuse’ social group did not apply.<sup>123</sup>

On the same day that the BIA issued *Matter of S-E-G-*, it also published *Matter of E-A-G-*, in which a young Honduran male applied for asylum based on his familial affiliation to gang members.<sup>124</sup> The applicant’s two older brothers were gang members and both lost their lives because of their membership.<sup>125</sup> Rival gang members killed his oldest brother and the gang killed his other brother after he renounced his membership.<sup>126</sup> After the applicant rejected the gang’s recruitment efforts, his family began receiving credible threats.<sup>127</sup> Because he feared that his life was in danger, he fled Honduras for the United States and applied for asylum based on his resistance to gang membership.<sup>128</sup> Notably, the Immigration Judge granted the boy’s asylum claim, however, the BIA reversed the immigration judge’s decision because “persons resistant to gang membership” lacked “social visibility.”<sup>129</sup> The BIA further noted that the family of gang members or former gang members could not constitute a social group because of its criminal affiliation.<sup>130</sup>

In 2014, the BIA came out with another decision, *Matter of M-E-V-G-*, after the Third Circuit remanded the case for the second time.<sup>131</sup> In this case, the BIA once again emphasized, “[r]esidents all generally suffer from the gang’s criminal efforts to sustain its

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119. *See In re S-E-G-*, 24 I. & N. Dec. 579, 586 (B.I.A. 2008).

120. *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007).

121. *Id.* at 518.

122. *See In re S-E-G-*, 24 I. & N. Dec. at 586.

123. *See In re E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008) (deciding that a particular Honduran male who opposed gang membership was not a member of a particular social group of persons).

124. *Id.* at 591-92.

125. *Id.*

126. *Id.* at 592.

127. *See id.* at 592 (explaining that the respondent left Honduras because of gang threats to his family).

128. *Id.* at 594.

129. *Id.* at 596.

130. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 229 (B.I.A. 2014).

enterprise” in countries with particularly prevalent gang activity, which undermines gang-based asylum claims.<sup>132</sup> Surprisingly, however, the BIA remanded the case to the Immigration Judge to determine the merits of the case, despite having denied relief to similarly-situated applicants in the past.<sup>133</sup> The BIA also held that its prior holdings should “not be read as a blanket rejection of all factual scenarios involving gangs,” because the BIA determines social groups on a case-by-case basis.<sup>134</sup> While this single paragraph in the BIA’s decision may give hope to gang-based-asylum seekers, the BIA still has not issued a precedent decision granting gang-based asylum.<sup>135</sup>

*B. Gang-based asylum applicants have difficulty showing that their government is unable or unwilling to protect its citizens against gang violence.*

Immigration judges and circuit courts have also denied gang-based asylum applications from Central America because they found that the applicant could not show that their government was “unwilling or unable” to assist in the prosecution of gangs.<sup>136</sup> In fact, the Tenth Circuit affirmed the BIA’s and immigration judge’s holding that an applicant who does not seek assistance from law enforcement in their country of nationality cannot show that the government was unable or unwilling to assist them.<sup>137</sup> In that case, the applicant explained that most people do not seek the assistance of law enforcement in El Salvador because law enforcement fails to respond out of fear of gang retaliation.<sup>138</sup> The applicant even provided the U.S. Department of State human rights report affirming his explanation.<sup>139</sup> But the immigration judge, BIA, and Tenth Circuit did not find this explanation sufficient to demonstrate that the government is unwilling or unable to investigate and prosecute.<sup>140</sup> So, even when applicants submit credible U.S. state department reports affirming that their government is unwilling or unable to investigate and prosecute gang members, courts refuse to accept their explanation

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131. *Id.* at 251.

132. *Id.* at 252.

133. *Id.* at 251.

134. BIA Precedent Chart, *supra* note 6, (showing that the BIA has not issued a precedent decision granting gang-based asylum).

135. *See In re S-E-G-*, 24 I. & N. Dec. 579, 581-82 (B.I.A. 2008).

136. *Cisneros-Diaz v. Holder*, 415 F. App’x 940, 942-43 (10th Cir. 2011).

137. *See id.* at 941 (explaining that petitioner did not ask help from the police because he thought the police were corrupt and would not have helped him).

138. *Id.* at 943.

139. *Id.* at 943.



unless the applicant actually reported the incident to the police—the very entity that fails to protect them.

VII. THE BIA INCONSISTENTLY APPLIES ITS SOCIAL-GROUP ANALYSIS BECAUSE IT RECOGNIZES GENDER AND NATIONALITY BASED SOCIAL GROUPS FOR DOMESTIC-VIOLENCE- AND FGM-ASYLUM CLAIMS, BUT DENIES GANG-BASED-ASYLUM CLAIMS THAT HAVE THE SAME SOCIAL GROUP CHARACTERISTICS.

The BIA does not hold each asylum applicant to the same social-group scrutiny. Recently, it contradicted its *S-E-G-* and *E-A-G-* social-group holdings in its precedent decision *Matter of A-R-C-G-*,<sup>141</sup> in which it recognized “Guatemalan women who are unable to leave their domestic relationship” as a social group founded on nationality, gender, and familial relationship.<sup>142</sup> Moreover, while the United States certainly does not condone domestic violence, just as it does not condone gang membership, being the wife in an abusive relationship is a ground for asylum while being the immediate family member of a gang member or former gang member is not.<sup>143</sup> Here, the BIA grants asylum to one group of people based on a family relationship, yet does not grant asylum to the other similarly situated claim—individuals fleeing gang violence.

The BIA, however, was not originally so willing to grant asylum to victims of domestic violence. In 2001, the BIA initially denied asylum to a domestic violence survivor from Guatemala because the applicant did not demonstrate that her social group was sufficiently particular or that her husband harmed her because of her social group.<sup>144</sup> The BIA held that “virtually any victim of repeated violence who offers some resistance could qualify for asylum, particularly where the government did not control the assailant.”<sup>145</sup> The Attorney

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140. *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

141. *Id.* at 388 (stating “[d]epending on the facts and evidence in an individual case, ‘married women in Guatemala who are unable to leave their relationship’ can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3) (2012).”).

142. *Compare In re A-R-C-G-*, 26 I. & N. Dec. at 394-95 (holding that “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group that forms the basis of a claim for asylum), *with In re E-A-G-*, 24 I. & N. Dec. 591, 593-598 (B.I.A. 2008) (holding that “persons resistant to gang membership” was not a social group).

143. *In re R-A-*, 22 I. & N. Dec. 906, 927 (B.I.A. 2001).

144. *In re R-A-*, 22 I. & N. Dec. at 916.

General, however, vacated that decision and the immigration judge eventually granted the applicant from *Matter of R-A*-asylum.<sup>146</sup>

Several unpublished decisions also demonstrate the BIA's emphasis on the "social distinction" aspect of the domestic-violence-asylum applicant's social group by showing how society views survivors of domestic violence as a particular group of people.<sup>147</sup> Domestic-violence-asylum applicants have successfully proven that their social group is "distinct" with affidavits, laws, programs, and the availability of women's shelters.<sup>148</sup> U.S. Citizenship and Immigration Services—the DHS agency that determines asylum eligibility for persons not in immigration court proceedings—followed suit in its policy. In the USCIS policy manual, it states that "[v]iolence against mothers, sisters and daughters, like other forms of violence against women, is often related to the historically more powerful position of men in the family and in society, the perceived inferiority of women and unequal status granted by laws and societal norms."<sup>149</sup> Similarly, the U.S. Department of State holds a policy that gender may be the basis for a social group when determining refugee status outside of the United States.<sup>150</sup>

Domestic violence claims are not the only asylum claims based on gender and birthplace that the United States has accepted. In fact, the BIA has recognized claims based on past female genital mutilation (FGM) and fear of future FGM since the 1990s.<sup>151</sup> In *Matter of Kasinga*, the Board found that the applicant's social group, "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" was sufficient

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145. For a history of the case, see *Matter of R-A*-, UC HASTINGS CENTER FOR GENDER & REFUGEE STUDIES, [cgrs.uchastings.edu/our-work/matter-r](https://perma.cc/ZD9K-AHSH) [https://perma.cc/ZD9K-AHSH] (last visited March 7, 2018) (describing a history of the case and providing in-depth resources pertaining to it).

146. *In re D-M-R*-, (BIA June 9, 2015) (unpublished) (analyzing the distinctness of the social group of women domestically abused in El Salvador).

147. See *id.* (concluding that domestic-violence-asylum applicants have a distinct social group).

148. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING COURSE, FEMALE ASYLUM APPLICATIONS AND GENDER-RELATED CLAIMS 15 (2009).

149. See U.S. DEPARTMENT OF STATE, GENDER GUIDELINES FOR OVERSEAS REFUGEE PROCESSING (2000) (acknowledging the Department of Justice's position that "gender alone may form the basis for membership in a particular social group" and that a domestic-violence victim may establish a nexus to the domestic abuse "because of her gender or because of her status in a domestic relationship").

150. See *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (recognizing an applicant's eligibility for asylum because of FGM).

for asylum.<sup>152</sup> Similarly, women who have already undergone FGM, and thus do not necessarily fear that they will be subjected to FGM again in the future, also have successful asylum claims based on their past persecution as a female in a certain family, tribe, or country.<sup>153</sup> Despite no longer having a fear of future persecution, applicants may still qualify for asylum based on compelling reasons arising out of the severity of the past persecution or a reasonable probability that the applicant will experience other serious harm upon return to her country.<sup>154</sup>

These decisions allowing domestic violence claims and FGM claims set precedent not only in their acceptance of gender-based social groups, but also in affirming that the government's unwillingness or inability to control their persecutors. Of particular interest is *Matter of R-A-*, in which the female respondent did contact the police for a few of the instances of abuse, but the police never restrained her abusive husband because they did not want to interfere with domestic relations.<sup>155</sup> Although the applicant did not seek police help every time her husband abused her, the few instances she did seek assistance were sufficient to establish that Guatemalan law enforcement was unable or unwilling to help her.<sup>156</sup>

Even if gender-based asylum claims are distinct from gang-based asylum claims because of the nature of the claim, they both incorporate human rights abuses that the United States has historically protected in its application of asylum policy.<sup>157</sup> Considering that the BIA recognizes "Guatemalan women who are unable to leave their domestic relationship" as a cognizable social group, domestic-violence claims are based on the applicant's freedom to associate as well as her freedom from arbitrary interference with privacy, family, home, or correspondence. Likewise, gang-based asylum applications are founded on these same fundamental rights. Gangs often coerce children and young adults to associate with their

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151. *Id.* at 358.

152. *See In re A-T-*, 24 I. & N. Dec. 617, 617-18 (A.G. 2008) (remanding a decision that rejected a claim based on previous FGM).

153. *In re L-S-*, 25 I. & N. Dec. 705, 705 (B.I.A. 2012).

154. *In re R-A-*, 22 I. & N. Dec. 906, 909 (B.I.A. 2001).

155. *Id.* at 929 (showing that when respondent requested the aid of the government, the government showed no interest in protecting her from her abusive spouse).

156. *See In re D-M-R-*, (BIA June 9, 2015) (*unpublished*) (protecting human rights by granting asylum to El Salvadoran women in domestic relationships who are unable to leave); *see also In re E-A-G-*, 24 I. & N. Dec. 591, 591-92 (B.I.A. 2008) (failing to protect human rights by not granting asylum to individuals receiving death threats).

gang;<sup>158</sup> when these children and individuals avoid gang recruitment, they face physical assaults, extortion, sexual abuse, and death.<sup>159</sup> They are thus also unable to leave their situation or assert their right not to associate with gangs,<sup>160</sup> like domestic-violence survivors are unable to leave their relationship. Gangs may also interfere with an individual's privacy, family, home, and correspondence if they have family members in an opposing gang or refuse to associate with a gang.<sup>161</sup> This interference is similar to the interference that victims of domestic violence face when their persecutor controls their relationships, the wellbeing of their children and other family members, or constrain their liberty. Because gang-based asylum and domestic-violence claims involve similar human-rights abuses, they demand the same equitable treatment from the BIA.

Further, the United States should consider that its human rights reports also indicate that gangs commit human rights violations against certain social groups in the northern triangle.<sup>162</sup> In *Matter of A-R-C-G-*, the BIA explicitly cited the State Department's country report on human rights for Guatemala to qualify domestic-violence victims as a persecuted social group.<sup>163</sup> Specifically, the BIA noted that the report listed sexual violence as a serious societal problem in

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157. See Semple, *supra* note 4 (noting how “gangs have recruited boys as lookouts and drug runners and forced girls into becoming their brides.”).

158. See *id.* (explaining the threats of death, physical assaults, and sexual abuse of children who resist gang recruitment).

159. See *id.* (stating “interviews with migrants and their advocates suggest that families are fleeing — sometimes in groups of as many as 15 people — because they have no alternative. Gangs in certain communities in the Northern Triangle have become so merciless, and their control so widespread, that a family is often left with a stark choice: Comply, flee or die.”).

160. See *id.* (explaining the interference of gangs in family life and privacy because of the refusal to associate with the gang).

161. See U.S. DEP'T OF STATE, EL SALVADOR 2016 HUMAN RIGHTS REPORT 22 (2016), <https://www.state.gov/documents/organization/265798.pdf> [<https://perma.cc/UZP3-6F7X>] [hereinafter *El Salvador Human Rights Report*] (acknowledging that gangs committed violent crimes against women in El Salvador); see U.S. DEP'T OF STATE, HONDURAS 2016 HUMAN RIGHTS REPORT 1, 4-5 (2016), <https://www.state.gov/documents/organization/265808.pdf> [<https://perma.cc/XMM5-7LY7>] [hereinafter *Honduras Human Rights Report*] (reporting that gangs committed acts of murder, extortion, kidnapping, torture, and human trafficking); see U.S. DEP'T OF STATE, GUATEMALA 2016 HUMAN RIGHTS REPORT 23 (2016), <https://www.state.gov/documents/organization/265802.pdf> [<https://perma.cc/99FV-BZ92>] [hereinafter *Guatemala Human Rights Report*] (reporting that gangs used children in drug running and prostitution).

162. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 393-94 (B.I.A. 2014).

Guatemala.<sup>164</sup> The same human rights report states that gang recruitment of street children is also a serious problem and is listed under its “displaced children” section.<sup>165</sup> Likewise, the 2016 human rights reports for Honduras and El Salvador both list gang recruitment under internal displacement.<sup>166</sup> These reports further indicate that gang violence against children results in additional gross human rights violations, such as murder, rape, and trafficking.<sup>167</sup> In El Salvador, nonprofit organizations also reported that Salvadoran police and armed forces sometimes targeted and mistreated poor male youths who “fit the stereotype of gang members.”<sup>168</sup> Even when the individuals were not affiliated with gangs, they were often ostracized by their communities upon their return.<sup>169</sup> While the reports do not state the exact reasons why gangs persecute certain individuals, they do indicate that the violence is often not random, but targeted at particular age and socioeconomic groups.<sup>170</sup>

Considering the BIA does, in fact, permit asylum claims based on gender, familial affiliation, and the applicant’s nationality, it is curious why the Board continues to deny gang-based asylum claims even when the social group has the same characteristics. In addition, given that the BIA recognizes that Central America has challenges enforcing the law in its precedent domestic-violence-asylum claims,<sup>171</sup> it does not accept that Honduras, Guatemala, and El Salvador are unwilling or unable to prosecute gang members.

VIII. THE UNITED STATES SHOULD ADAPT ITS HUMANITARIAN-  
IMMIGRATION POLICY TO ACCOMMODATE INDIVIDUALS FLEEING  
FROM GANG VIOLENCE IN CENTRAL AMERICA.

Gang-based-asylum, Withholding, and CAT claims may seem to have a dim future in the Department of Justice considering strong BIA precedent. In light of the recent developments in domestic-

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163. *Id.*

164. *See* Guatemala Human Rights Report, *supra* note 161.

165. *See* El Salvador Human Rights Report, *supra* note 161; *see also* Honduras Human Rights Report, *supra* note 162.

166. *Id.*

167. El Salvador Human Rights Report, *supra* note 161.

168. *Id.*

169. *Id.*

170. *In re* R-A-, 22 I. & N. Dec. 906, 909 (B.I.A 2001) (the BIA had granted asylum to a asylum seeker who claims she belonged to the particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”).

violence asylum claims in the BIA as well as the international community's response to the Central America gang crisis, however, the future may be brighter than it appears. The BIA's eventual change in policy toward gender-based asylum shows that asylum law should be flexible to meet the ever-changing violence and traumatic events occurring in the world.

Although the BIA initially rejected domestic-violence asylum claims because they lacked a cognizable social group and nexus, it changed its position, conforming to the international community's recommendations as well as social and political policy development in the U.S. The former Immigration and Nationality Services, in concluding that it should recognize domestic violence under certain circumstances as a basis for asylum, justified its policy change by citing the ever-developing nature of asylum law.<sup>172</sup> It explained that as the area of gender-based asylum law has developed, "DOJ's interpretation of the refugee definition has developed accordingly."<sup>173</sup> Thus, the United States has, at least on occasion, accepted that U.S. asylum policy must develop alongside changes in asylum law.

Just a few years earlier, though, the BIA in *Matter of R-A* warned that if they granted asylum based on domestic violence claims, they would open the floodgates to an infinite number of these types of claims.<sup>174</sup> Finding that the applicant's social group based on gender, nationality, and familial relationship was not a cognizable social group because it was not socially distinct,<sup>175</sup> the BIA denied R-A's claim although it admitted that the heinous physical, mental, and sexual violence she suffered at the hands of her husband did amount to past persecution.<sup>176</sup>

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171. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, QUESTIONS AND ANSWERS: THE *R-A*- RULE (2000), available at [https://www.uscis.gov/sites/default/files/files/pressrelease/R-A-Rule\\_120700.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/R-A-Rule_120700.pdf) [<https://perma.cc/69LW-TBPB>] [hereinafter *The R-A-Rule*].

172. *Id.*

173. *In re R-A*-, 22 I. & N. Dec. at 916 (stating "it would seem that virtually any victim of repeated violence who offers some resistance could qualify for asylum, particularly where the government did not control the assailant.").

174. *Id.* at 917 (stating, "the group is defined largely in the abstract. It seems to bear little or no relation to the way in which Guatemalans might identify subdivisions within their own society or otherwise might perceive individuals either to possess or to lack an important characteristic or trait...for the group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien's society...").

175. *Id.*

In coming to its decision to accept domestic violence claims, the INS considered the international community's response to gender-based and domestic-violence asylum claims, pointing to policy in other democratic countries.<sup>177</sup> In supporting its policy change, the INS stated that “[a]sylum law in the United Kingdom, Australia, New Zealand, and Canada all recognize that domestic violence can, in certain circumstances, for the basis for asylum.”<sup>178</sup>

Likewise, since asylum claims are ever changing, the United States should expand its view of asylum to conform to our current world needs, which would provide refuge for thousands of people. This would not open the floodgates to asylum—just as allowing victims of domestic violence to apply for asylum did not. Applicants must still meet the high bar of providing substantial evidence that they have been, or will be, victims of persecution.

In fact, the Third Circuit's recent remand of a gang-based asylum case calls into question the BIA's current asylum policy.<sup>179</sup> In *Matter of M-E-V-G-*, the Third Circuit remanded to the BIA twice for further consideration of its particular social-group interpretation.<sup>180</sup> After the circuit court remanded the case to the BIA a second time, the BIA remanded the case back to the immigration judge to make a decision as to whether the applicant demonstrated membership in a particular social group and nexus.<sup>181</sup> In its decision, the BIA explained that its precedent gang-based asylum decisions “should not be read as a blanket rejection of all factual scenarios involving gangs.”<sup>182</sup> The BIA cited heavily to the UNHCR's Guidance Note on Refugee Claims Relating to Victims of Organized Gangs<sup>183</sup> in coming to its ultimate decision, as well as to other countries' current interpretation of social group.<sup>184</sup> The Third Circuit is not alone in

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176. The R-A- Rule., *supra* note 171.

177. *Id.*

178. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 250-51 (B.I.A. 2014).

179. See *Valdiviezo-Galdamez v. Attorney General of the U.S.*, 502 F.3d 285, 291 (3rd Cir. 2007), and *Valdiviezo-Galdamez v. Attorney General of the U.S.*, 663 F.3d 582, 612 (3rd Cir. 2011) (both cases remanded back to BIA for further proceedings based on court's findings).

180. *In re M-E-V-G-*, 26 I. & N. Dec. at 252-53.

181. *Id.* at 251.

182. U.N. High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (2010) [hereinafter *UNHCR Guidance Note on Refugee Claims*].

183. “The UNHCR has recognized that ‘[g]ang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs’...[a]lthough the UNHCR indicates that certain marginalized social

rejecting the BIA's narrow interpretation: other circuits have also rejected the its social group application to asylum claims based on former gang membership.<sup>185</sup> This recent, reluctant acceptance of a possible gang-based asylum demonstrates a potential, much-needed shift in asylum policy.

Similarly, although it hesitates to find that the government is unwilling or unable to control gangs unless the police are notified and fail to act, the BIA has stated that asylum applicants may be able to "convincingly demonstrate that those authorities would have been unable or unwilling to protect, and for that reason she could not rely on them."<sup>186</sup> The U.S. Department of State human rights reports on El Salvador, Honduras, and Guatemala all show that the governments have difficulty controlling gangs and protecting its people from gang violence.<sup>187</sup> Thus, the U.S. does at least recognize that the Northern Triangle governments often are actually unwilling or unable to prosecute gang-related crimes, and therefore people may be less willing to seek redress. So, while having evidence of past attempts to contact law enforcement would best serve gang-based claims, there is a possibility of getting around this stumbling block.

Moreover, changes in international policy also demonstrate a push in the international community to admit Central American refugees, and that U.S. should likewise revise its asylum policy in favor of gang-based asylum. The U.N. High Commissioner for Refugees (UNHCR) recently published a policy note regarding asylum based on fear of

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groups may be specifically targeted by gangs, it also noted that "a key function of gangs is criminal activity. 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." *In re M-E-V-G-*, 26 I. & N. Dec. at 250. The court also said, "However, the European Union adopted a "particular social group" definition that departs from the UNHCR Guidelines by requiring a social group to have both an immutable/fundamental characteristic and social perception." *In re M-E-V-G-*, 26 I. & N. Dec. at 247.

184. Recently, the Fourth and Seventh circuits have rejected the BIA's interpretation that former gang membership is not a sufficient social group. *See* *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014) ("we conclude that the BIA erred as a matter of law in its interpretation of the phrase "particular social group" by holding that former gang membership is not an immutable characteristic of a particular social group for purposes of § 1231(b)(3)"); *see also* *Benitez Ramos v. Holder*, 589 F.3d 426, 426 (7th Cir. 2009) (court found that petitioner was a member of a particular social group within the meaning of the statute and vacated the BIA's decision.)

185. *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007).

186. *See* *El Salvador Human Rights Report*, *supra* note 161; *see also* *Honduras Human Rights Report*, *supra* note 161, *see also* *Guatemala Human Rights Report*.



gang violence.<sup>188</sup> First, the UNHCR defines a particular social group in one of two ways: applicants may show that they are part of a group that shares a characteristic fundamental to their identity, or that their group is perceived as a group by the society in question.<sup>189</sup> While the BIA ultimately rejected this social group definition in *Matter of M-E-V-G-*, it admitted that the UNHCR's recommendations are persuasive.<sup>190</sup> Also, if the BIA did decide to accept the U.N.'s interpretation of "particular social group," many Central Americans fleeing gang violence would likely become eligible for asylum.<sup>191</sup> In fact, the U.N. explains how gang-related claims would fit into its social group framework.

Individuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender and social status. Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance...thus, an age-based identification of a particular social group, combined with social status, could be relevant concerning applicants who have refused to join gangs. The immutable character of "age" or "youth" is in effect, unchangeable at any given point in time.<sup>192</sup>

The UNHCR's analysis suggests that people whose immediate relatives are "gang resisters" may also qualify for asylum through the familial social group.<sup>193</sup> But, this analysis seems a bit too far removed from forming a social group. While immediate relatives of gang members might be a social group because their chances of being harmed by gangs are relatively high, it is rare that family members of gang resisters are actually harmed to a level of persecution.<sup>194</sup> If anything, family members of gang resisters receive threats, but this

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187. UNHCR Guidance Note on Refugee Claims, *supra* note 182.

188. *In re M-E-V-G-*, 26 I. & N. Dec. at 248 and accompanying note 15.

189. UNHCR Guidance Note on Refugee Claims, *supra* note 182; *In re M-E-V-G-*, 26 I. & N. Dec. at 248-53.

190. UNHCR Guidance Note on Refugee Claims, *supra* note 182.

191. *Id.*

192. *Id.*

193. This is based on my personal experience as a clerk in an immigration court and in an immigration law office. Often, individuals claim that they have been threatened because their family members resisted gang recruitment, but they have not been hurt themselves. This situation may vary and this note recognizes that there may be situations in which someone has suffered past persecution on account of their familial affiliation to a person who resisted recruitment.

does not rise to the level of persecution.<sup>195</sup> The U.N.'s recommendations, at the least, reflect the growing international momentum toward accepting Central Americans fleeing from gang violence and recognition of the changing faces of our world's refugees.<sup>196</sup>

The United States should also review its gang-based asylum policy due to growing domestic and international trends, just as it eventually adopted a new asylum policy when our society began advocating for foreign victims of domestic violence and the international community pushed to accept these claims. Attorneys should not have to take out their paintbrushes and try to craft a lengthy and colorful "social group" every time they submit a gang-based asylum claim just to try to fit into the BIA's narrow mold for gang-based claims. Central Americans who have experienced gang violence or fear it because of their hometown, gender, and familial affiliations should be eligible for asylum just as "Guatemalan women unable to leave their domestic relationship" are eligible. The U.S. and the U.N. recognize that asylum law is ever-changing based on world events; right now, refugees are pouring in from our neighbors. And while they may not look like the refugee in 1951 or 1967, they aren't supposed to. "Particular social group" was created for people who did not fit the 1951 mold but who still needed protection—it was a catchall phrase drafted for these refugees. Other countries have begun to recognize the crisis, and as signatories to the Convention, are doing something about it. The United States should follow suit, just as it did to protect Central American victims of domestic violence. The United States should focus more on taking down the brick wall between domestic-violence claims and gang-based asylum claims and protect our world's ever-changing refugees.

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194. Threats by themselves, without action or reason to believe that action is imminent, are insufficient to prove past persecution or well-founded fear of future persecution. *See Hysaj v. Ashcroft*, 99 Fed. Appx. 73 (7th Cir. 2004) (holding that applicant showed no evidence that threats were imminent or in danger of being carried out). But, threats coupled with violence or attempted violence are sufficient to establish past persecution or a well-founded fear of future persecution. *See Precetaj v. Holder*, 649 F.3d 72 (1st Cir. 2011) (holding that an immigration judge's finding that the applicant did not establish past persecution was unfounded because the applicant submitted substantial evidence that he received threats as well as experienced physical violence on several occasions.).

195. Nora Strum, *UNHCR calls for urgent action as Central America asylum claims soar*, UNHCR (Apr. 5, 2016) <http://www.unhcr.org/en-us/news/latest/2016/4/5703ab396/unhcr-calls-urgent-action-central-america-asylum-claims-soar.html> [<https://perma.cc/PQ8K-L47V>].