



**GUIDANCE NOTE ON REFUGEE CLAIMS  
RELATING TO VICTIMS OF ORGANIZED  
GANGS**

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The Office of the United Nations High Commissioner for Refugees (UNHCR) issues Guidance Notes on thematic legal issues pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, and subsequent General Assembly resolutions in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. Guidance Notes seek to provide guidance in the particular thematic area concerned, by analysing international legal standards, jurisprudence and other relevant documents.

Guidance Notes are in the public domain and are available on Refworld, <http://www.refworld.org>. Any questions relating to specific aspects of this Note may be addressed to the General Legal Advice Unit of the Division of International Protection (DIP), UNHCR, Geneva, e-mail HQPR02@UNHCR.ORG.

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## I. INTRODUCTION

1. Gang violence is a feature of everyday life in some countries of the world. Entire communities may be dominated by gangs and gang culture. The violence affects men, women and children alike. Many victims are young people who are targeted by gangs for recruitment and to carry out crime. This Note provides guidance on the assessment of asylum claims caused by, or associated with, organized gangs. It presents a brief overview of these gangs and their activities as well as a typology of victims of gang-related violence.<sup>1</sup>
2. As organized gangs have become increasingly common in various parts of the world, asylum claims connected with their activities have multiplied in regions as far apart as Europe and Central America. During recent years, an increasing number of claims have been made especially in Canada, Mexico, and the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their countries of origin.<sup>2</sup> Most of the examples and jurisprudence relied on in this Note illustrating the risks and legal issues involved therefore refer to this particular region. The Note may also be of relevance for similar types of claims arising in other regions.
3. The main question addressed in this Note is whether victims of criminal gangs or activities associated with those groups may be considered in need of international protection under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and, if so, under what circumstances.

## II. OVERVIEW OF GANGS AND THEIR PRACTICES

4. Although there is no universally recognized definition of a “gang”, the term is commonly used to denote a group of two or more members which carries out criminal activities as its primary or secondary objective.<sup>3</sup> For the purpose of this Note, the term “gang” refers to the relatively durable, predominantly *street-based groups of young people* for whom crime and violence is integral to the group’s identity. The term is also used to refer to *organized criminal groups* of individuals for whom involvement in crime is for personal gain (financial or otherwise) and their primary “occupation.” The notion of “organized gangs” may also include *vigilante type groups* involved in criminal activities.<sup>4</sup> Members of gangs typically

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<sup>1</sup> For further information about gangs, see the background research for this Note: UNHCR, *Living in a World of Violence: An Introduction to The Gang Phenomenon* (publication forthcoming).

<sup>2</sup> For further information, see Washington Office on Latin America, “*Central American Gang-Related Asylum: A Resource Guide*”, May 2008, [http://www.wola.org/media/Gangs/WOLA\\_Gang\\_Asylum\\_Guide.pdf](http://www.wola.org/media/Gangs/WOLA_Gang_Asylum_Guide.pdf) (hereafter “WOLA, *A Resource Guide*”); Capital Area Immigrants’ Rights, “*Seeking asylum from Gang-Based Violence in Central America: A Resource Manual*”, Aug. 2007.

<sup>3</sup> The U.S. Federal Bureau of Investigation, for instance, defines a gang as “a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence and any other criminal activity to sustain the enterprise.” See also Deborah L. Weisel, “*Contemporary Gangs: An Organizational Analysis*,” LFB Scholarly Publishing LLC, 2002, pp. 34–36.

<sup>4</sup> See “*State failure and extra-legal justice: vigilante groups, civil militias and the rule of law in West Africa*”: New Issues in Refugee Research, Research Paper No. 166, UNHCR Policy Development and Evaluation Service, <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=48f351722&query=State%20failure%20and%20extra->

share common social, cultural and psychological characteristics. Their members may be from marginalized segments of society,<sup>5</sup> the same socio-economic class or within a certain age range.<sup>6</sup> Gangs may also be organized along ethnic, political or religious lines.<sup>7</sup>

5. Certain behavioural characteristics can be used to identify gangs. They may be defined by qualities of exclusivity, as only certain individuals are recognized and permitted access. In addition, as part of crafting their identity and defining themselves, gangs and their members engage in rivalries with other gangs. There are also expectations of loyalty and consequences for perceived violations of those expectations within gangs. Typically, membership in a gang has been displayed by common attire, adherence to a certain dress code, hairstyle, jewellery and/or body tattoos and other identifying marks on the body. More recently, however, many gangs have moved away from these traditional identifiers in order to remain more clandestine in their activities.
6. The individual organization and culture of gangs vary considerably, however. Members of a gang tend to share a common mentality which defines the way in which they perceive and respond to events. Central to this mentality is the notion of respect and responses to perceived acts of disrespect. Because respect and reputation play such an important role in gang culture, members and entire gangs go to great lengths to establish and defend both. Refusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response. Significantly, once an individual or family has been targeted for retaliation, the gravity of the threat does not diminish over time.
7. Some gangs, such as the Maras,<sup>8</sup> rely heavily on forced recruitment to expand and maintain their membership. They typically recruit young people who are poor, homeless and from marginalized segments of society or particular neighborhoods. Initiation rituals are characterized by violent and abhorrent acts, requiring recruits to endure physical and sexual violence as well as to commit serious crimes,

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[legal%20justice:%20vigilante%20groups,%20civil%20militias%20and%20the%20rule%20of%20law%20in%20West%20Africa.](#)

<sup>5</sup> See, for instance, about the Yakuza in Japan, Kristof, N. D., "Japan's Invisible Minority: Better off Than in Past, but Still Outcasts", New York Times, 30 Nov. 1995.

<sup>6</sup> The Committee on Economic, Social and Cultural Rights, in its Concluding Observations on El Salvador, E/C.12/SLV/CO/2, 27 June 2007, <http://www.unhcr.org/refworld/docid/46b9d7532.html>, expressed concerns that the Maras are "composed mainly of socially and economically marginalized young men".

<sup>7</sup> For further information about different types of gangs, see, for instance, Immigration and Refugee Board of Canada, *Kenya: The Mungiki sect; leadership, membership and recruitment, organizational structure, activities and state protection available to its victims (2006–October 2007)*, 1 Nov. 2007, <http://www.unhcr.org/refworld/docid/4784def81e.html>; Immigration and Refugee Board of Canada, *Croatia: Treatment of Muslims and Muslims of mixed descent by skinheads, nationalist and racist groups; availability and accessibility of state protection for Muslims (1995-2004)*, 18 May 2004, <http://www.unhcr.org/refworld/docid/41501c160.html>; U.S. Bureau of Citizenship and Immigration Services, *Jamaica: Jamaican Posses*, 22 Sep. 1999, <http://www.unhcr.org/refworld/docid/3ae6a6a10.html>; Anderson, A., "The Red Mafia: A Legacy of Communism", *Economic Transition in Eastern Europe and Russia: Realities of Reform*", ed. Lazear, P. Edward, Stanford California, The Hoover Institution Press, 1995.

<sup>8</sup> The Mara Salvatrucha or MS-13 gang and the Mara 18 or M-18 gang, hereinafter collectively referred to as "the Maras", are the most notorious of the Central American gangs.

including murder.<sup>9</sup> Membership of a gang is usually seen as a life-long commitment. Thus, any desertion carries heavy consequences; gangs tend to punish defectors severely, including through intimidation, death threats and/or physical revenge (which sometimes extends to family members).<sup>10</sup>

8. As indicated above, 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. Some gangs, such as the Maras, have become increasingly violent with a sharper focus on criminal activities in order to increase their economic profit.<sup>11</sup>
9. Gang members may in some countries also unite in conflict against law enforcement agents.<sup>12</sup> Some States in Central America have, as a response, adopted the so-called “mano dura” (“strong hand”) approach to the gang phenomenon.<sup>13</sup> Responses have, *inter alia*, included “social cleansing” practices, such as extrajudicial killings, police violence, arbitrary or unlawful arrests and detention<sup>14</sup> as well as inhumane prison conditions.<sup>15</sup> Such measures appear to be directed against gang members and those suspected of being gang members, and they are often supported or condoned by the State. As noted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

The evidence shows that social cleansing is more than the actions of a few rogue officers. This does not mean that it has risen to the level of officially sanctioned policy, but the frequency and regularity of social cleansing does indicate that it presents an issue of institutional responsibility.<sup>16</sup>

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<sup>9</sup> Report of the International Human Rights Clinic, *No place to hide: Gang, State and Clandestine Violence in El Salvador*, Human Rights Programme, Harvard Law School, Feb. 2007 (hereinafter “IHRC, *No place to hide*”), <http://www.law.harvard.edu/programmes/hrp/documents/NoPlacetoHide.pdf>, pp. 31–32.

<sup>10</sup> Desertion is perceived to undermine the internal discipline of the gang as well as to impact the gang’s ability to dominate its territory and carry out its activities, *ibid*, pp. 33–34.

<sup>11</sup> See, for instance, Writenet, *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations*, Aug. 2008 (hereinafter “Writenet, *Report on Central America*”), <http://www.unhcr.org/refworld/docid/48ad1eb72.html>; IHRC, *No place to hide*, above fn. 9; USAID, *Central America and Mexico Gang Assessment*, Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development, Apr. 2006, [http://www.usaid.gov/locations/latin\\_america\\_caribbean/democracy/gangs\\_assessment.pdf](http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf).

<sup>12</sup> WOLA, *A Resource Guide*, above fn. 2, p. 5.

<sup>13</sup> In the views of some observers, these “zero tolerance” responses have been ineffective in addressing gang-related crime and raise additional human rights concerns. See Writenet, *Report on Central America*, above fn. 11, pp. 25–26, 37; IHRC, *No place to hide*, above fn. 9 pp. 44–45.

<sup>14</sup> The Committee on the Rights of the Child expressed concerns in its Concluding observations on Honduras, CRC/C/HND/CO/3, 3 May 2007, <http://www.unhcr.org/refworld/docid/478c93e72.html>, that “many children are arrested and detained on the mere allegation that they may belong to a mara because of their appearance, e.g. due to the way of dressing or to the presence of a tattoo or a symbol”, and recommended that the State party “ensure that persons below 18 are not deprived of their liberty unlawfully or arbitrarily, in particular as a consequence of the application of anti-maras measures”.

<sup>15</sup> See, for instance, Writenet, *Report on Central America*, above fn. 11.

<sup>16</sup> Human Rights Council, *Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Guatemala (21-25 August 2006)*, 19 Feb. 2007, A/HRC/4/20/Add.2, <http://www.unhcr.org/refworld/docid/461f844d2.html>, para. 21.

### III. TYPOLOGY OF VICTIMS OF ORGANIZED GANGS

10. Gang-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. Individuals, local businesses, buses and taxis may be subjected to demands for “renta” and threats of violence if refusing to comply with these demands.<sup>17</sup>
11. Certain social groups may, however, be specifically targeted. This includes people who are marginalized in society and, consequently, more vulnerable to forced recruitment, violence and other forms of pressure from gangs. It is important to note that although gang-related violence mostly affects men and boys, women and girls may also be exposed to such violence. Lack of protection by the State, lack of opportunities and family care, poverty and a need for social belonging may push children and youth into joining gangs. The primary victims of youth gang-related violence are other young people, including those who are involved in gangs and those who are not.<sup>18</sup> Several distinct categories of applicants in gang-related asylum claims can be identified and are briefly outlined below.

#### a) Resistance to gang activity

12. Gangs may direct harm at individuals who in various ways have resisted gang activity or who oppose, or are perceived to oppose, the practices of gangs. Members of this group need to be understood in their specific country and societal contexts. In areas where criminal activity is widespread and law enforcement is incapable of protecting people from gang violence, a person expressing opposition to gangs will often stand out from the rest of the community. Such “gang-resisters” may be grouped broadly into the following categories:
  - a. individuals at risk of, or who refuse, recruitment, such as young men and adolescent boys of a certain social status;
  - b. individuals, such as young women and adolescent girls, who refuse sexual demands by gangs, including for prostitution and trafficking purposes,<sup>19</sup> or to become sexual property of gangs;
  - c. business owners and others unable or unwilling to meet extortion or other unlawful demands for money or services by gangs;<sup>20</sup>

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<sup>17</sup> “Renta” is money collected by gang members from local businesses, public transportation drivers, households, etc., as part of an organized extortion system. See IHRC, *No place to hide*, above fn. 9, p. 81.

<sup>18</sup> See Commission on Human Rights, Extrajudicial, summary or arbitrary executions: *Report submitted pursuant to Commission on Human Rights resolution 2002/36: Addendum - Mission to Honduras*, 14 June 2002, E/CN.4/2003/3/Add.2, <http://www.unhcr.org/refworld/docid/3dec85782.html>, which noted that the “killing of children by unknown perpetrators is routinely attributed to inter-gang wars between the maras. It is alarming that a section of the Honduran press often demonizes street children and blames the high level of violence in the country on child gangs ... [i]n the end, every child with a tattoo and street child is stigmatized as a criminal”, para. 29; WOLA, *Transnational Study on Youth Gangs*, Mar. 2007, [http://www.wola.org/media/Gangs/executive\\_summary\\_gangs\\_study.pdf](http://www.wola.org/media/Gangs/executive_summary_gangs_study.pdf), p. 9.

<sup>19</sup> For persons who have been trafficked by gangs, please refer to UNHCR, *Guidelines on International Protection No. 7: “The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked,”* 7 Apr. 2006, <http://www.unhcr.org/refworld/docid/443679fa4.html>.

- d. witnesses of crimes committed by gangs, or individuals who have reported such incidents to the authorities who subsequently become vulnerable to violence as a form of deterrence or retribution;<sup>21</sup>
- e. law enforcement agents may become targets because of their efforts to combat gangs;
- f. NGO workers, human rights activists, lawyers and participants in community- or church-based groups who oppose gangs, thus becoming the targets of intimidation tactics and violence by gangs;<sup>22</sup>
- g. other individuals who are, or are perceived to be, a threat to gangs or as not conforming with their practices, including ethnic and sexual minorities.

**b) Former and current gang members**

13. In certain circumstances, former and current gang members may be considered as victims of gang-related violence, in particular, as a result of forced recruitment, violent gang rituals and the enforcement of a gang's membership code. Victims due to their *former* gang membership typically involve gang members who have deserted the gangs or who were forcibly recruited and managed to escape.<sup>23</sup> Such applicants could fear retaliation and violence from their own and/or rival gangs and not always benefit from the protection of law enforcement agencies. Although seeking to disassociate themselves from the gangs, they may continue nevertheless to be perceived as members, for instance, because of remaining gang tattoos.
14. *Current* gang members could fear harm from another gang or private individuals. More frequently, however, their fear may relate to harm emanating from law enforcement agents. This category also includes individuals who have joined gangs outside their country of origin but may fear harm if returned.

**c) Victims and critics of State's anti-gang policies and activities**

15. Gang-related claims to asylum could also involve victims of State's unlawful or arbitrary measures to combat the gang phenomenon (for instance, the above-mentioned social cleansing practices). Such measures could be directed against current gang members but may also involve other individuals who are mistakenly perceived to belong to gangs, such as former gang members and young people whose age, appearance or social background resemble those of gang members. The "Mano Dura" and similar approaches have occasionally targeted groups that

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<sup>20</sup> See, for instance, *Jose Francisco Marquez-Perez, Petitioner v. Mukasey*, No. 06-61153, U.S. Court of Appeals for the 5<sup>th</sup> Circuit, 29 Feb. 2008 (non-precedent decision), <http://www.unhcr.org/refworld/docid/4b6aca8d2.html>, where the proposed group involved "business owners in El Salvador who [were] targeted by gang members for money;" *X (Re), Immigration and Refugee Board of Canada (Refugee Division)*, No. T99-04988, 17 Nov. 1999, <http://www.unhcr.org/refworld/docid/4b6be1ad2.html>, which concerned a Polish businessman who had fled threats and extortion demands of former police officers.

<sup>21</sup> *Yoli v. Canada (Minister of Citizenship and Immigration)*, F.C.J. No. 182 2002 FCT 1329, Canada, Federal Court, 30 Dec. 2002, <http://www.unhcr.org/refworld/docid/4039fa464.html>.

<sup>22</sup> *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, U.K. Asylum and Immigration Tribunal, 24 Nov. 2000, <http://www.unhcr.org/refworld/docid/40487df64.html>.

<sup>23</sup> *Santos-Lemus v. Mukasey*, No. 07-70604, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 9 Aug. 2008, <http://www.unhcr.org/refworld/docid/4b6c22a82.html>.



have no association with gangs but who may be considered “undesirable” in society,<sup>24</sup> e.g. drug addicts, street children,<sup>25</sup> sexual minorities<sup>26</sup> and sex workers.

16. Unlawful or arbitrary measures, including extra-judicial killings, have also sometimes been used against members of civil society who may be perceived as critics of the government’s approach towards the gangs. This includes, for example, human rights activists and former law enforcement officials who have acted as “whistle-blowers” and reported corrupt or otherwise unlawful behaviour of government officials in relation to gangs.<sup>27</sup>

#### **d) Family members**

17. Family members of the above categories may also be routinely targeted by gangs. Typically, families could be subjected to threats and violence as an act of retaliation or to exert pressure on other members of the family to succumb to recruitment attempts or extortion demands. Even though the applicant may not have personally opposed the gangs or does not share the views of his/her family members, the gang or in some cases agents of the State may attribute such resistance or views to the applicant. For example, a woman (or girl) could be exposed to harm due to being perceived by gangs as holding the same anti-gang views as her father, husband, son or brothers.

## **IV. LEGAL ANALYSIS**

18. The increasing number of asylum claims resulting from gang-related activities, especially in the context of Central America, has necessitated clarification regarding the interpretation of the refugee definition contained in the 1951 Convention. Eligibility for international protection for individuals fleeing gang-related violence will depend on a number of factors, including the risks faced by the applicant, the severity and nature of the violence/human rights abuses suffered or feared, the causal link with one of the grounds enumerated in the refugee definition of the 1951 Convention, his/her involvement with gang activities as well as the level of available State protection in the country concerned. Obviously, exclusion considerations will need to be considered carefully in many such claims.
19. Proper consideration of the age and gender aspects of a claim will be particularly important in applications made by children, youth and women; it is essential that

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<sup>24</sup> Writenet, *Report on Central America*, above fn. 11.

<sup>25</sup> The Committee on the Rights of the Child in its Concluding Observations on Colombia, CRC/C/COL/CO/3, 8 June 2008, <http://www.unhcr.org/refworld/docid/45377ee30.html>, was particularly disturbed by threats posed by social cleansing and noted that the right to life of children who live and/or work on the streets may be particularly threatened and also expressed concerns over the vulnerability of street children to youth gangs, paras. 84–85.

<sup>26</sup> In *RRT Case N98/22948*, RRTA 1055, Australia, Refugee Review Tribunal, 20 Nov. 2000, <http://www.unhcr.org/refworld/docid/4b7a97fd2.html>, the Tribunal accepted that “urban death squads and vigilante groups target sections of society who they consider to be disposable” and upheld the claim for refugee status of a HIV positive gay Colombian man. The Tribunal found that the identification of poor gay men as “disposables” would put them at risk of “social clean up” operations which “target the urban poor, some gay men, transvestites, male and female prostitutes, street children, vagrants and petty criminals”.

<sup>27</sup> Writenet, *Report on Central America*, above fn. 11, p. 10.

their relevance not be overlooked or underestimated during the assessment of claims.<sup>28</sup>

**a) Well-founded fear of persecution**

20. When assessing the well-foundedness of the fear of persecution, it is important to take into account a number of factors pertaining to the personal profile of the applicant, including his/her background, experiences, activities, and family situation. Gang-related asylum claims frequently reveal that one or more members of the same family have been threatened, harmed, killed or forced to relocate.<sup>29</sup> Harm inflicted on other individuals in similar situations, particularly other family members, may support the well-foundedness of the fear of the applicant.
21. In general, gang-related harm involves different forms of physical and sexual violence such as homicide, assault, rape, robbery, theft, arson and associated threats.<sup>30</sup> Beatings, rape and other serious assaults will generally rise to the level of persecution as would other serious human rights violations, such as trafficking and kidnapping.<sup>31</sup> Threats of violence or death, even where the applicant has not yet suffered violence, may also amount to persecution where the threat is deemed credible in light of the particular context and background of the applicant.
22. Pressure to join a gang often takes place through a gradual escalation of threats and violence. Coercing someone into a criminal gang or preventing him/her from leaving it through the use of violence, threats or other forms of coercion is at variance with a number of human rights, including the rights to freedom of association and to liberty and security of the person.<sup>32</sup> Forcible recruitment

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<sup>28</sup> See, *Doe v. Holder, Attorney General: Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, 13 Nov. 2009, <http://www.unhcr.org/refworld/docid/4b03eb182.html>, pp. 17–19.

<sup>29</sup> See, for instance, *Matter of E-A-G-*, 24 I&N Dec. 591, U.S. Board of Immigration Appeals, 30 July 2008, <http://www.unhcr.org/refworld/docid/4ae9acc00.html>.

<sup>30</sup> See *Francis Gatimi, et al v. Eric H. Holder, Jr. Attorney General of the U.S.*, No. 08-3197, U.S. Court of Appeals for the 7<sup>th</sup> Circuit, 20 Aug. 2009, <http://www.unhcr.org/refworld/docid/4aba40332.html>. The Court examined whether violence by gangs can amount to persecution and found that “the immigration judge ruled that the acts committed by the Mungiki against Gatimi were not persecution but merely ‘mistreatment.’ That is absurd.” See also - *Sandra --*, U.S. Department of Justice, Executive Office for Immigration Review (hereafter “EOIR”), Baltimore, MD, 16 Dec. 2008, where the Court held that “being relentlessly stalked, threatened, and physically and sexually assaulted by members of a violent gang whom the Guatemalan government has heretofore been unable to control would qualify as ‘infliction of suffering’ and thus be considered past persecution,” p. 17.

<sup>31</sup> Such acts may violate the right to life and the right to liberty and security enshrined in the International Covenant on Civil and Political Rights, <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> (hereinafter “ICCPR”), respectively Arts. 6 and 9. In the case of children, such acts may also violate a range of rights set out in the Convention on the Rights of the Child, <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (hereinafter “CRC”), including the right to life and maximum survival and development (Art. 6), the right to protection from all forms of violence (Art. 19), and the right not to be subject to abduction, sale and trafficking (Art. 35).

<sup>32</sup> See, for instance, the CRC, Arts. 6, 19, 20, 32. See also, the Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, <http://www.unhcr.org/refworld/docid/4538834f0.html>, which noted that “Violence results from a complex interplay of individual, family, community and societal factors. Vulnerable adolescents such as those who are homeless or who are living in institutions, who belong to gangs or who have

attempts, including under death threat, by violent groups would normally amount to persecution.<sup>33</sup> It is also important to recall, in particular with respect to children who have been forced into or abducted by criminal gangs and are under the control of gangs, that all forms of slavery and practices similar to slavery are prohibited according to international human rights law.<sup>34</sup> Such practices, including the sale and trafficking of human beings,<sup>35</sup> as well as forced or compulsory labour,<sup>36</sup> would normally be considered as persecution.

23. Harm inflicted by State agents, such as police officers and prison guards, may include extrajudicial killings, torture, arbitrary arrest and detention.<sup>37</sup> Although a State has the

right, and responsibility to curb violence by enacting and enforcing criminal laws for the protection of society, that obligation does not extend to exercising that duty in such a way as to intentionally inflict severe pain or suffering on individuals under its custody and control.<sup>38</sup>

## b) Agents of persecution

24. In most gang-related claims, the persecution emanates from criminal gangs and other similar non-State groups. As stipulated by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, persecution may “emanate from sections of the population that do not respect the standards

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been recruited as child soldiers are especially exposed to both institutional and interpersonal violence”, para. 19.

<sup>33</sup> As an illustration as to how forced recruitment may constitute persecution see, for instance, *Dinora Del Carmen Molina v. INS*, 170 F.3d, 1247, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 26 Mar. 1999, <http://www.unhcr.org/refworld/docid/4152e0fbc.html>, which concerned a guerrilla group in El Salvador.

<sup>34</sup> The Convention to Suppress the Slave Trade and Slavery, 25 Sep. 1926, <http://www.unhcr.org/refworld/docid/3ae6b36fb.html>, provided the first basic definition of slavery: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”, Art 1(1). See also, International Labour Organization, Worst Forms of Child Labour Convention, 17 June 1999, C182, <http://www.unhcr.org/refworld/docid/3ddb6e0c4.html>, Art. 3.

<sup>35</sup> See also, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 Nov. 2000, <http://www.unhcr.org/refworld/docid/4720706c0.html>, Art. 3.

<sup>36</sup> International Labour Organization, Forced Labour Convention, C29, 28 June 1930, C29, <http://www.unhcr.org/refworld/docid/3ddb621f2a.html>, defines forced or compulsory labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

<sup>37</sup> The Committee on the Rights of the Child has, in the context of administration of juvenile justice, expressed particular concern at the repressive measures taken in response to youth gangs. See, for example, its Concluding Observations on El Salvador, CRC/C/15/Add.232, 30 June 2004, <http://www.unhcr.org/refworld/docid/42d3c19c4.html>, paras. 67–68. Some State agents have been implicated in ordering, facilitating or acquiescing to extrajudicial killings of gang members, including while in prison; see, for instance, the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his Mission to Guatemala, above fn. 16, and the follow-up report, A/HRC/11/2/Add.7, 4 May 2009, <http://www.unhcr.org/refworld/docid/4a0932270.html>.

<sup>38</sup> See *Matter of M-R-*, EOIR Immigration Court, York PA, (unpublished), 24 May 2005, and reasoning in relation to deferral of removal under the Convention Against Torture. The applicant was a former gang member who feared that he would be imprisoned under Honduran anti-gang legislation due to his past membership in MS-13 and that he would be subjected to severe pain and suffering while imprisoned. The decision was over-turned, however, on appeal.

established by the laws of the country concerned”. The UNHCR Handbook further provides that “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.”<sup>39</sup>

25. After determining whether the harm feared can be considered persecution in the sense of the 1951 Convention, it is necessary to establish whether the State is *unwilling* or *unable* to provide protection to victims of gang-related violence. The authorities may be unwilling to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of protection. The State could prove unable to provide effective protection, especially when certain gangs, such as the Maras, yield considerable power and capacity to evade law enforcement or when the corruption is pervasive.
26. The State may in certain circumstances be considered the agent of persecution in gang-related claims. This may be the case, for instance, where individual State agents collaborate with gang members or direct gangs to engage in violence and other criminal activities while acting outside the scope of their official duties or as part of unlawful measures to combat gang-related violence.<sup>40</sup> A State’s responsibility is engaged where groups or individuals, even if formally separated from the government structures, act at the instigation, or with the consent of, the government.
27. An assessment of the availability of State protection will require detailed and reliable country of origin information, including information about existing programmes, to address the gang phenomenon and their effectiveness. As with all other elements of refugee status determination, it is important to analyse the individual circumstances of each case. A State is not expected to guarantee the highest possible standard of protection to all its citizens all the time, but protection needs to be real and effective.<sup>41</sup>
28. Factors that may be indicative of available State protection and may help adjudicators analyse claims include: efforts to reform and expand the criminal justice system; attempts to end the practice of social cleansing; and the establishment of witness protection programmes. Conversely, the following factors are indicative of a lack of effective State protection: lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on

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<sup>39</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 Jan. 1992, <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereinafter the “UNHCR, *Handbook*”), para. 65. See also the EU Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC, <http://www.unhcr.org/refworld/docid/4157e75e4.html>, which explicitly refers to non-State actors as agents of persecution (Art. 6 (c)).

<sup>40</sup> See, for instance, Writenet, *Report on Central America*, above fn. 11

<sup>41</sup> The existence of Mano Dura and other similar programmes launched to address gang-related crime need not necessarily be taken as evidence that effective State protection is available. Some observers have commented on the inability of these programmes to effectively deal with the gangs and related crime; see, for instance, the Writenet, *Report on Central America*, above fn. 11.

the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs; a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.<sup>42</sup>

### c) Link to a Convention ground

29. To meet the criteria of the refugee definition, an individual's well-founded fear of persecution must be related to one or more of the five Convention grounds. As noted in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status "it is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared."<sup>43</sup> It must be shown that the Convention ground is a contributing factor to the risk of being persecuted, although it does not need to be the sole, or even dominant, cause.<sup>44</sup> Where the risk of persecution derives from a non-State actor, the causal link may be satisfied:

(1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.<sup>45</sup>

30. In many gang-related cases, in particular those concerning young people who resist recruitment or other unlawful gang demands, an individual is targeted because s/he lives in a poor neighbourhood, and/or is without family or other social support networks. On that basis, individuals are at heightened risk of being targeted because of their marginalization, social status and vulnerability.

### d) Convention grounds

31. Jurisprudential developments suggest that gang-related asylum claims have most frequently been analysed within the 1951 Convention ground of "membership of a particular social group" and/or "political opinion". This in itself does not exclude

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<sup>42</sup> See discussion on State protection in *RPD File No. TA7-04670, TA7-04671, TA7-04672, (Private Proceedings), Immigration and Refugee Board of Canada, CanLII 49548, Canada, Immigration and Refugee Board, 31 Jan. 2008, <http://www.unhcr.org/refworld/docid/4b6bea7e2.html>, p. 3.*

<sup>43</sup> UNHCR, *Handbook*, above fn. 39, para. 67.

<sup>44</sup> UNHCR, *Position on Claims for Refugee Status under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, 17 Mar. 2006, <http://www.unhcr.org/refworld/docid/44201a574.html>, para. 13.

<sup>45</sup> UNHCR, *Guidelines on International Protection No. 2: "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*, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f23f4.html>, (hereinafter "UNHCR, *Guidelines on Membership of a Particular Social Group*"), para. 23.

the applicability of any of the other 1951 Convention grounds. It is also important to note that the grounds are not mutually exclusive and may overlap.<sup>46</sup>

**(i) Religion**

32. The 1951 Convention ground of religion may be relevant for the analysis of a claim where the applicant's religious beliefs are incompatible with gang life style.<sup>47</sup> It could, for example, be the case where the applicant refuses to join a gang because of his/her religious belief or conscience, or where a gang member who experiences religious conversion wants to exit the gang. An individual's religion or beliefs may also be a ground for persecution where intolerance and violence against people of other religions or beliefs in a particular society is promoted by gangs. In such contexts, it is important to consider whether the applicant's religious conviction has been or could be brought to the attention of gang members.<sup>48</sup>

**(ii) Race and nationality**

33. Some gangs are motivated by racist or nationalist ideologies and operate in environments where racial discrimination is common. Gangs may, for example, fuel xenophobia and carry out hate crimes against foreigners as well as ethnic and national minorities. In such contexts, individuals belonging to these minorities, including indigenous groups, may be targeted by gangs because of their race or nationality. In the absence of State protection, the 1951 Convention grounds of race and/or nationality may thus be applicable where the applicant is persecuted by a gang on account of his or her race, ethnicity or nationality.<sup>49</sup>

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<sup>46</sup> UNHCR, *Handbook*, above fn. 39, para. 67. See also, *Orozco-Polanzo (Re)*, No. A75-244-012, U.S. EOIR, Immigration Court, El Paso, Texas, 18 Dec. 1997, <http://www.unhcr.org/refworld/docid/4b6beec42.html>. The applicant was a young male from Guatemala who had refused recruitment attempts by two gangs as he did not believe in the values of the gangs. The Court found that "the grounds of political opinion and membership in a particular group are interchangeable".

<sup>47</sup> In *Romero-Rodriguez v. U.S. Attorney General*, 131 Fed.Appx.203, 2005 WL 1106550, U.S. Court of Appeals for the 11<sup>th</sup> Circuit, 10 May 2005, <http://www.unhcr.org/refworld/docid/4b7aa25b2.html>, the applicants claimed a fear of persecution for their refusal to join a criminal organization due to their religious and conscientious upbringing.

<sup>48</sup> See further UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 Apr. 2004, <http://www.unhcr.org/refworld/docid/4090f9794.html>, paras. 4, 14.

<sup>49</sup> UNHCR, *Handbook*, above fn. 39, paras. 68–70, 74–76. See also decision V-95-00138, Canada, Convention Refugee Determination Division, 16 Jan. 1997, which noted that racial discrimination was common in Colombia and that young, poor, black men were common targets of gangs, operating with the tacit approval of the government. It was determined that the applicant had suffered from discrimination amounting to persecution on account of his race and socio-economic group. However, he was found to have an internal flight alternative; *X (re)*, File No. TA7-13448, TA7-13528; TA7-13529, TA7-13530, Canada, Immigration and Refugee Board, 28 July 2008 (amended 16 Sep. 2008), <http://www.unhcr.org/refworld/docid/4b7bad512.html>, which concerned a Roma family fearing harm from skinhead gangs; *Refugee Appeal Nos. 76259, 76260 & 76261*, New Zealand, Refugee Status Appeals Authority, 16 Dec. 2008, <http://www.unhcr.org/refworld/docid/4a1a8c002.html>.

*(iii) “Membership of a Particular Social Group”*

34. UNHCR defines 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. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>50</sup>

This definition combines the two alternate approaches emerging in State practice, that is, the “protected characteristics” approach and the “social perception” approach into one definition. In UNHCR’s view, both approaches are legitimate. The group only needs to be identifiable through one of the approaches, not both.<sup>51</sup>

35. Although a social group cannot be “defined exclusively by the persecution that the members of the group suffer or by a common fear of being persecuted”, the fact that members of a group have been or are being persecuted may serve to illustrate the potential relationship between persecution and a particular social group.<sup>52</sup> However, in order to be recognized, it is not necessary for a group to be victim of a higher incidence of crime or human rights violations than the rest of the population. As with other types of claims, the size of the group is also not relevant.<sup>53</sup>

*Innate and immutable characteristics*

36. 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.<sup>54</sup> 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. Indeed, recent studies have found that the recruitment practices of Central American gangs

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<sup>50</sup> UNHCR, *Guidelines on Membership of a Particular Social Group*, above fn. 45, paras. 11–13.

<sup>51</sup> *Ibid*, para. 14. “Social visibility” and “particularity” have been introduced in U.S. jurisprudence as additional requirements for recognition of a particular social group in a number of decisions, including in relation to gangs. Recently, however, in *Francis Gatimi, et al., v. Eric H. Holder*, above fn. 30, the “social visibility” requirement was questioned. For further information about UNHCR’s position on the issue, see *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 Apr. 2009, <http://www.unhcr.org/refworld/docid/49ef25102.html>; *Doe v. Holder*, UNHCR, Amicus Curiae, above fn. 28.

<sup>52</sup> *A v Minister for Immigration & Ethnic Affairs*, Australia, High Court, 24 Feb. 1997, <http://www.unhcr.org/refworld/docid/3ae6b7180.html>. The Court found that “while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.”

<sup>53</sup> UNHCR, *Guidelines on Membership of a Particular Social Group*, above fn. 45, para. 18.

<sup>54</sup> See, for instance, *VM (FGM - Risks - Mungiki - Kikuyu/Gikuyu) Kenya v. Secretary of State for the Home Department*, UKAIT 00049, U.K. Asylum and Immigration Tribunal, 9 June 2008, <http://www.unhcr.org/refworld/docid/484d4a222.html>, which involved a female asylum-seeker fearing persecution in the form of enforced female genital mutilation from her partner, a member of the Mungiki organization; the recognized group was “women (girls) in Kenya”.

frequently target young people.<sup>55</sup> 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>56</sup>

37. Past actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable.<sup>57</sup> For instance, *In Matter of S-E-G* (2008), the United States Board of Immigration Appeals accepted that “youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.”<sup>58</sup> Past association with a gang may be a relevant immutable characteristic in the case of individuals who have been forcibly recruited.

*Characteristics fundamental to one’s conscience and exercise of human rights*

38. Resisting involvement in crime by, for instance, evading recruitment or otherwise opposing gang practices may be considered a characteristic that is fundamental to one’s conscience and the exercise of one’s human rights. At the core of gang resistance is the individual’s attempt to respect the rule of law<sup>59</sup> and, in the case of those who refuse to join the gangs, also the right to freedom of association, including the freedom to not associate.<sup>60</sup> Former gang members may also be considered as seeking to exercise their right to rehabilitation and reform.<sup>61</sup> The ethical belief at stake, namely the belief to be “law-abiding”, may be considered to be of such a fundamental nature that the person concerned ought not be required to renounce it, as this, in effect, would be tantamount to requiring him/her to give in to the demands of the gangs and become involved in crime.<sup>62</sup> United States

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<sup>55</sup> Youth within the age range of 8–18 years may be particularly vulnerable to recruitment. See, for instance, the USAID, *Central America and Mexico Gang Assessment Report*, above fn. 11, p. 15.

<sup>56</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 Dec. 2009, <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>, para. 49. See also, *Matter of S-E-G, et al.*, 24 I&N Dec. 579, U.S. Board of Immigration Appeals, 30 July 2008, <http://www.unhcr.org/refworld/docid/4891da5b2.html>, in which the Court acknowledged that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable,” p. 583.

<sup>57</sup> UNHCR, *Guidelines on Membership of a Particular Social Group*, above fn. 45, para. 6.

<sup>58</sup> See *Matter of S-E-G*, above fn. 56.

<sup>59</sup> ICCPR, Art. 14.

<sup>60</sup> ICCPR, Art. 22; American Convention on Human Rights, <http://www.unhcr.org/refworld/docid/3ae6b36510.html>, Art. 16.

<sup>61</sup> These fundamental principles underpin ICCPR, Arts. 10(3), 14. See further Human Rights Committee, *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 Apr. 1984, <http://www.unhcr.org/refworld/docid/453883f90.html>, para. 16; *CCPR, General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 Apr. 1992, <http://www.unhcr.org/refworld/docid/453883fb11.html>, paras. 10–13.

<sup>62</sup> *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*. UNHCR Intervening: Case for the Intervener, 25 Mar. 1999, <http://www.unhcr.org/refworld/docid/3eb11c2f4.html>; *Doe v. Holder*, UNHCR, Amicus Curiae, above fn. 28, p. 27.



courts, for instance, have recognized particular social groups such as “young people who refuse to join a gang because they oppose crime”.<sup>63</sup>

39. Some applicants claim a fear of persecution as a result of pursuing their occupation, for example, business owners and public transportation staff who have been pressured by gangs to pay “renta” and other extortionate demands.<sup>64</sup> Requiring an applicant to abandon his or her occupation in order to avoid persecution amounts to a violation of the right not to be arbitrarily deprived of the right to work.<sup>65</sup> A particular social group based on the applicant’s occupation may in certain circumstances therefore be recognized where disassociation from the profession is not possible or this would entail a renunciation of basic human rights. This could also include journalists who have investigated crimes committed by gangs or former law enforcement officers who have reported corrupt behaviour on the part of some Stage agents.<sup>66</sup>
40. An applicant who is a family member of a “gang resister” (or gang member) could also be persecuted for reasons of his/her family membership, for example, where the family has a known record of being opposed to a gang. In such cases, the applicant’s “family” may be regarded as a relevant particular social group.<sup>67</sup> Family members may also experience persecution because of their imputed membership in any of the above-mentioned groups.<sup>68</sup>

#### *The social perception approach*

41. The social perception approach may also be relevant for the identification of a relevant social group. In a cultural context where it is risky for people to oppose gangs, often in closely knitted neighbourhoods that are effectively controlled by gangs, gang resisters may be set apart in society. In addition to youth and gender, those targeted for gang recruitment and other gang-related practices may be perceived by society as a social group by reason of their origin, social background

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<sup>63</sup> *Orozco-Polanco (Re)*, above fn. 46.

<sup>64</sup> See, for instance, *RRT Case No. 0906782*, RRTA 1063, Australia, Refugee Review Tribunal, 24 Nov. 2009, <http://www.unhcr.org/refworld/docid/4b5708f42.html>, where the recognized particular social group was “bus, public transport and truck drivers.”

<sup>65</sup> International Covenant on Economic, Social and Cultural Rights, <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>, Arts. 2(2), 6.

<sup>66</sup> *RPD File No. TA7-04670, TA7-04671, TA7-04672*, above fn. 42. The principal applicant was targeted by an organized crime gang as a result of articles he had written. The Board found that “the PC is a XXXXX and he should not be expected to abandon his vocation and go into hiding in another location in Mexico”.

<sup>67</sup> “Family” or “kinship ties” have been recognized by several jurisdictions as constituting a “particular social group” for the purpose of the refugee definition. See, for instance, *Matter of Acosta*, A-24159781, U.S. Board of Immigration Appeals, 1 Mar. 1985, <http://www.unhcr.org/refworld/docid/3ae6b6b910.html>; *Sanchez Trujillo v. INS*, 801 F.2d 1571, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 15 Oct. 1986, <http://www.unhcr.org/refworld/docid/4a3a3af50.html>. The Court noted that “perhaps a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests,” para. 26.

<sup>68</sup> See, for instance, *Orejuela v. Gonzales*, 423 F.3d 666, U.S. Court of Appeals for the 7<sup>th</sup> Circuit, 8 Sep. 2005, <http://www.unhcr.org/refworld/docid/4b7a9a0a2.html>. The applicant was targeted by FARC (Revolutionary Armed Forces of Colombia) which had killed her husband. The Court granted the application based on the fact that the political opinion of her husband had been imputed to her. See further, *Del Carmen Molina v. INS*, above fn. 33.

or class.<sup>69</sup> Examples abound of young people from certain areas or backgrounds who are regularly targeted by gangs for recruitment, extortion or other purposes.<sup>70</sup>

42. Imputed gang membership may amount to being a member of a relevant social group in the case of youth or others who are erroneously perceived to be gang members but who, in fact, have no affiliation with a gang. For example, youth who happen to be present when gang members are arrested may be erroneously considered gang members. When gangs exercise de facto control over some neighbourhoods of certain cities, it is consequently plausible for a young person to be targeted by virtue of his/her tie to that neighbourhood. Youth may also be targeted if they are friends with gang members.

*Special considerations concerning applicants with past or current gang affiliation*

43. Claims concerning individuals with present or past voluntary affiliation with gangs require a careful assessment of whether the applicant is indeed a member of a particular social group. In UNHCR's view, voluntary membership in organized gangs normally does not constitute membership of a particular social group within the meaning of the 1951 Convention. Because of the criminal nature of such groups, it would be inconsistent with human rights and other underlying humanitarian principles of the 1951 Convention to consider such affiliation as a protected characteristic.<sup>71</sup>
44. In such cases, it is important to take into account the circumstances under which the applicant joined the gang. An individual who has been forcibly recruited into a gang would primarily be considered a victim of gang practices rather than a person associated with crime. This applies in particular to young people who may have less capacity or means to resist gang pressures. Children who lack the requisite maturity and mental capacity would normally not be considered to have voluntarily joined a gang.<sup>72</sup> However, even if gang association occurred on a

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<sup>69</sup> Social groups with low socio-economic status have been recognized by some jurisdictions. See, for example, *MA6-03043*, CanLII 47104, Canada, Immigration and Refugee Board, 29 Feb. 2009, <http://www.unhcr.org/refworld/docid/4b7aa3662.html>, which recognized that “poor Haitian women with HIV/AIDS” can constitute a particular social group; *MA0-06253*, CanLII 26873, Canada, Immigration and Refugee Board, 18 Jan. 2001, <http://www.unhcr.org/refworld/docid/4b7aa5692.html>, which found that “in a country where major landholders, with impunity and the use of violence, still oppose agrarian reforms designed to provide poor and disadvantaged peasants with a minimum of dignity and chance for survival, membership in such an agricultural cooperative is a sacred and essential right which no one should be compelled to waive”. See also, *RRT Case N98/22948*, above fn. 26.

<sup>70</sup> USAID, *Central America and Mexico Gang Assessment Report*, above fn. 11, p. 15. See further Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 2007 ed., pp. 85–86; Michelle Foster, *International Refugee Law and Socio-Economic Rights, Refuge from Deprivation*, 2007, pp. 303–313.

<sup>71</sup> In *Arteaga v. Mukasey*, 511 F.3d 940, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 27 Dec. 2007, <http://www.unhcr.org/refworld/docid/4b6be7662.html>, the Court noted that “to do as Arteaga requests would be to pervert the manifest humanitarian purpose of the statute in question and to create a sanctuary for universal outlaws. Accordingly, we hold that participation in such activity is not fundamental to gang members’ individual identities or consciences, and they are therefore ineligible for protection as members of a social group”, at 946. See also, *Chacon v. INS*, 341 F.3d 533, U.S. Court of Appeals for the 6<sup>th</sup> Circuit, 18 Aug. 2003, <http://www.unhcr.org/refworld/docid/4b6bf1ac2.html>.

<sup>72</sup> In *Canada (Minister of Citizenship and Immigration) v. X*, CanLII 47735, Canada, Immigration and Refugee Board, 31 May 2007, <http://www.unhcr.org/refworld/docid/4b7a9d2d2.html>, the Board

voluntary basis, former gang members, including those who have engaged in, or have been convicted of, criminal activity, may constitute a particular social group under certain circumstances provided they have denounced their affiliation with the gang and credibly deserted from it. In such cases, it is important to assess whether the applicant is fleeing persecution or prosecution/punishment for a common law offence.<sup>73</sup> It will also be necessary to consider whether any of the exclusion clauses apply (as further addressed below, at (g) Exclusion).

**(iv) Political opinion**

45. Gang-related refugee claims may also be analysed on the basis of the applicant's actual or imputed political opinion vis-à-vis gangs, and/or the State's policies towards gangs or other segments of society that target gangs (e.g. vigilante groups). In UNHCR's view, the notion of political opinion needs to be understood in a broad sense to encompass "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged".<sup>74</sup>
46. The 1951 Convention ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin.<sup>75</sup> In certain contexts, expressing objections to the activities of gangs or to the State's gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a "political opinion" within the meaning of the refugee definition.
47. It is important to consider, especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and *de facto* exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities. Such cases, thus, may under certain circumstances be properly analysed within the political opinion Convention ground.<sup>76</sup> Some jurisdictions have recognized that opposition to a criminal activity

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adopted the reasoning in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, A-207-04, 2005 CAF 85, Canada, Federal Court of Appeal, 4 Mar. 2005, <http://www.unhcr.org/refworld/docid/47e0e21b2.html>, i.e. that "in the case of a minor under the age of 12, for example, it would be highly unusual for there to be a finding of membership [in a criminal organization, in this case a gang]" and that "[T]here is a continuum that the closer the minor is to age 18, the greater the presumption of understanding of his actions."

<sup>73</sup> UNHCR, *Handbook*, above fn. 39, paras. 56–59.

<sup>74</sup> UNHCR, *Guidelines on International Protection No. 1: 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*, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 32. This interpretation has also received support in academic commentary; see for instance, Goodwin-Gill and Mc Adam, *The Refugee in International Law*, above fn. 70, p. 87.

<sup>75</sup> *Refugee Appeal Nr. 76044*, New Zealand, Refugee Status Appeals Authority, 11 Sep. 2008, <http://www.unhcr.org/refworld/docid/48d8a5832.html>, para. 84.

<sup>76</sup> See, for instance, *Emilia Del Socorro Gutierrez Gomez v. The Secretary of State for the Home Department*, above fn. 22, which noted that "the risk of extortion threats from a criminal gang will not normally be on account of political opinion, but in some societies where criminal and political activities heavily overlap, the picture may be different", para. 40; *Vassilev v. Canada (Minister of Citizenship and Immigration)*, CanLII 5394 (F.C.), 131 F.T.R. 128, Canada, Federal Court, 4 July

or, conversely, advocacy in favour of the rule of law may be considered a political opinion.<sup>77</sup>

48. Although not every expression of dissent will amount to political opinion, it may be political where the dissent is rooted in a political conviction.<sup>78</sup> Where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion.<sup>79</sup>
49. In certain circumstances, an applicant who fears harm because of his/her opposition to a government's policy or to the authorities' investigation of gang-related crime may qualify as a refugee on account of his/her political opinion. Such action could be viewed as a criticism of the State's inability to ensure law and order or imply an accusation of corruption amongst State authorities.<sup>80</sup> The political opinion ground would be particularly relevant where gang activity is closely intertwined with some parts of the authorities and/or the applicant has acted as a "whistle-blower" against corruption or other unlawful measures by certain State agents.<sup>81</sup>
50. In some cases, the opinion of the applicant may be characterized as neutral rather than as opposition.<sup>82</sup> This may, for example, be the case where a person expressly declines to join a gang, telling the gang that s/he is satisfied as s/he is. In such situations, neutrality is not the absence of an opinion but rather a conscious and

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1997, <http://www.unhcr.org/refworld/docid/4b6bf8502.html>. The Court found that "in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion."

<sup>77</sup> The U.S. Immigration Court, for instance, has found that the applicant had the political opinion of "believing in following the rule of law and earning an honest living and of opposing gang lifestyle and its accompanying illegal activities". See *Matter of Orozco-Polanco*, above fn. 46.

<sup>78</sup> (*Attorney General*) v. *Ward*, 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993, <http://www.unhcr.org/refworld/docid/3ae6b673c.html>. The Court found that "Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction."

<sup>79</sup> *Klinko v. Canada (Minister of Citizenship and Immigration)*, 3 F.C. 327; [2000] F.C.J. No. 228, Canada, Federal Court, 22 Feb. 2000, <http://www.unhcr.org/refworld/docid/403f18574.html>.

<sup>80</sup> See, for instance, *TA2-15177*, CanLII 55276, Canada, Immigration and Refugee Board, 7 Mar. 2003, <http://www.unhcr.org/refworld/docid/4b7aa7032.html>, which involved a claimant from Peru whose knowledge of misappropriation of funds in the government resulted in threats against his family and the kidnapping of his sister. The claimant was found to have a well-founded fear of persecution by reason of imputed political opinion; *Demchuk v. Canada*, CanLII 8677 (F.C.), Canada, Immigration and Refugee Board, 9 Sep. 1999, <http://www.unhcr.org/refworld/docid/4b7aa8572.html>.

<sup>81</sup> *Grava v. INS*, 205 F.3d. 1177, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 7 Mar. 2000, <http://www.unhcr.org/refworld/docid/4152e0fa6.html>. The Court found that threats against a whistle-blower who reported corrupt behaviour of government officials might be on account of political opinion.

<sup>82</sup> See, for instance, *Sangha v. INS*, 103 F. 3d, 1482, 1487, U.S. Court of Appeals for the 9<sup>th</sup> Circuit, 1997, <http://www.unhcr.org/refworld/docid/4152e0fc15.html>. The Court noted that "in these cases, the victim was recruited by a political group. The victim refused, and the political group threatened death if he did not comply. We reasoned in those cases that the victim's refusal showed his political neutrality, which was the equivalent of a political opinion, and that the persecutor's threats were persecution on account of that political opinion."

deliberate choice of the applicant and may constitute a political opinion. This may be especially so in an “environment in which political neutrality is fraught with hazard.”<sup>83</sup> A political opinion can be expressed both affirmatively and negatively. No doubt, rejecting a recruitment attempt may convey anti-gang sentiments as clearly as an opinion expressed in a more traditional political manner by, for instance, vocalizing criticism of gangs in public meetings or campaigns.<sup>84</sup>

51. Political opinion can also be imputed to the applicant by the gang without the applicant taking any action or making a particular statement him/herself.<sup>85</sup> A refusal to give in to the demands of a gang is viewed by gangs as an act of betrayal, and gangs typically impute anti-gang sentiment to the victim whether or not s/he voices actual gang opposition. Family members who are related to those who oppose gang practices may be perceived to hold the same opinion.<sup>86</sup>

#### e) Internal flight alternative

52. The option of internal flight or relocation must be both relevant and reasonable. Relocation is normally not considered relevant where the feared persecution emanates from, or is condoned or tolerated by, State agents, as State agents are presumed to exercise authority in all parts of the country.<sup>87</sup> This, therefore, generally precludes relocation where State agents are complicit with the gang activities or in cases involving a fear of arbitrary and unlawful State measures.
53. Where the applicant fears persecution by a non-State agent, the first analysis includes an assessment of the ability of the gang (or other similar group) to pursue the applicant in the proposed alternative location and the protection that would be available there from State authorities.<sup>88</sup> It is important to distinguish the reach of gangs which operate in relatively small countries, from gangs active in larger countries. Given that many of the Central American gangs, such as the Maras, have country- or even region-wide reach and organization, there may generally be no realistic internal flight alternative in claims relating to these gangs.<sup>89</sup>

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<sup>83</sup> *Calderon-Medina (Re)*, No. A 78-751-1981, U.S. EOIR Immigration Court, Newark, NJ, 1 May 2002, <http://www.unhcr.org/refworld/docid/4b6bfb332.html>.

<sup>84</sup> *Matter of D-V*, U.S. EOIR, Immigration Court, San Antonio, Texas, (unpublished), 9 Sep. 2004.

<sup>85</sup> An imputed political opinion is defined as a political opinion that is attributed to the asylum-seeker by his/her persecutors. See, *Vasquez v. INS*, 177 F.3.d 62, 65, U.S. Court of Appeals for the 1<sup>st</sup> Circuit, 24 May 1999, <http://www.unhcr.org/refworld/docid/4b6c02142.html>. The Court held that whether correctly or incorrectly attributed, an imputed political opinion “may constitute a reason for political persecution within the meaning of the Act.”

<sup>86</sup> *Althea Sonia Britton v. Secretary of State for the Home Department*, EWCA Civ 227, U.K. Court of Appeal, 7 Feb. 2003, <http://www.unhcr.org/refworld/docid/403e49454.html>. The appellant and her family became the targets of a gang for political reasons (her cousins left a political party in which they had been active members, and as result were suspected of betraying it).

<sup>87</sup> UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, <http://www.unhcr.org/refworld/docid/3f2791a44.html>, para. 13.

<sup>88</sup> *Ibid*, para. 15.

<sup>89</sup> As noted by WOLA, *A Resource Guide*, above fn. 2, p. 3, “Even if one were able to move to another city, the gang presence is pervasive and relocation would not provide safety from persecution by gangs. Abandoned children without family support are even less likely to be able to relocate.”

54. Experiences of individuals fleeing gang violence often reveal that the victim may have sought protection internally within his/her country or relocated in the region, in order to escape the gangs. Such attempts have often been unsuccessful as gangs can locate the individual in urban as well as in rural areas, appearing at the applicant's home and place of work as well as near the homes of family members. Young people, without adult support, are likely to face even more difficulties relocating without their family's assistance.

#### **f) Exclusion**

55. The clauses contained in Article 1F of the 1951 Convention provide for the exclusion from refugee status of individuals who, otherwise, would meet the refugee definition set out in Article 1A(2) of the 1951 Convention but who are deemed not deserving of international protection on account of the commission of certain serious and heinous acts. Since Article 1F is intended to protect the integrity of asylum, it needs to be applied scrupulously.<sup>90</sup>

56. In cases where there are indications that an individual has been associated or involved with criminal activities which may bring him/her within the scope of Article 1F of the 1951 Convention, adjudicators will need to undertake an exclusion assessment.<sup>91</sup> Bearing in mind UNHCR's Exclusion Guidelines, a number of issues which are particularly relevant to gang-related asylum claims are highlighted below.

##### **(i) Excludable acts in the context of asylum claims relating to gangs**

57. Given the context in which gangs operate, Article 1F(b) of the 1951 Convention will be most relevant. It provides for the exclusion from refugee status of persons who have committed "a serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee".<sup>92</sup>

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<sup>90</sup> Art. 1F stipulates that "the provisions of the 1951 Convention shall not apply to any person with respect to whom there are serious reasons for considering that he [or she] (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; c) has been guilty of acts contrary to the purposes and principles of the United Nations." UNHCR's interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F is set out in UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter: "UNHCR, *Guidelines on Exclusion*") <http://www.unhcr.org/refworld/docid/3f5857684.html>; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter "UNHCR, *Background Note on Exclusion*"), <http://www.unhcr.org/refworld/docid/3f5857d24.html>; UNHCR, *Statement on Article 1F of the 1951 Convention*, July 2009, (hereafter "UNHCR, *Statement on Article 1F*"), <http://www.unhcr.org/refworld/docid/4a5de2992.html>, and UNHCR, *Handbook*, above fn. 39, paras. 140–163.

<sup>91</sup> UNHCR's interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F stated above should be referred to by decision makers when examining asylum claims relating to gangs and other groups involved in criminal activities.

<sup>92</sup> UNHCR, *Background Note on Exclusion*, above fn. 90, para. 37.

58. Many of the crimes committed by gangs, such as extortion, robbery, murder, homicide, violent assaults, rape, prostitution, kidnapping and trafficking in people, drugs and arms, and other violent crimes would generally qualify as serious offences under Article 1F(b) of the Convention.

**(ii) Individual responsibility**

59. For exclusion to be justified, individual responsibility needs to be established in relation to a crime falling within the scope of Article 1F. Three issues need to be addressed in this context: (i) the involvement of the applicant in the excludable act; (ii) the applicant's mental state (*mens rea*); and, (iii) possible grounds for rejecting individual responsibility.<sup>93</sup>

60. In other words it is important to determine, based on credible and reliable information, that the individual committed or participated in the commission of the material elements of the crime(s) in question with the requisite mental element (*mens rea*).<sup>94</sup> Depending on the circumstances, a person may incur individual responsibility: (i) by perpetrating excludable crimes him/herself; (ii) for crimes perpetrated by others, either by provoking others to commit such crimes (e.g. through planning, inciting, ordering); or (iii) by making a substantial contribution to the commission of the crimes such that others know that his/her acts facilitated the criminal conduct (e.g. by aiding, abetting, or participating in a joint criminal enterprise).<sup>95</sup> In relation to gang-related asylum claims, the latter is particularly relevant.

61. The fact that an individual was part of a gang does not in itself entail individual liability for excludable acts. However, for applicants who were associated with a gang that has reportedly been involved in "serious non-political crimes" it is necessary to conduct a thorough assessment of their activities, roles and responsibilities. In some cases, depending on the gang's objectives, activities, methods and other circumstances, individual responsibility for excludable acts may be presumed if membership in a particularly violent group is voluntary.

## V. CONCLUSION

62. Clearly not all individuals who are affected in some way by the activities of organized gangs qualify for international protection. Victims of gang violence would, for instance, normally not be eligible for refugee status where the State is able or willing to provide effective protection. Gang members who flee legitimate prosecution for criminal activities would normally not meet the inclusion criteria of the 1951 Convention. In some situations, however, the very methods through which a State seeks to protect against gang violence may themselves be repressive. Additionally, those who have committed serious non-political crimes

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<sup>93</sup> *Ibid*, paras. 50–63.

<sup>94</sup> As reflected in the Rome Statute of the International Criminal Court, 17 July 1998, <http://www.unhcr.org/refworld/docid/3ae6b3a84.html>, Art. 30, the mental element generally required for individual responsibility is "intent" (with regard to conduct or consequences) and "knowledge" (with regard to circumstances or consequences).

<sup>95</sup> UNHCR, *Background Note on Exclusion*, above fn. 90, paras. 50–56.

would normally not be considered as victims of gangs but as ordinary criminals and be excluded from refugee protection under the 1951 Convention.

63. Gang violence may affect large segments of society, especially where the rule of law is weak. Evidently, however, certain individuals are particularly at risk of becoming victims of gangs. They may be targeted because of their age, occupation, socio-economic status and their refusal to comply with gangs. Many asylum claims originate from marginalized youth who have been caught up in the violence. Their family members are often also drawn into the equation when gangs threaten to retaliate or exercise pressure to compel compliance with their demands.
64. One of the complex legal questions that needs to be considered in gang-related asylum claims is the establishment of a link between the persecution feared and one or more of the grounds enumerated in the 1951 Convention. Jurisprudence in this regard is far from uniform. In some jurisdictions, it has been argued that to fear harm “at the hands of gangsters” is not for a Convention ground; the claimant is simply targeted because of his/her money or for reasons of retribution by an organized gang. A link to the 1951 Convention ground “membership of a particular social group” has sometimes been dismissed because the possible “group” is merely defined by the persecution feared.
65. As reflected in some of the recent jurisprudential developments referred to in this Note, the necessary causal link can, under certain circumstances, be established. UNHCR’s perspective is that the interpretation of the 1951 Convention grounds needs to be inclusive and flexible enough to encompass emerging groups and respond to new risks of persecution. Young people, in particular, who live in communities with a pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention. Additionally, people fleeing gang-related violence may have a well-founded fear of persecution on account of their political opinion, especially where criminal and political activities heavily overlap. In the absence of effective State protection, individuals may also fear persecution at the hands of gangs which pursue religious or ethnic ideologies through violent means.