

UNHCR's Views on Asylum Claims from Individuals Fleeing Violence by Gangs and Other Organized Criminal Groups in Central America and Mexico

Using international law to support claims from individuals seeking protection in the U.S.

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The United Nations High Commissioner for Refugees (UNHCR) has long recognized the protection needs of individuals fleeing threats or harm by gangs and other organized criminal groups in various parts of the world, including Central America and Mexico, and it has recognized that, depending on the circumstances, survivors of such violence may be considered in need of international protection under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees.¹ The purpose of this note is to summarize UNHCR's views on the asylum claims of individuals fleeing violence by gangs and other criminal groups in Central America and Mexico as relevant to pursuing asylum in the United States. While this note focuses predominantly on gang and cartel violence and activity in Central America and Mexico, its contents may be relevant to similar claims originating in other areas of the world.

Over the years, an increasing number of individuals at risk of or who have suffered violence by organized criminal groups in Central America and Mexico have fled to the United States in search of protection. These countries face longstanding and ongoing complex challenges by sophisticated, organized armed criminal groups, which often have a transnational reach and drive up rates of murder, gender-based violence, and other forms of serious harm.² This surging tide of violence forces thousands of women, men, and children to leave their homes every month out of fear of persecution or torture.³ UNHCR works to understand and address these protection risks, and it has issued guidance Eligibility Guidelines⁴ for El Salvador, Guatemala, and Honduras, a Guidance Note on Refugee Claims Relating to Victims of Organized

¹ See generally UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* (Mar. 31, 2010), <https://www.refworld.org/docid/4bb21fa02.html> [hereinafter *Gang Guidance Note*].

² UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, at 4, U.N. Doc. HCR/EG/SLV/16/01, Mar. 15, 2016, <https://www.refworld.org/docid/579767434.html> [hereinafter *El Salvador Eligibility Guidelines*]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, U.N. Doc. HCR/EG/GTM/18/01, Jan. 2018, <https://www.refworld.org/docid/5a5e03e96.html> [hereinafter *Guatemala Eligibility Guidelines*]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, U.N. Doc. HCR/EG/HND/16/03, July 27, 2016, <https://www.refworld.org/docid/579767434.html> [hereinafter *Honduras Eligibility Guidelines*].

³ See generally *El Salvador Eligibility Guidelines*; *Guatemala Eligibility Guidelines*; *Honduras Eligibility Guidelines*; UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico (2015)*, available at <http://www.unhcrwashington.org/womenontherun> [hereinafter *Women on the Run*]; UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection (2014)* [hereinafter *Children on the Run*].

⁴ UNHCR's Eligibility Guidelines discuss risk profiles and provide legal interpretations to assist decision-makers and private practitioners in assessing international protection needs. See, e.g., *El Salvador Eligibility Guidelines*; *Guatemala Eligibility Guidelines*; *Honduras Eligibility Guidelines*.

Gangs,⁵ as well as conducted studies examining the protection concerns of children⁶ and women⁷ from the region. The resources compiled at the end of this document expand upon this discussion.

I. Relevance of International Refugee Law in the United States

The 1951 Convention and its 1967 Protocol⁸ are the key international instruments governing the protection of refugees. The United States is a signatory and party to the 1967 Protocol, and therefore is bound to comply with the obligations deriving from the Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention,⁹ and it has incorporated the substantive provisions of the Protocol into U.S. domestic law.¹⁰ U.S. law, based on the 1951 Convention and the 1967 Protocol, defines a refugee as someone who is outside of his or her country of nationality 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 future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹

U.S. courts have an obligation to construe U.S. statutes in a manner consistent with U.S. international obligations whenever possible.¹² In their efforts to fulfill that duty, U.S. courts have relied on UNHCR guidance, especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook),¹³ in assessing refugee claims and have recognized that UNHCR’s analysis provides significant direction in understanding issues in refugee law.¹⁴ The U.S. Supreme Court, for instance, has “consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee

⁵ Gang Guidance Note. The Gang Guidance Note discusses risk profiles and international protection needs of individuals affected by Gang violence. *Id.*

⁶ Children on the Run; UNHCR, Uprooted (Arrancados de raíz) (2014) (Spanish), <https://www.acnur.org/fileadmin/Documentos/Publicaciones/2014/9828.pdf> [hereinafter Uprooted]. In *Children on the Run*, UNHCR research indicated that 58 per cent of the 404 children interviewed in the United States presented protection concerns, and that if not allowed to lodge an asylum claim, they could face harm if returned home. *Children on the Run*, at 17. In *Uprooted*, UNHCR research found that nearly 50 per cent of the children interviewed at Mexico’s southern border identified specific incidents of beatings, intimidation, threats, and insecurity as a reason for leaving the NTCA. *Uprooted*, at 16.

⁷ See generally, *Women on the Run*. Through first-hand accounts, the report sheds light on the severity of the protection crisis in El Salvador, Guatemala, Honduras and Mexico, finding that women from these countries face a startling degree of violence that has a devastating impact on their daily lives, presenting a clear need for international protection. *Id.* at 2.

U.N. General Assembly, *Convention Relating to the Status of Refugees*, 19 U.S.T. 6259, 189 U.N.T.S. 137 (July 28, 1951) [hereinafter 1951 Convention]; UN General Assembly, Protocol relating to the Status of Refugees, GA Res. 2198 (XXI), UN GAOR, 21st Sess., U.N. Doc. A/RES/2198 (Dec. 6, 1966) [hereinafter 1967 Protocol].

⁹ The 1967 Protocol binds parties to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention with respect to “refugees” as defined in Article 1A(2) of the 1951 Convention. 1967 Protocol, Art. I, ¶¶ 1–2. The 1967 Protocol universalizes the refugee definition in Article 1 of the 1951 Convention, removing the geographical and temporal limitations. *Id.* ¶¶ 2–3. The United States acceded to the 1967 Protocol in 1968, thereby binding itself to the international refugee protection regime and the refugee definition in the 1951 Convention. H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.A.N. 160; H.R. Rep. No. 96-608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

¹⁰ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

¹¹ 8 USC § 1101(a)(42).

¹² *Murray v. The Charming Betsy*, 6 U.S. 64, 80 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (finding “abundant evidence” that Congress intended to conform the definition of refugee and the asylum law of the U.S. “to the United Nation’s [sic] Protocol to which the United States has been bound since 1968”).

¹³ The UNHCR Handbook was prepared at the request of the Member States of the Executive Committee of the High Commissioner’s Programme, including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, at 9, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019).

¹⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421, n.22 (1987) (“The Handbook provides significant guidance in construing the Protocol . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes.”).

Convention.”¹⁵ Thus, UNHCR guidance can serve as a critical tool in evaluating and resolving the diverse, evolving interpretative questions related to the refugee definition that continue to arise, including in the United States.

While international law can be used to support and advance an individual’s claim to asylum in the United States, UNHCR recognizes that an asylum seeker may need to affirmatively highlight relevant international legal standards to receive individualized consideration by U.S. courts and authorities in a particular case. Therefore, advocates and asylum seekers may wish to submit relevant materials, such as UNHCR’s *Guidelines on International Protection, Guidance Note, or Eligibility Guidelines*,¹⁶ to be included in the record when applicable. These sources are cited throughout the document and compiled thematically in the last section.

II. Gang-Related Forms of Persecution and Common Risk Profiles of Those Fleeing Gangs

a. Harms Perpetrated in the Gang Context

Asylum claims with a gang component may present questions regarding the persecution component of the refugee definition. The Handbook provides that a threat to life or freedom or other serious human rights violations on account of race, religion, nationality, political opinion or membership of a particular social group constitutes persecution.¹⁷ Certain physical, sexual, and psychological harms—including but not limited to assault, rape, and death threats—committed by gang members or State actors (e.g., due to an individual’s actual or perceived gang affiliation) may constitute persecution.¹⁸ This non-exhaustive list further details common types of persecution perpetrated in the context of gangs, as well as other organized criminal groups, in Central America and Mexico:

- **Physical and sexual violence** may constitute persecution. Beatings, rape, and other serious assaults, as well as trafficking and kidnapping generally rise to the level of persecution.¹⁹ Harm inflicted by State actors on individuals, including those actually or perceived to be affiliated with gangs, such as torture and arbitrary arrest and detention, may constitute persecution where severe pain or suffering is intentionally inflicted on individuals under the State’s custody or control.²⁰

¹⁵ *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing Supreme Court cases where the Court turned to UNHCR guidance materials for assistance in interpreting U.S. obligations under the Refugee Convention); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (“In interpreting the Protocol . . . we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (stating that the Court views the UNHCR Handbook as “persuasive authority in interpreting the scope of refugee status under domestic asylum law.”) (Internal quotation marks omitted).

¹⁶ See e.g., Gender Guidelines; 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*, U.N. Doc. HCR/GIP/09/08 (Sept. 22, 2009) [hereinafter *Child Guidelines*]; Gang Guidance Note; El Salvador Eligibility Guidelines.

¹⁷ Handbook, ¶ 51.

¹⁸ Gang Guidance Note, ¶ 21.

¹⁹ Gang Guidance Note, ¶ 21.

²⁰ Gang Guidance Note, ¶ 23.

- **Psychological violence** may constitute persecution. This might include coercing someone to work for or preventing someone from leaving a criminal gang, or to take or refrain from other actions, by using death threats.²¹
- **Trafficking** is prohibited by international law²² and generally rises to the level of persecution.²³ This harm may occur for various reasons but generally is perpetrated with an “overarching aim to gain profit through the exploitation of human beings.”²⁴ It encompasses forced prostitution and other forms of sexual exploitation, as well as “forced labour or services, slavery or practices similar to slavery, [and] servitude or the removal of organs.”²⁵ Trafficking is a common practice of gangs, and women and children—particularly those lacking protection or who are otherwise marginalized—are especially vulnerable to exploitation for sexual acts or service to the gang.²⁶

International law imposes an absolute prohibition against the use, under any circumstances, of children under 18 years of age by armed groups distinct from the armed forces of a State, and UNHCR considers an armed group’s trafficking of a child to constitute persecution.²⁷ Children may also be forced to participate in gang activities “under duress, in self-defence, to avoid harm to their families, to seek protection against unwanted marriages or sexual abuse within their homes, or to access basic means of survival.”²⁸ Children who have been released from armed groups and return to their countries of origin may be at risk of “harassment, re-recruitment or retribution, including imprisonment or extra-judicial execution.”²⁹

- **Extortion** can rise to the level of persecution. It is a common practice used by gangs to maintain control over territories.³⁰ While extortion on its own can constitute persecution,³¹ individuals who refuse to meet extortion demands also commonly face violence and death threats by gangs.³² Individuals in certain professions—transportation drivers, business owners, bill collectors, messengers, and teachers—are often specifically targeted.³³

²¹ Gang Guidance Note, ¶¶ 21-22.

²² Trafficking violates the right not to be subject to abduction, sale and trafficking. U.N.G.A., International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 35 (Dec. 19, 1966). Article 4 of the Optional Protocol to the Convention on the Rights of the Child also contains an absolute prohibition against the recruitment or use, under any circumstances, of children under 18 years of age by armed groups distinct from the armed forces of a State. U.N.G.A., Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, U.N. Doc. A/Res/54/263 (May 25, 2000).

²³ Gang Guidance Note, ¶ 21.

²⁴ 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*, ¶ 1, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) [hereinafter *Trafficking Guidelines*].

²⁵ *Trafficking Guidelines*, ¶ 3.

²⁶ *Trafficking Guidelines*, ¶¶ 19-20.

²⁷ *Child Guidelines*, ¶ 21. Children may also have a well-founded fear of persecution based on the treatment the non-State armed group subjects them to. *Id.* ¶ 23.

²⁸ *Child Guidelines*, ¶ 22.

²⁹ *Child Guidelines*, ¶ 23.

³⁰ Gang Guidance Note, ¶ 8.

³¹ *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017) (holding that “extortion itself can constitute persecution, even if the targeted individual will be physically harmed only upon failure to pay”) (internal citation omitted).

³² Gang Guidance Note, ¶ 12.

³³ Gang Guidance Note, ¶ 39; Department of State, El Salvador 2021 Human Rights Report, at 41, https://www.state.gov/wp-content/uploads/2022/02/313615_EL-SALVADOR-2021-HUMAN-RIGHTS-REPORT.pdf (2021).

b. Common Risk Profiles of People Fleeing Gangs

UNHCR recognizes that individuals with gang-related asylum claims share risk profiles which may make them more vulnerable and likely to face harm. This non-exhaustive list lays out common risk profiles and harms that may be associated with them:

- **Persons perceived by gangs as contravening its rules or resisting its authority:** Individuals who have resisted gang activity or who oppose, or are perceived to oppose, gang practices are more susceptible to harm by gangs, including for retribution or deterrence.³⁴ Such “gang resisters” may share other characteristics, such as age or gender, or fall into one of the following categories:
 - Children and youth who resist trafficking by gangs³⁵
 - Women and girls who refuse sexual demands, including for prostitution or trafficking purposes³⁶
 - Ethnic and sexual minorities³⁷
 - Business owners who refuse to meet extortion demands³⁸
 - Informants, witnesses, and victims of gang crimes, who may testify in court or report crimes to authorities³⁹
 - Members of law enforcement combatting gang activity or refusing bribes to assist gangs⁴⁰
 - NGO workers, human rights activists, journalists, lawyers and participants in community- or church-based groups who oppose gangs⁴¹
 - Other individuals who are, or are perceived to be, a threat to gangs or as not conforming with their practices⁴²

- **Children:** Children living in El Salvador, Guatemala, Honduras, and Mexico face various protection concerns.⁴³ They are vulnerable to a range of harms perpetrated by organized criminal actors, including “physical violence, including rape and severe beatings; threats of violence; and extortion,”⁴⁴ because of characteristics that set them apart in society, “such as their young age, impressionability, dependency, poverty and lack of parental guidance.”⁴⁵ Some may be at

³⁴ Gang Guidance Note, ¶ 12.

³⁵ Children and youth are at a heightened risk of being trafficked, making them more susceptible to harm when they resist. Gang Guidance Note, ¶ 11.

³⁶ Gang Guidance Note, ¶ 12.

³⁷ Gang Guidance Note, ¶ 12.

³⁸ Gang Guidance Note, ¶ 12.

³⁹ Gang Guidance Note, ¶ 12; El Salvador Eligibility Guidelines, at 32. Witnesses and victims of crimes committed by gangs are targeted, whether or not they formally denounce the crimes to the authorities. El Salvador Eligibility Guidelines, at 32. Similarly, informants who cooperate with authorities, and often their family members as well, are at risk, even when they are in witness protection programs. El Salvador Eligibility Guidelines, at 32.

⁴⁰ For example, in El Salvador, “some local gangs have reportedly been ordered to kill a specified number of police officers living in their territories.” El Salvador Eligibility Guidelines, at 40-41.

⁴¹ UNHCR Gang Guidance Note, ¶ 12

⁴² UNHCR Gang Guidance Note, ¶ 12.

⁴³ For a more detailed discussion of child asylum claims, including risk profiles of children and child-specific legal interpretations, see generally UNHCR, Cover Note on Child Asylum Claims (2022); UNHCR, Child Guidelines.

⁴⁴ Children on the Run, at 6-7, 38-39, 44.

⁴⁵ UNHCR Gang Guidance Note, ¶ 36, Children on the Run, at 6. Studies have shown that gangs frequently target youth within the age range of 8-18 years. USAID Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development, *Central America and Mexico Gang Assessment*, 17 (Apr. 2006).

heightened risk where gangs control the schools they attend,⁴⁶ and others in the community—marginalized children, street children, and children lacking protection—are often targets as well.⁴⁷ Moreover, given the widespread presence and significant reach of the gangs, those not involved may find it difficult to avoid coming into contact with local gangs or being mistaken for a member or affiliate of the local gang by a rival gang.⁴⁸

- **Women and girls:** Women and girls who live in societies dominated by gangs are particularly vulnerable. They frequently face extreme levels of violence, both by armed groups and abusive partners, who might be members or affiliates of those groups.⁴⁹ Because gangs are often considered the highest powers in areas where they operate and there may exist collusion between the authorities and criminal groups, women may have little confidence that the government can protect them from violence by their gang-affiliated partners and / or other gang members.⁵⁰ In addition, gangs may attempt to force women and girls into sexual relationships with gang members, and attack those who refuse to comply.⁵¹ Their protection needs are exacerbated by high impunity rates in cases involving gender-based violence, which can undermine women’s confidence in protection and judicial systems and further discourage them from reporting incidents to authorities.⁵²
- **Individuals identifying as or perceived to be LGBTIQ+:** Discrimination against people with diverse sexual orientation and gender identities is widespread in Central America, including due to a strong *macho* ethos among gangs.⁵³ Individuals identifying as or perceived to be LGBTIQ+ are thus more susceptible to experiencing harm.
- **Family members of individuals targeted by gangs:** Family members of individuals targeted by gangs for any reason are at an increased risk of harm themselves.⁵⁴ They may be targeted in acts of retaliation, to exert pressure on a gang-resisting family member, or because they are perceived as holding anti-gang views.⁵⁵
- **Law enforcement agents or military officers:** Law enforcement agents and military officers may be targeted by gangs for various reasons, including their efforts to combat gang activity, refusal to participate in gang activities, or reporting of corrupt or unlawful behavior of officials who have colluded with gangs.⁵⁶

⁴⁶ See, e.g., Honduras Eligibility Guidelines, at 52 (“In some schools, opposing gangs reportedly control different parts of the school, resulting in situations where some students are unable even to deliver a textbook to certain classrooms because of the risk they face.”).

⁴⁷ Gang Guidance Note, ¶ 30.

⁴⁸ El Salvador Eligibility Guidelines, at 35; Honduras Eligibility Guidelines, at 52; Guatemala Eligibility Guidelines, at 45. Children who travel—to school, to visit relatives, to attend a health center, etc.—in an area that is controlled by a gang different from the one that controls the area where they live are at risk of being targeted for violence by the rival gang during such travel. El Salvador Eligibility Guidelines, at 35.

⁴⁹ Women on the Run, at 4, 15-30; UNHCR Amicus Brief, *Matter of O.L.B.D.*, 31, No. 18-1816 (A206-252-605) (1st. Cir. Mar. 11, 2019), <https://www.refworld.org/docid/5c8924454.html>.

⁵⁰ Women on the Run, at 4, 15-30; UNHCR Amicus Brief, *Matter of O.L.B.D.*, at 31.

⁵¹ Women on the Run, at 16, 38.

⁵² Women on the Run, at 17; Honduras Eligibility Guidelines, at 25; Guatemala Eligibility Guidelines; El Salvador Eligibility Guidelines.

⁵³ El Salvador Eligibility Guidelines, at 38-39, Honduras Eligibility Guidelines, at 19.

⁵⁴ Gang Guidance Note, ¶ 17.

⁵⁵ Gang Guidance Note, ¶ 17.

⁵⁶ Gang Guidance Note, ¶¶ 12, 16.

- **Victims and critics of a State’s anti-gang policies and activities:** In some countries, including El Salvador,⁵⁷ Guatemala,⁵⁸ and Honduras,⁵⁹ governments have adopted strict anti-gang laws and policies. These include “social cleansing” practices, “such as extrajudicial killings, police violence, arbitrary or unlawful arrests and detention, as well as inhumane prison conditions.”⁶⁰ While the targets of such policies are typically gang members, as well as their family members and affiliates on some occasions, individuals who are mistakenly perceived to be affiliated with gangs or otherwise considered “undesirable,” such as former gang members, “young people whose age, appearance or social background resemble those of gang members,” drug addicts, street children, sexual minorities, and sex workers have similarly been targeted.⁶¹ Arbitrary and unlawful practices such as extra-judicial killings have also been used against individuals who are perceived as critics of a government’s anti-gang policies, such as whistleblowers, human rights activists, and former law enforcement officials who report corrupt behavior.⁶²

III. Gang-Related Asylum Claims Based on Membership in a Particular Social Group

“Membership in a particular social group” is one of the five protected grounds, though it is not defined in the 1951 Convention. It has been increasingly invoked in asylum applications in recent years, especially in asylum cases arising in Central America or Mexico with a gang or organized crime element. At the same time, in the United States, this ground has been subject to increased litigation and has seen attempts to narrow its scope. The Handbook provides generally that a particular social group (PSG) normally comprises persons of similar background, habits, or social status,⁶³ and other UNHCR guidelines elaborate on the proper interpretation and substantive analysis of membership in a PSG.⁶⁴

While a PSG cannot be “exclusively defined by the fact that it is targeted for persecution,” there is no “closed list” of groups that constitute a PSG.⁶⁵ Social groups should also be viewed in an evolutionary manner, “open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”⁶⁶ The following subsections offer an overview of relevant international legal standards on cognizable groups and nexus and articulate how they apply in the specific context of gang-related asylum claims presented in the United States.

a. Legal Cognizability of Particular Social Groups

International law recognizes alternative approaches to defining a “particular social group,” and asylum claims with a gang component may be established under either. Under these alternative approaches, an asylum seeker may demonstrate that their PSG is comprised of a group of persons that *either* shares a common characteristic, such as sex, caste, color, family background or a shared past experience, **(the**

⁵⁷ El Salvador Eligibility Guidelines, at 5.

⁵⁸ Guatemala Eligibility Guidelines, at 7-8.

⁵⁹ Honduras Eligibility Guidelines, at 7.

⁶⁰ Gang Guidance Note, ¶ 9.

⁶¹ Gang Guidance Note, ¶ 15.

⁶² Gang Guidance Note, ¶ 16.

⁶³ Handbook, ¶ 77.

⁶⁴ 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*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Social Group Guidelines]; Gang Guidance Note, ¶¶ 34-44.

⁶⁵ Social Group Guidelines, at 2.

⁶⁶ Social Group Guidelines, at 3.

protected characteristics approach) or is perceived as a distinct group by society (**the social perception approach**).⁶⁷ Individuals who are targeted by gangs frequently share innate or immutable characteristics which set them apart in society.⁶⁸ For example, those who are harmed by gangs may share innate or immutable characteristics such as age,⁶⁹ gender,⁷⁰ and social status.⁷¹ Similarly, actions like resisting gang recruitment or opposing gang practices may be considered reflective of “a characteristic that is fundamental to one’s conscience and the exercise of one’s human rights.”⁷² Individuals fleeing gang violence may also belong to groups that are set apart in society—based on their origin, social background, occupation, class, age, or gender⁷³—satisfying the social perception approach to identifying a social group. This may be the case in close-knit neighborhoods that are effectively controlled by gangs.⁷⁴

Claims based on membership in a PSG have come under increased scrutiny in U.S. courts and administrative bodies in recent years. While U.S. law initially followed the protected characteristics approach,⁷⁵ it has evolved to require essentially that *both* alternative approaches be satisfied, as a PSG must include members who share a common, immutable characteristic; be defined with particularity; and be socially distinct⁷⁶—thus establishing a threshold for cognizable PSGs that far exceeds international standards. Notably, in 2018, the decision in *Matter of A-B-* restated these heightened requirements⁷⁷ and significantly affected asylum seekers who had fled domestic and gang violence.⁷⁸ UNHCR subsequently filed several amicus briefs addressing the U.S. interpretation of “particular social group,” underscoring how it is at variance with international legal standards and emphasizing that those fleeing gang violence can qualify for international protection.⁷⁹

Although *Matter of A-B-* was vacated in 2021,⁸⁰ establishing legally cognizable PSGs in U.S. asylum adjudication remains challenging and out of step with international law in a number of ways. The size of a PSG, for instance, sometimes becomes an issue. Under prevailing international standards, the size, cohesion, and diffusiveness of a proposed group are not at all relevant to determining whether a PSG

⁶⁷ Social Group Guidelines, ¶ 11. 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.” Social Group Guidelines, ¶ 11. It might also be based on shared past experiences (such as former military or political leadership), or shared values, attitudes or behaviors, such as sexuality.

⁶⁸ Gang Guidance Note, ¶ 35-36.

⁶⁹ “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.” Gang Guidance Note, ¶ 36.

⁷⁰ Gang Guidance Note, ¶ 36.

⁷¹ Gang Guidance Note, ¶ 36.

⁷² Gang Guidance Note, ¶ 38.

⁷³ Gang Guidance Note, ¶ 41; UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”*, at 26 (July 15, 2020), <https://www.refworld.org/docid/60f846504.html> [hereinafter UNHCR Comments on Global Asylum Rule].

⁷⁴ Gang Guidance Note, ¶ 41.

⁷⁵ *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (interpreting “particular social group” to mean a group of persons who share a common, immutable characteristic.).

⁷⁶ *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 589 (BIA 2008).

⁷⁷ See *Matter of A-B-I*, 27 I&N Dec. 316, 317 (A.G. 2018) (“the applicant must demonstrate membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question.”).

⁷⁸ *Matter of A-B-I*, 27 I&N Dec. 316, 320 (A.G. 2018) (suggesting, in dicta, that “claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum”).

⁷⁹ See, e.g., UNHCR Amicus Brief, *Grace v. Barr*, No. 19-5013 (D.C. Cir. July 31, 2019), <https://www.refworld.org/docid/5d7a0e544.html>; UNHCR Amicus Brief, *Matter of O.L.B.D.*, No. 18-1816 (A206-252-605) (1st. Cir. Mar. 11, 2019), <https://www.refworld.org/docid/5c8924454.html>; UNHCR Amicus Brief, *Marroquin-Perez v. Barr*, No. 18-73146 (BIA Feb. 28, 2020), <https://www.refworld.org/docid/5f647e574.html>.

⁸⁰ *Matter of A-B-III*, 28 I&N Dec. 307 (A.G. 2021).

exists within the meaning of Article 1A(2) of the 1951 Convention.⁸¹ Therefore, while “gang violence may affect large segments of society, especially where the rule of law is weak,”⁸² this does not preclude an individual’s claim for international protection.⁸³ Still, while there are no explicit limitations on the size of a PSG under U.S. law and PSGs “may contain only a few individuals or a large number of people,”⁸⁴ the Board of Immigration Appeals (BIA) and federal courts have cautioned that “major segments of the population will rarely, if ever, constitute distinct social groups.”⁸⁵ This position, especially should it be used to deny recognition of an otherwise cognizable PSG, is contrary to international law.

Despite these challenges, U.S. federal courts and administrative adjudicators have found individuals fleeing gang violence to be members of various social groups. The below list (and corresponding footnotes) includes examples of PSGs in gang-related cases that U.S. courts or administrative bodies have mostly, albeit not always, recognized:

- Social groups based on gender and nationality⁸⁶
- Social groups based on gender and other characteristics⁸⁷
- Social groups based on sexual orientation and/or gender identity⁸⁸

⁸¹ This means that an asylum seeker does not have to establish that all members of the group are at risk of being persecuted or that all members of the proposed group know or associate with each other for the PSG to be considered legally cognizable. Social Group Guidelines, ¶¶ 15, 17-18; UNHCR Amicus Brief, *Matter of O.L.B.D.* (citing Social Group Guidelines, ¶¶ 15, 18).

⁸² Gang Guidance Note, ¶ 63.

⁸³ Gang Guidance Note, ¶¶ 63, 65.

⁸⁴ *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (reasoning “that the size and breadth of a group alone does not preclude a group from qualifying as . . . a social group”).

⁸⁵ *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (Feb. 7, 2014) (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (noting that “a particular social group must be narrowly defined and . . . major segments of the population will rarely, if ever, constitute a distinct social group”).

⁸⁶ UNHCR has recognized that individuals may be set apart in society based on their gender, which can form the basis of a social group. Gang Guidance Note, ¶¶ 36, 41; Gender Guidelines, ¶ 30. U.S. courts have recognized social groups based on a combination of gender and nationality, including in the context of gang-based asylum claims, though some opinions are unpublished. *See, e.g.*, CGRS Case No. 7922 (I.J. Dec. 29, 2011) (recognizing “Salvadoran females” as social group); CGRS Case No. 13726 (I.J. Mar. 29, 2017) (recognizing “Guatemalan women” as social group); CGRS Case No. 28922 (I.J. Apr. 26, 2019) (recognizing “Women in Honduras” and “Honduran women” as social groups); *Silvestre-Mendoza v. Sessions*, 729 Fed. App’x 597, 598-99 (9th Cir. 2018) (unpublished) (remanding to BIA to consider whether social group comprised of “Guatemalan women” is cognizable); *Ticas-Guillen v. Whitaker*, 744 Fed. App’x 410, 411 (9th Cir. 2018) (unpublished) (remanding to BIA to consider whether social group comprised of “women in El Salvador” is cognizable). Other U.S. courts, however, regularly reject social groups based on these characteristics. *See, e.g.*, *Fuentes v. Barr*, 969 F.3d 865, 873 (8th Cir. 2020) (rejecting “female heads of households” and “vulnerable Salvadoran females”); *De Guevara v. Barr*, 919 F.3d 538, 541 (8th Cir. 2019) (rejecting “Salvadoran female heads of households” and “vulnerable Salvadoran females”).

⁸⁷ Courts have recognized social groups based on a combination of gender and other characteristics. *See, e.g.*, *Alvarez Lagos v. Barr*, 927 F.3d 236, 252-54 (4th Cir. 2019) (recognizing “unmarried mothers living under the control of gangs in Honduras” as cognizable social group); *Cabrera v. Sessions*, 890 F.3d 153, 162-63 (5th Cir. 2018) (remanding for BIA to consider cognizability of social group comprised of female human rights defenders from Honduras); *Alvarez-Pineda v. Barr*, 837 Fed. App’x 173, 178 (4th Cir. 2020) (unpublished) (remanding to BIA to consider whether social group comprised of “single mothers in Guatemala that lack traditional family [patriarchal] structure” was cognizable); *Gonzales-Solares v. Whitaker*, 742 Fed. App’x 277, 278 (9th Cir. 2018) (unpublished) (remanding to BIA to consider whether social group comprised of “young, single women” is cognizable). Other U.S. courts, however, regularly reject such social groups. *See, e.g.*, *Villegas Sanchez v. Garland*, 990 F.3d 1173, 1181-83 (9th Cir. 2021) (rejecting “Salvadoran women who refuse to be victims of violent sexual predation of gang members” and “Salvadoran women who refuse to be girlfriends of MS gang members”); *Hernandez-Chacon v. Barr*, 948 F.3d 94, 102 (2d Cir. 2020) (rejecting “Salvadoran women who have resisted the sexual advances of a gang member”); *Suate-Orellana v. Barr*, 979 F.3d 1056, 1061 (5th Cir. 2020) (rejecting “Honduran women who have been targeted for and resisted gang recruitment after the murder of a gang-associated partner”); *Fuentes v. Barr*, 969 F.3d 865, 872 (8th Cir. 2020) (rejecting “female heads of households” and “vulnerable Salvadoran females”); *De Guevara v. Barr*, 919 F.3d 538, 541 (8th Cir. 2019) (rejecting “Salvadoran female heads of households” and “vulnerable Salvadoran females”); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 650-54 (10th Cir. 2012) (rejecting “women in El Salvador between the ages of 12 and 25 who resisted gang recruitment”); *Caal-Tiul v. Holder*, 582 F.3d 92, 95 (1st Cir. 2009) (rejecting “indigenous women” in case involving gang violence).

⁸⁸ *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, n.1 (9th Cir. 2004) (recognizing that sexual identity is inherent to one’s identity); *see also, Hernandez-Montiel v. INS*, 225 F.3d 1088, 1094-95 (9th Cir. 2000) (finding that a gay man with a female sexual identity who suffered persecution in Mexico, largely because he was effeminate, qualified for asylum). For more guidance on UNHCR’s views on asylum claims based on LGBTIQ+ identity, *see* UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012); UNHCR Cover Note on LGBTIQ+ claims.

- Social groups based on family or kinship⁸⁹
- Social groups based on relationships and status within them⁹⁰
- Social groups based on past experiences, such as being a former gang member⁹¹
- Social groups comprised of individuals who testify against gangs or cooperate with law enforcement⁹²
- Social groups comprised of law enforcement involved in anti-gang activity⁹³

The below list (and corresponding footnotes) includes examples of gang-related PSGs that are considered viable under international standards but have not necessarily received any or significant recognition in the U.S. context:

- Social groups based on opposition to organized crime or recruitment into organized crime⁹⁴
- Social groups based on occupation⁹⁵

⁸⁹ UNHCR has recognized that an applicant’s family may constitute a social group. Gang Guidance Note, ¶ 40. *See Perez-Sanchez v. U.S. Att’y Gen.*, 935 F.3d 1148, 1158 (8th Cir. 2019) (finding that Mexican cartel targeted the applicant because of his family relationship to his father-in-law); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (affirming validity of nuclear family as particular social group); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (holding that family members of witnesses who testify against MS-13 gang members constitute particular social group); *Alvarado v. Barr*, 832 Fed. App’x 181, 183 (4th Cir. 2020) (unpublished) (recognizing “nuclear family of applicant’s mother” as social group).

⁹⁰ *Ortez-Cruz v. Barr*, 951 F.3d 190, 196 (4th Cir. 2020) (recognizing “Honduran women in domestic relationships who are unable to leave the domestic relationship” and “women who are viewed as property by virtue of their position in the domestic relationship” as social groups); *Gomez-Zuluaga v. U.S. Att’y Gen.*, 527 F.3d 330, 351 (3d Cir. 2008) (recognizing “Colombian women who have the shared past experience of relationships with military and police men” as a social group). *But see, Villeas Sanchez v. Garland*, 990 F.3d 1173, 1181-83 (9th Cir. 2021) (rejecting “Salvadoran women who refuse to be victims of violent sexual predation of gang members” and “Salvadoran women who refuse to be girlfriends of MS gang members”), *Suate-Orellana v. Barr*, 979 F.3d 1056, 1061 (5th Cir. 2020) (rejecting “Honduran women who have been targeted for and resisted gang recruitment after the murder of a gang-associated partner”); *De Rivas v. Sessions*, 691 Fed. App’x 839, 840 (8th Cir. 2018) (rejecting “women who are targeted to become ‘gang girlfriends’” and “witnesses to a crime who report the crime to the police”).

⁹¹ UNHCR considers that past actions or experiences, such as refusal to join a gang, “may be considered irreversible and thus immutable,” which could form the basis of a particular social group. Gang Guidance Note, ¶ 37. U.S. courts have recognized social groups based on past actions or experiences. *See, e.g., W.G.A. v. Sessions*, 900 F.3d 957, 963–65 (7th Cir. 2018) (recognizing “former gang members” as social group); *Urbina-Mejia v. Holder*, 597 F.3d 360, 366–67 (6th Cir. 2010) (same); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (same, former members of MS-13 gang). *But see, Nolasco v. Garland*, 7 F.4th 180, 188 (4th Cir. 2021) (rejecting “former members of MS-13” and “former members of MS-13 who leave for moral reasons” as overbroad and lacking social distinction).

⁹² *Guzman Orellana v. Att’y Gen.*, 956 F.3d 171, 178–79 (3d Cir. 2020) (recognizing that individuals who “provide assistance to law enforcement against major Salvadoran gangs” may form a social group); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) (holding that Salvadoran witnesses who testified against gang members constitute particular social group); *Garcia v. Att’y Gen.*, 665 F.3d 496, 504 (3d Cir. 2012) (same, Guatemalan gangs). *But see, Rivas v. Sessions*, 899 F.3d 537, 541 (8th Cir. 2018) (rejecting social group comprised of witnesses to a crime who report the crime to the police).

⁹³ *Madrigal v. Holder*, 716 F.3d 499, 505 (9th Cir. 2013) (recognizing “former Mexican army soldiers who participated in anti-drug activity” as social group). Individuals in law enforcement who oppose gang activities may also have a claim based on political opinion. *See, e.g., Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010) (noting that “opposition to government corruption may constitute a political opinion, and retaliation against someone for expressing that opinion may amount to political persecution”).

⁹⁴ UNHCR recognizes that individuals who resist gang recruitment may share innate or immutable characteristics or be set apart in society based on their age, gender, social status, or origin. Gang Guidance Note, ¶ 36. U.S. courts, however, generally reject social groups based on a combination of rejecting gang practices and other characteristics. *See Tino v. Garland*, 13 F.4th 708, 710 (8th Cir. 2021) (rejecting “family unaffiliated with any gangs who refuse to provide any support to transnational criminal gangs in Guatemala”); *Rosales-Reyes v. Garland*, 7 F.4th 755, 760 (8th Cir. 2021) (rejecting “Mexican mothers who refuse to work for the cartel”); *Cortez-Mendez v. Whitaker*, 912 F.3d 205, 209–10 (4th Cir. 2019) (rejecting that refusal to join gang constitutes a protected ground on account of which asylum can be granted); *Santos-Ponce v. Wilkinson*, 987 F.3d 886, 890-91 (9th Cir. 2021) (rejecting “minor Christian males who oppose gang membership”); *Villeas Sanchez v. Garland*, 990 F.3d 1173, 1182 (9th Cir. 2021) (rejecting “Salvadoran women who refuse to be victims of violent sexual predation of gang members” and “Salvadoran women who refuse to be girlfriends of MS gang members”); *Suate-Orellana v. Barr*, 979 F.3d 1056, 1061 (5th Cir. 2020) (rejecting “Honduran women who have been targeted for and resisted gang recruitment after the murder of a gang-associated partner”); *Hernandez-Chacon v. Barr*, 948 F.3d 94, 102 (2d Cir. 2020) (rejecting “Salvadoran women who have resisted the sexual advances of a gang member”).

⁹⁵ UNHCR recognizes that “persons in professions or positions susceptible to extortion, including but not limited to those involved in informal and formal commerce as business owners, their employees and workers, or as street vendors; public transport workers; taxi and *mototaxi* drivers; public sector employees; and certain returnees from abroad may have claims to refugee status on account of their membership in a particular

UNHCR notes that individuals may be eligible for asylum based upon multiple PSGs, as well as multiple protected grounds since the Convention grounds are not mutually exclusive (see Section IV, below).⁹⁶

b. Nexus

Under the 1951 Convention, nexus is established when the persecutor harms an individual for reasons of a Convention ground.⁹⁷ The protected ground only has to be a “relevant contributing factor, [and] it need not be . . . the sole, or dominant, cause” of the persecution.⁹⁸ Gangs, for example, often target individuals because of vulnerabilities related to their age, socio-economic status, lack of family or other support networks, or their refusal to comply with gang demands,⁹⁹ and such individuals therefore may have claims for refugee status on account of various Convention grounds.¹⁰⁰ Even if an asylum seeker is unable to show that the persecutor acted based on a protected ground, however, nexus may nonetheless be established if the State is unable or unwilling to protect the asylum seeker *based on* a Convention ground.¹⁰¹ This could be the case, for instance, when a State is biased or discriminates against women, perhaps demonstrating this stance when it declines to investigate gang violence they have suffered or prosecute the organized criminal perpetrators of that harm.¹⁰² Thus, establishing the link between the persecution suffered or feared and a Convention ground is a complex and highly fact-specific inquiry, and there are various applicants with gang-related claims who are in need of and entitled to international protection.¹⁰³

U.S. law governing nexus exceeds international standards. Under U.S. law, an asylum seeker must demonstrate that a protected ground “was or will be at least one central reason” for the applicant’s persecution.¹⁰⁴ U.S. courts frequently deny gang-related asylum claims based on asylum seekers’ failure to meet the nexus standard under U.S. law,¹⁰⁵ finding that the central reason for persecution was not a

social group, among other Convention grounds.” UNHCR Comments on Global Asylum Rule, at 46; El Salvador Eligibility Guidelines, at 31-32; Guatemala Eligibility Guidelines, at 40-41; Honduras Eligibility Guidelines, at 46-47. U.S. law, however, has generally rejected social groups based on occupation. *Gonzalez-De Leon v. Barr*, 932 F.3d 489, at 5 (6th Cir. 2019) (rejecting “taxi drivers in Guatemala,” “taxi drivers living in the poppy producing region of Guatemala,” and “Guatemala taxi drivers who have refused gang recruitment and extortion”).

⁹⁶ Individuals with gang-related claims for protection may be members of a social group while also having a claim based on their (imputed) political opinion or religion. Gang Guidance Note, ¶ 31.

⁹⁷ Social Group Guidelines, ¶ 21.

⁹⁸ Gender Guidelines, ¶ 20; Social Group Guidelines ¶¶ 15, 18.

⁹⁹ Gang Guidance Note, ¶¶ 30, 63-65.

¹⁰⁰ UNHCR Comments on Global Asylum Rule, at 45.

¹⁰¹ Social Group Guidelines, ¶ 22.

¹⁰² UNHCR Amicus Brief, *In the Matter of Thomas*, at 17, A75-597-033/-034/-035/-036 (BIA Jan. 25, 2007).

¹⁰³ UNHCR Comments on Global Asylum Rule, at 45.

¹⁰⁴ INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). As with the definition of PSG, federal courts have interpreted the “one central reason” requirement in various ways, and some administrations have attempted to heighten the requirement for proving nexus. For example, while the Third Circuit held that “one central reason” must be “an essential or principal reason for the persecution,” *Gonzalez-Posadas v. U.S. Att’y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015), the Ninth Circuit has held that the persecutor may be motivated by more than one central reason, and an applicant must not prove which reason was dominant. *Singh v. Holder*, 764 F.3d 1153, 1162 (9th Cir. 2014). In addition, in *Matter of A-B- II*, then-Acting Attorney General Rosen attempted to heighten the nexus standard by requiring that asylum seekers show that the protected status was the “but-for” cause and “neither incidental nor tangential to another reason for the harm.” *Matter of A-B- II*, 28 I&N Dec. 199, 210-11 (A.G. 2021) *vacated by Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

¹⁰⁵ See, e.g., *Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (finding no nexus between gang persecution and applicant’s family relationship where attack against applicant was due to mistaken association with rival gang); *Guerra-Marchorro v. Holder*, 760 F.3d 126, 128-29 (1st Cir. 2014) (finding no nexus between harm by Mara Salvatrucha gang and applicant’s social group of “abandoned Guatemalan children lacking protection from gang violence”); *Aldana-Ramos v. Holder*, 757 F.3d 9, 15-16 (1st Cir. 2014) (finding that kinship ties may form the basis of a PSG but denying asylum on nexus grounds.).

protected ground but instead financial gain¹⁰⁶ or gang recruitment.¹⁰⁷ UNHCR notes that, as a Convention ground need not be the sole or dominant cause for the persecution (rather, it only needs to be a relevant contributing factor), an individual may have a valid claim for international protection, even if the persecutor may also financially benefit from the harm inflicted on the individual.¹⁰⁸ Moreover, the existence of personal or interpersonal animus, an issue that has also come up in U.S. asylum adjudication,¹⁰⁹ does not necessarily lead to a claim failing for lack of nexus. Persecution could, for example, be perpetrated due to personal or interpersonal animus in combination with one or more Convention grounds, and this would satisfy the causal link under international standards so long as the Convention ground(s) were a relevant, contributing factor.¹¹⁰ Accordingly, personal or interpersonal animus should not automatically preclude a grant of refugee status.

IV. Gang-Related Asylum Claims Based on Other Convention Grounds

Any of the Convention grounds may be applicable to asylum claims with a gang component, and while the focus of this note is on social group claims, those may frequently overlap with a claim on other grounds, such as political opinion or religion.¹¹¹ In other words, the Convention grounds are not mutually exclusive, and an applicant “may be eligible for refugee status under more than one of the grounds identified in Article 1A(2).”¹¹² For example, individuals resisting gang recruitment may be seen as expressing a political opinion, or their resistance may be a manifestation of a religious conviction. Thus, persecution in such circumstances might effectively be linked to religion or political opinion, actual or imputed, as well as membership in a PSG.

UNHCR’s Gang Guidance Note elaborates on how the Convention grounds may apply in claims with a gang component.¹¹³ Political opinion, for instance, should be understood in the broad sense, to incorporate “any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.”¹¹⁴ As such, “expressing objections to the activities of gangs or to the State’s gang-related

¹⁰⁶ *Cruz-Guzman v. Barr*, 920 F.3d 1033, 1037-38 (6th Cir. 2019) (finding no nexus between the harm and family membership but rather that the gang had a criminal desire for financial gain); *Lopez-Lopez v. Sessions*, 885 F.3d 49, 50-51 (1st Cir. 2018) (finding no nexus between persecution and a protected ground, where drug dealers in Guatemala took over applicant’s land and made him cultivate raw materials for drugs, because the central motivation of the drug dealers was profit); *Gonzalez-Posadas v. U.S. Att’y Gen.*, 781 F.3d 677, 686-87 (3d Cir. 2015) (finding that homosexuality was not one central reason for persecution where evidence showed gang members were interested in applicant because he had money and was a potential recruit).

¹⁰⁷ *Cortez-Mendez v. Whitaker*, 912 F.3d 205, 208-12 (4th Cir. 2019) (finding no nexus between gang persecution and applicant’s membership in his disabled father’s family where evidence indicated that the gang targeted the applicant due to his resistance to the gang’s recruitment efforts).

¹⁰⁸ UNHCR Comments on Global Asylum Rule, at 46.

¹⁰⁹ See, e.g., *Matter of Pierre*, 15 I&N Dec. 461, 462-63 (BIA 1975) (finding no nexus because “[t]he motivation behind [the persecutor’s] alleged actions appears to be strictly personal”); *Marquez v. INS*, 105 F.3d 374, 380 (7th Cir. 1997) (“A personal dispute, no matter how nasty, cannot support [a noncitizen’s] claim of asylum.”); Final Rule, *Procedures for Asylum and Withholding of Removal; Credible and Reasonable Fear Review*, 85 Fed. Reg. 80,274, 80,281 (Dec. 11, 2020) (providing that “[i]nterpersonal animus or retribution” is a circumstance that “would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant’s inability to demonstrate persecution on account of a protected ground”) (currently enjoined by *Pangea Legal Services v. DHS* (3:20-cv-09253) and *Immigration Equality v. DHS* (3:20-cv-09258), Order Re Preliminary Injunction (N.D. Cal. Jan. 8, 2021)).

¹¹⁰ UNHCR Comments on Global Asylum Rule, at 44-45.

¹¹¹ Handbook, ¶ 77.

¹¹² UNHCR, *Guidelines on International Protection No. 2, “Membership of a Particular Social Group”*, ¶ 4, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Social Group Guidelines].

¹¹³ Gang Guidance Note, ¶¶ 32, 33, 45-51.

¹¹⁴ Gang Guidance Note, ¶ 45. “Political opinions may manifest in various expressions of anti-gang beliefs and values. Examples include: refusing forced affiliation or taxes-via-extortion; testifying or informing against the gangs; reporting incidents of gang violence to authorities, participating in community based gang prevention and intervention activities; maintaining neutrality (especially in ‘hazardous’ conditions); or associating with persons or social or religious groups that promote anti-gang values.” UNHCR Comments on Global Asylum Rule, at 37.

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.”¹¹⁵ Moreover, in areas where gangs exercise power, effectively control society, or where State agents are intertwined with gangs, opposition to a government’s policy or investigation of gang activities could similarly qualify as a political opinion.¹¹⁶ Expression of dissent may also amount to a political opinion where it is rooted in a political conviction, for example where an individual has resisted gang activity because he or she is ideologically opposed to gang practices.¹¹⁷ Finally, neutrality can constitute a political opinion that forms the basis of a claim for international protection, especially in environments “in which neutrality is fraught with hazard.”¹¹⁸

While U.S. administrative bodies and courts have advised and found that a general aversion to gangs is not necessarily politically motivated,¹¹⁹ they have recognized that there may be cases where refusing to comply with gang demands is an element of a cognizable political opinion claim.¹²⁰ To prove a causal link between the persecution and the political opinion Convention ground in gang-related cases, an applicant must make two showings: first, that he or she was “politically or ideologically opposed to the gang’s particular ideals or to gangs in general (or that the gang believes this) and not merely that he or she did not want to be personally involved in or had an aversion to specific activities of the particular gang,”¹²¹ and, second, that the gang targeted him or her because of this political opinion.¹²² In line with this reasoning, U.S. courts generally do not recognize a mere refusal to join a gang as a political opinion on which an asylum claim can be based,¹²³ but they have recognized some political opinions that have a gang component, even while rejecting similar gang-related social groups.¹²⁴

¹¹⁵ Gang Guidance Note, ¶ 46. Other examples of how a political opinion may manifest in anti-gang beliefs and values include “refusing forced affiliation or taxes-via-extortion; testifying or informing against the gangs; reporting incidents of gang violence to authorities, participating in community-based gang prevention and intervention activities; maintaining neutrality (especially in “hazardous” conditions); or associating with persons or social or religious groups that promote anti-gang values.” UNHCR Comments on Global Asylum Rule, at 37.

¹¹⁶ Gang Guidance Note, ¶¶ 47-49.

¹¹⁷ Gang Guidance Note, ¶ 48.

¹¹⁸ Gang Guidance Note, ¶ 50 (citing *Calderon-Medina (re)*, No. A 78-751-1981 (EOIR Immigration Court, Newark, NJ, May 1, 2002), <https://www.refworld.org/cases,USIC,4b6bfb332.html>). In those instances, neutrality “is not the absence of an opinion but rather a conscious and deliberate choice of the applicant.” Gang Guidance Note, ¶ 50.

¹¹⁹ *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578–79 (8th Cir. 2009).

¹²⁰ See, e.g., *Alvarez-Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019) (acknowledging record showing that gang viewed the applicant’s failure to pay an extortion demand as a political act and a “direct challenge to [the gang’s] efforts to establish and maintain political domination in Honduras,” and recognized that this may constitute an imputed anti-gang political opinion).

¹²¹ RAI0 Directorate, Officer Training Program, Nexus and the Protected Grounds, at 29, dec. 20, 2019, https://www.uscis.gov/sites/default/files/document/foia/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf (citing *Santos-Lemus v. Mukasey*, 542 F.3d 738, 746-547 (9th Cir. 2008) (stating that resistance to gang recruitment alone does not constitute a political opinion) *abrogated on other grounds*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013)); *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009) (same).

¹²² *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582, 62 (3d Cir. 2011) (holding that refusal to join a gang alone is not a political opinion and that applicant must also show that he was persecuted on account of the political opinion.)

¹²³ See, e.g., *Zelaya-Moreno v. Wilkinson*, 989 F.3d 190, 194, 203 (2d Cir. 2021) (not recognizing applicant’s belief that “gangs were bad for his hometown and his country”, of which he informed the gang, as political opinion); *Valdiviezo-Galdamez v. Attorney General*, 663 F.3d 582, 62 (3d Cir. 2011) (holding that refusal to join a gang alone is not a political opinion and that more than just holding the opinion is necessary to show persecution on account of that political opinion.); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578-79 (8th Cir. 2009) (finding that mere refusal to joining a gang was not a political opinion in the context of the case); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 746-47 (9th Cir. 2008) (stating that resistance to gang recruitment alone does not constitute a political opinion) *abrogated on other grounds*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013).

¹²⁴ *Hernandez-Chacon v. Barr*, 948 F.3d 94, 99, 103-105 (2d Cir. 2020) (recognizing “resistance to male domination in Salvadoran society” as a political opinion on which an asylum claim may be based, while rejecting “Salvadoran women who have rejected the sexual advances of a gang member”); *Alvarez-Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019) (Court acknowledged record showing that gang viewed the applicant’s failure to pay an extortion demand as a political act and a “direct challenge to [the gang’s] efforts to establish and maintain political domination in Honduras,” and recognized that this may constitute an imputed anti-gang political opinion.); see also, *Perez-Ramirez v. Holder*, 648 F.3d 953 (9th Cir. 2011) (finding that whistleblowing by a government employee against government officials engaged in corruption may constitute political

In addition, individuals fleeing gang violence may also have a claim for international protection based on their religion.¹²⁵ When people’s religious beliefs are incompatible with gang practices or “intolerance and violence against people of other religions or beliefs in a particular society is promoted by gangs,” an individual may have a claim for international protection on account of their religion.¹²⁶ Additionally, people involved in religious organizations may be perceived as undermining a gang’s authority, which may lead people to be more susceptible to harm by gangs.¹²⁷ U.S. courts and administrative bodies have recognized gang-related asylum claims based on religious persecution.¹²⁸

Finally, gangs may target individuals based on their race or ethnicity, which may give rise to a claim for international protection.¹²⁹ People belonging to indigenous groups or who are considered national minorities are at heightened risk of being targeted by gangs.¹³⁰ While the U.S. government has recognized that indigenous people may be at particular risk of gang violence,¹³¹ asylum seekers with gang-related claims who seek protection based on their race or ethnicity frequently fail to satisfy the nexus requirement under U.S. law.¹³²

V. Agents of Persecution and a State’s Ability and Willingness to Protect

International legal standards do not require the persecutor to be a State actor, and gang-related violence may constitute persecution “whether perpetrated by State or private actors.”¹³³ In UNHCR’s view, “the source of feared harm is of little, if any, relevance to the finding of whether persecution has occurred, or is likely to occur.”¹³⁴ The Handbook, while acknowledging that persecution is “normally related to action by the authorities of a country,” explicitly states that it “may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”¹³⁵ In most gang-related claims, persecution emanates from criminal gangs and other non-State groups.¹³⁶ Such claims may warrant a more nuanced analysis, but that does not render these claims “less relevant or less deserving of international protection.”¹³⁷ In some instances, however, the State may be considered an agent of persecution, for example, where “individual State agents collaborate with gang members or direct gangs

activity for the purpose of the political opinion convention ground.) *overruled on other grounds, Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015).

¹²⁵ Gang Guidance Note, ¶ 32.

¹²⁶ Gang Guidance Note, ¶ 32.

¹²⁷ El Salvador Eligibility Guidelines, at 29-30; Honduras Eligibility Guidelines, at 45.

¹²⁸ See, e.g. *Unpublished IJ decision* (Arlington, VA, Aug. 10, 2012) (granting asylum to applicant based on his well-founded fear of persecution on account of his religion, where the applicant proselytized and spoke out against gangs in El Salvador as part of his religious practice.), available at <https://www.aila.org/infonet/ij-grants-el-salvadoran-asylum-religious-persecut>. The U.S. government has also recognized in its training materials that organized criminal groups “may be motivated to harm religious people both to further their criminal goals and because of their religious beliefs.” RAI0 Directorate, Officer Training, International Religious Freedom Act (IRFA) and Religious Persecution, at 38, Dec. 20, 2019, https://www.uscis.gov/sites/default/files/document/foia/IRFA_LP_RAIO.pdf (citing *Ivanov v. Holder*, 736 F.3d 5, 15 (1st Cir. 2013)).

¹²⁹ Gang Guidance Note, ¶ 33.

¹³⁰ Gang Guidance Note, ¶ 33.

¹³¹ See Department of State, 2021 Country Reports on Human Rights Practices: Guatemala, at 42 (2021), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/guatemala/>.

¹³² See, e.g., *Martin Martin v. Barr*, 916 F.3d 1141, 1145 (8th Cir. 2019) (Court did not find nexus between applicant’s indigenous ethnicity and alleged persecution by gang).

¹³³ Gender Guidelines, ¶ 9.

¹³⁴ UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 19 (Apr. 2001), <https://www.refworld.org/docid/3b20a3914.html>.

¹³⁵ Handbook, ¶ 65.

¹³⁶ Gang Guidance Note, ¶ 24.

¹³⁷ UNHCR Comments on Global Asylum Rule, at 44.

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.”¹³⁸

Persecution by non-State actors may give rise to an asylum claim if such persecution is “knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”¹³⁹ *Effective protection* is not fulfilled by “merely enacting a law prohibiting persecutory practices,”¹⁴⁰ as the State “may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.”¹⁴¹ Instead, effective protection depends on the de jure as well as de facto capabilities of the authorities.¹⁴² In other words, protection is *ineffective* where “the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence . . . with due diligence.”¹⁴³ Other factors indicative of ineffective protection in the gang context are a “lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs; [and] a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.”¹⁴⁴

Under U.S. law, persecution by non-State actors may give rise to asylum eligibility when the government is unwilling or unable either to control the ‘private’ actor or to protect the asylum seeker.¹⁴⁵ Most courts, administrative bodies, and training materials apply the framing focused on the ‘private’ actor,¹⁴⁶ which slightly diverges from the international standard as it focuses on a State’s ability to *control the persecutor*, rather than on its ability to effectively *protect an individual* from persecution. In one decision, the U.S. government attempted to heighten the standard by requiring asylum seekers to show that the State “condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”¹⁴⁷

¹³⁸ Gang Guidance Note, ¶ 26.

¹³⁹ Handbook, ¶165.

¹⁴⁰ UNHCR Amicus Brief, *Mijangos v. Barr*, 27, No. 19-70489, (9th Cir. Feb. 28, 2020), <https://www.refworld.org/docid/5f60a2bd4.html>.

¹⁴¹ In such cases, the practice would still constitute persecution. Gender Guidelines, ¶ 11 (emphasis omitted).

¹⁴² UNHCR Amicus Brief, *Mijangos v. Barr*, at 27. Factors indicative of State protection 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.” Gang Guidance Note, ¶ 28.

¹⁴³ Sexual Orientation Guidelines, ¶¶ 34-37.

¹⁴⁴ Gang Guidance Note, ¶ 28.

¹⁴⁵ *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014); see also *Rosales Justo v. Sessions*, 895 F.3d 154, 159, 163 (1st Cir. 2018) (holding that asylum seeker had met the “unable or unwilling” standard where government had displayed a “willingness to investigate” the murder of the applicant’s family member by non-State actors but could nonetheless not protect the applicant).

¹⁴⁶ *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2015) (holding that a non-State actor’s conduct may constitute persecution where the government is “unable or unwilling to control it”); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014) (“[I]n order for the respondent to prevail on an asylum claim based on past persecution, she must demonstrate that the Guatemalan Government was unwilling or unable to control the ‘private’ actor.”); see also RAI0 Directorate, Officer Training Definition of Persecution and Eligibility based on Past Persecution, at 4.2, Dec. 20, 2019, https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf (“An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.”); Ellison & Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUMN. RTS. L. REV. 441, 455-91 (Winter 2021) (analyzing the standard applied at the BIA, in each federal Circuit Court, and at the Supreme Court).

¹⁴⁷ *Matter of A-B- I*, I&N Dec. 316, 337 (A.G. 2018), *Matter of A-B- II*, 28 I&N Dec. 199 (A.G. 2021) vacated by *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

This development was heavily litigated in federal courts¹⁴⁸ until the decision was vacated and adjudicators received instructions to revert to the previous “unwilling or unable to control” standard.¹⁴⁹

IV. Overview of UNHCR Resources to Support Gang-Based Asylum Claims

For a discussion of UNHCR’s views on the legal analysis of gang-related asylum claims, including in the U.S. context, see:

- [UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs](#) (Mar. 2010)
- [Comments on the Proposed Rules from the U.S. Dept. of Justice and Dept. of Homeland Sec., “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”](#) (July 2020)
- [Amicus Brief, *Marroquin-Perez v. Barr*](#) (Feb. 2020)
- [Amicus Brief, *Matter of O.L.B.D.*](#) (Mar. 2019)
- [Amicus Brief, *Grace v. Barr*](#) (July 2019)

For more detailed analysis of the situation in El Salvador, Guatemala, and Honduras and an assessment of the potential international protection needs of asylum seekers from those countries, see:

- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala](#) (Jan. 2018)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador](#) (Mar. 2016)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras](#) (July 2016)
- [Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection](#) (Mar. 2014)
- [Arrancados de Raíz \(Uprooted\)](#) (2014) (Spanish)
- [Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico](#) (Oct. 2015)

¹⁴⁸ See *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) (finding that implementation of the heightened standard was arbitrary and capricious, as the government failed to acknowledge or explain the change); *Jimenez Galloso v. Barr*, 954 F.3d 1189, 1192 (8th Cir. 2020) (holding that the unwilling-or-unable test, rather than the completely helpless test, controls since the two tests conflict and the unwilling-or-unable standard came first). For a detailed discussion on the “unwilling or unable” standard and interpretations in the different federal circuit courts before the vacatur of *Matter of A-B-*, see Ellison & Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 Colum. Humn. Rts. L. Rev. 441 (Winter 2021).

¹⁴⁹ *Matter of A-B- III*, 28 I&N Dec. 307, 309 (A.G. 2021) (vacating *Matter of A-B- I* and *II*, pointing out confusion over the applicable “unable or unwilling standard,” and instructing courts to follow pre-*A-B- I* precedent until further rulemaking clarifies the standard).