

# Gang persecution as grounds for asylum in the US

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**A substantial group of Central American immigrants have been filing asylum cases in the USA based on fears of gang-based persecution.**

Reflecting US preoccupations over the past decade, the debate over immigration there has generally been framed in terms of economics and security. The history and political climate surrounding US immigration policy make asylum cases based on fears of gang-based persecution notoriously difficult to win but recent changes might signal the beginnings of a more expansive humanitarian policy.

The US remains without an animating vision on immigration but President Obama's campaign platform – the last time the current administration set out a coherent view on immigration – mainly conceptualised immigrants as “undocumented workers” or as part of a “flow of illegal traffic” that must be regulated and stopped.

Daniel Sharp, legal director of the Central American Resource Center,<sup>1</sup> says that the US government operates on the assumption that anyone coming from south of the border is seeking a better life economically. But, he estimates, half or more of the asylum cases being filed by Central American immigrants are related to street gangs, an observation that is unsurprising given the actual situation in many of these countries.

In 2007, a UN report presented the drastic problem of growing gang membership and influence. According to this report, Guatemala had 434 gangs with a total membership of 14,000, while in Honduras there were 112 gangs with 36,000 members. Gang membership per 100,000 people was calculated as: Belize 36, Panama 43, Costa Rica 62, Nicaragua 81, Guatemala 111, El Salvador 152 and Honduras 500. For Honduras this means that 5% of the entire male population aged 15-24 is a gang member.

In 2009 a US State Department report on Guatemala estimated that 3,000 children nationwide were involved in street gangs: “criminals often recruited street children for purposes of stealing, transporting contraband, prostitution, and illegal drug activities.”<sup>2</sup> The International Crisis Group released a report in 2010 noting that “Guatemala has become a paradise for criminals” and pointing out the effect of gangs on entire segments of the population: “Criminal organisations traffic in everything from illegal drugs to adopted babies, and street gangs extort [from] and terrorise entire neighbourhoods, often with the complicity of [the] authorities.”<sup>3</sup>

Applicants for asylum include men and women who fear, and have been victims of, gang-based violence, young men targeted for recruitment, and former gang members. Taken together, their claims form a litany of miseries and fears that tend to follow a pattern – repeated threats and instances of brutality, family members disappeared or killed – that depicts their lives in these countries as imbued with terror and violence.

Some asylum cases that came to court in the US in 2010 include: a young Mayan who had protested about low wages in the sugarcane fields and had been threatened and beaten three separate times, during which one of his assailants said “the next time, we will kill you if you [have] not gone back to work”; a woman whose uncle's military connections led to her receiving threats; young men who had resisted gang recruitment and been threatened; and former gang members who had left and were afraid to return. All of these cases were denied.

One problem is the difficulty in establishing persecution. According to previous case law, fear of “general

strife” is not by itself enough to make a case for asylum. One established precedent defines persecution as an “extreme concept ... mere harassment does not amount to persecution.”

Furthermore, even if persecution is shown to have occurred, applicants must show that it is based on one of five grounds: race, nationality, religion, political opinion and/or social group. Gang-based asylum cases are usually argued on the grounds of the last two, either where opposition to or refusal to join a gang is depicted as a political opinion or where young women and men are construed as a social group targeted for violence or recruitment by gangs.

According to a lawyer who has worked with such asylum cases, “Political opinion that has qualified in the past for asylum... such as cases where people resisted the Shining Path [in Peru]... these organisations had a more explicit political agenda but the amount of power that they wielded ... is comparable to that of gangs.”

Secondly, government complicity in the reinforcement of, or their inability to protect against, persecution must be established. While nationwide efforts to combat violence and crime in Central American countries are not certain to succeed, and collusion on the part of local authorities has been noted, such bare facts are often not sufficient in court. Immigrants must show how repeated efforts to elicit help from the local police resulted in a refusal or clear-cut failure to help; being too afraid to contact police in the first place or external difficulties that render an investigation futile have not counted as substantial evidence in past cases. Additionally, asylum seekers must show why they cannot just move to another part of the country in order to escape persecution.

It is no surprise then that it is extremely difficult for applicants to obtain asylum if their claims

are based on gang- or drug cartel-related violence.

### Humanitarian asylum reforms

The near impossibility of securing asylum based on fears of gang-based persecution calls into question the seemingly humanitarian aspirations of the law. The practice of an expansively humanitarian asylum policy in the US has a long history of being mixed up in politics. Even during the height of their civil wars and the aftermath, Guatemalans and Salvadorans were characterised as economic migrants as a result of a political stance by the Reagan administration, which denied that civil rights violations were being perpetrated by governments that were allies of the US. In 1984, only 3% of asylum cases for Guatemalans and Salvadorans were granted.

“When I read articles and I hear how people in general in the [US] talk about south of the border, I hear that most people come here for economic reasons,” an immigration lawyer says. “In the field I work in that’s not really the case; it’s an issue of the breakdown of the country or widespread violence.”

This generalisation feeds into the floodgates argument, the fear of letting in more immigrants when the

general perception is that there are already too many. If fear of gangs is grounds for being granted asylum, a huge number of people would suddenly qualify, it is argued.

In terms of reform, legal theorist and lawyer Matthew Price believes in confining asylum, in practice, to a more restrictive definition when government involvement in persecution can be proved. For cases such as gang-based persecution, which reflects a breakdown of the state rather than persecution by the state, he recommends expanding the definition of Temporary Protected Status (TPS) which is currently used primarily in the case of environmental disasters such as Hurricane Mitch.

This would allow immigrants facing threats and violence to enter on the grounds that they can then return if the situation in their countries improves. If there is no improvement within a specified amount of time, such as five years, immigrants can then apply for permanent status. The current TPS model does not have a pathway to permanent residency, meaning that immigrants can be stuck in limbo for years. Such a change, however, is unlikely to happen without a shift in public sentiment. Anti-immigrant groups

already criticise TPS because they feel that it allows immigrants with this status to remain indefinitely.

Price acknowledges this major obstacle: “The issue is that to change TPS in a way that is more generous is not something that’s going to be politically palatable when there’s a lot of anti-immigrant sentiment.” The only thing to do is to continue attempting to file asylum cases in the hope that change comes through the courts. There have been, for example, two recent cases in the US courts where ex-gang members have been recognised as a particular social group, which seem to be setting legal precedents and offering the potential for a change to a more sympathetic and flexible approach by the courts.<sup>4</sup>

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1. CARECAN was founded in 1983 in the midst of the Central American wars to help refugees from El Salvador <http://www.carecan-la.org>
2. US Bureau of Democracy, Human Rights, and Labor, 2009 Country Reports on Human Rights Practices, <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm>
3. *Guatemala: Squeezed between Crime and Impunity*, <http://tinyurl.com/ICG-Guatemala>
4. *Benitez Ramos v Holder* (2009, 589 F.3d 426) <http://caselaw.findlaw.com/us-7th-circuit/1499189.html> and *Urbina-Mejia v Holder* (2010, 597 F.3d 360) <http://caselaw.findlaw.com/summary/opinion/us-6th-circuit/2010/03/05/168573.html>

## Organised gangs: UNHCR Guidance Note

In response to a growing number of asylum claims connected with the activities of criminal gangs, in March 2010 UNHCR issued a Guidance Note on Refugee Claims relating to Victims of Organized Gangs. The phenomenon of gangs and gang violence is increasing in various countries of the world, including in El Salvador, Guatemala, Honduras, Jamaica, Brazil and the Russian Federation, and has proved difficult for many states to address. The result has been a steady outflow of people from these countries seeking asylum in countries including the US, Canada, Mexico, Australia and the European Union.

The Guidance Note provides legal interpretative guidance for governments, decision-makers, practitioners and UNHCR staff carrying out refugee status determination. Its scope is not limited to a particular type of gang or region but it is intended to be relevant for a wider range of claims relating to organised criminal groups, including street gangs, youth gangs and other types of criminal organisations such as drug cartels. The Guidance Note provides an overview of gangs and their practices, describes how different groups and individuals in society may be affected and targeted by gangs, and sets out guidance on how the elements of

the refugee definition contained in Article 1A of the 1951 Refugee Convention apply to gang-related asylum claims.

One of the central legal questions addressed in the Guidance Note is the establishment of a link between the persecution feared and one or more of the Convention grounds i.e. race, nationality, religion, membership of a particular social group and political opinion. It has been argued by some jurisdictions that victims of common crime are not protected by the 1951 Refugee Convention and that such individuals are simply targeted for their money or for reasons of retribution. However, as UNHCR explains, while gang violence may affect large segments of society, certain individuals such as marginalised young people from poor backgrounds and those who refuse to comply with gangs are at particular risk and can constitute a ‘particular social group’. Victims of gangs can also be persecuted because of their political opinion, especially where criminal and political activities overlap, thus qualifying as refugees under the 1951 Convention.

UNHCR’s Guidance Note on Refugee Claims Relating to Victims of Organized Gangs is available at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.