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BALANCING NATIONAL SECURITY AND INTERNATIONAL RESPONSIBILITY: THE IMMIGRATION SYSTEM'S LEGAL DUTY TO ASYLEES FLEEING GANG VIOLENCE IN CENTRAL AMERICA

MARGOT KNIFFIN*

I. INTRODUCTION

In September 2010, the United States government granted asylum to Mexican journalist, Jorge Luis Arguirre.¹ Arguirre began receiving death threats two years before as he was driving to a funeral of a fellow journalist who had been killed in gang violence.² At the time, Arguirre was working as the editor of an online newspaper in the city of Juarez, a Mexican “epicenter” of gang violence.³ The threats escalated until they finally compelled him to flee his home and seek the protection of asylum in the United States.⁴ Arguirre’s grant of asylum provides a new hope for Mexican journalists, one of the most targeted professional groups fleeing Mexican gang violence.⁵ However, in the wake of Arguirre’s success, many immigration lawyers and advocates are left questioning why asylum law fails to protect so many others. As El Paso immigration lawyer, Eduardo Becket, explains, “there is a flaw in the system . . . where we’re basically saying that if you’re not a famous person and a nobody, don’t ask.”⁶

This successful asylum case is believed to be the first of its kind since Mexican President Felipe Calderón declared war on the country’s drug cartels in 2006.⁷ Each year since then, thousands of individuals have come across the border with stories of death threats,

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1. Olga R. Rodriguez & Paul G. Weber, *Threatened Mexican Journalist Receives Asylum*, ASSOCIATED PRESS, Sept. 23, 2010, available at <http://www.msnbc.msn.com/id/39334585#.TqhM7Zs80ig>.

2. *Id.*

3. *Id.*

4. *Id.*

5. More than 30 media workers have disappeared or been killed since President Felipe Calderon launched his war on drug cartels in 2006. Julian Cardona, *Threatened Mexican Journalist Granted US Asylum*, REUTERS, Sept. 21, 2010, available at <http://www.reuters.com/article/idUSN2115054820100921?pageNumber=2v>.

6. Rodriguez & Weber, *supra* note 1.

7. Julian Cardona, *Threatened Mexican Journalist Granted US Asylum*, REUTERS, Sep. 21, 2010, available at <http://www.reuters.com/assets/print?aid=USN2115054820100921>.

bullet wounds, and lost family members, but only a small fraction receive asylum in the United States.⁸ Many of these asylum seekers come from Mexico and Central American countries and represent the thousands of young people who have fled the violence of the Central American gang, *Mara Salvatrucha* (MS-13), over the past decade.⁹ Born out of Los Angeles in the late 1980's, MS-13 members have a presence in thirty-one states and have spread to El Salvador, Guatemala and Honduras, adding to the estimated 500,000 gang members throughout Central America.¹⁰ The gang, which engages in the trafficking of illegal drugs, weapons and people, owes much of its strength to its violent recruitment tactics of Central American youth.¹¹ Unfortunately, despite new hope brought by Aguirre's recent success, the majority of the individuals fleeing MS-13 will not receive the protection of asylum once they arrive in the United States.¹²

This comment addresses how immigration judges and asylum officers rely on biased legal standards in asylum law to systemically exclude those fleeing gang violence in Central America. Balancing national security concerns about increased gang activity in the United States with an international responsibility to provide asylum to those fleeing persecution, this comment concludes that the United States' legal system must do more to protect the lives of individuals fleeing gang violence. Part I discusses the historical background of MS-13, the prominent Central American gang.¹³ Part II provides an overview of asylum and the particular social group basis for relief.¹⁴ Part III focuses on the Board of Immigration Appeal's introduction of "social visibility" as a defining standard of particular social group, and critiques the Board of Immigration Appeal's use of this standard to

8. Between 2008 and 2010, US immigration courts denied asylum to 85.8% of Mexican applicants, 88% of Guatemalan applicants, and 90.4% of El Salvadoran applicants. *Asylum Denial Rates by Nationality—Before and After the Attorney General's Directive*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/240/include/nationality_alpha.html (last visited Jan. 23, 2010).

9. Miriam Jordan, *Family Seeks U.S. Asylum After Fleeing Gang*, THE WALL STREET JOURNAL, Aug. 21, 2009, available at <http://online.wsj.com/article/SB125081039222347885.html>.

10. Freddy Funes, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. MIAMI L. REV. 301, 304–05 (2008).

11. *Id.*

12. In the El Paso Immigration Court, two of the five immigration judges have a combined rejection rate of 83.3% for the 346 asylum cases that they adjudicated between 2006 and 2011. Julian Aguilar, *Border Asylum Judges Deny Most Petitions*, THE TEXAS TRIBUNE, July 31, 2011, available at <http://www.texastribune.org/immigration-in-texas/immigration/border-asylum-judges-deny-most-petitions/>.

13. See *infra* Part I.

14. See *infra* Part II.

systematically exclude those fleeing gang violence in Central America.¹⁵ In addition, Part III demonstrates how both the Seventh Circuit and the United Nations High Commission For Refugees have rejected the “social visibility” standard as unworkable.¹⁶ Finally, Part IV balances the country’s national security concerns with our international obligations,¹⁷ and Part V argues that lawmakers must take responsibility for our country’s role in the birth of the MS-13 gang and reject the “social visibility” requirement to provide proper protection to those fleeing gang violence.¹⁸

II. HISTORICAL BACKGROUND OF GANG VIOLENCE IN MEXICO AND CENTRAL AMERICA

MS-13 and the 18th Street gang (M-18),¹⁹ two of Central America’s prominent street gangs, have their earliest roots in the streets of Los Angeles.²⁰ In 1980, a violent civil war erupted in El Salvador and, over the following twelve years, forced over 700,000 El Salvadorans to flee to their home country.²¹ Of those who came to the United States, 52% settled in downtown Los Angeles, an area which had historically been controlled by Mexican-American gangs.²² The new Salvadorian refugees soon began to organize their own gangs, such as MS-13, and also began joining existing groups, such as M-18, to protect themselves and their families from the dominant force of the Mexican gangs in Los Angeles.²³

15. *See infra* Part III.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part V.

19. Ana Arana, *How the Street Gangs Took Central America*, 84 FOREIGN AFF. 98, 100–01 (2005) (*Mara* is slang for “gang,” and *trucha*, – “trout,” in Spanish – is slang for a “shrewd person.”); *but see* Sebastian Amar et al., *Seeking Asylum from Gang-Based Violence in Central America: A Resource Manual*, CAPITAL AREA IMMIGRATION RIGHTS COAL. 1 (2007), <http://www.aifl.org/lac/GangResourceManual.pdf> (“The literal meaning of *Mara Salvatrucha* 13 is uncertain, with different sources providing different definitions. ‘*Mara*’ is alternatively thought to be slang for ‘gang’ or is thought to be a reference to a street in San Salvador. ‘*Salvatrucha*’ has been said to have roots in a slang term for street-wise Salvadoran guerillas who fought in El Salvador’s civil war, or the term for type of army ant. The ‘13’ is usually thought to be a reference to 13th Street in Los Angeles.”).

20. Arana, *supra* note 19, at 100.

21. Elyse Wilkinson, *Examining the Board of Immigration Appeals’ Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 390 (2010) (internal citations omitted).

22. *Id.* at 390–91 (internal citations omitted).

23. *Central American Gang-Related Asylum: A Resource Guide*, WASH. OFFICE ON LATIN AM. 2 (May 2008) [hereinafter WOLA Report].

In the wake of the 1992 Los Angeles riots,²⁴ the police concluded that the local street gangs of Salvadoran immigrants, then only small, disorganized groups, were responsible for the majority of the looting and criminal activity.²⁵ California responded by implementing a “get tough” approach to gangs, deporting thousands of gang members to Central American countries.²⁶ California also passed the “three strikes” law in 1996, which resulted in another dramatic increase in the number of incarcerated Latino immigrants.²⁷ MS-13 and M-18²⁸ members were then centrally located within the California prison system, providing an important opportunity for the gangs to organize and gain power.

Federal immigration laws also tightened during this time, resulting in the increased deportation of thousands of Central American immigrants.²⁹ In 1996, Congress passed both the Illegal Immigration Reform and Immigration Responsibility Act and the Anti-Terrorism and Effective Death Penalty Acts, which expanded the scope of deportable offenses under the Immigration and National Act (INA).³⁰ Because the Acts applied retroactively to those convicted before 1996, and even implicated individuals who resided in the country as legal permanent residents, their passage resulted in the mass deportation of young Central American criminals and their families

24. The Los Angeles riots occurred on April 29, 1992 after the four white policemen on trial for the fatal beating of Rodney King were found innocent. The riots lasted three days, only settling after the National Guard quelled the violence, and resulted in 52 deaths, 2,500 injuries and at least \$446 million in property damages. Denise DiPasquale & Edward L. Glaeser, *The Los Angeles Riot and the Economics of Urban Unrest*, J. URB. ECON. 43, 52–53 (1998).

25. Arana, *supra* note 19, at 100.

26. CAL. PEN. CODE § 186.22; *see also* Wilkinson, *supra* note 21, at 391.

27. Vincent Schiraldi, Jason Colburn & Erik Lotke, *Three Strikes and You're Out: An Examination of the Impact of 3 Strike Laws 10 Years After Their Enactment*, JUSTICE POLICY INSTITUTE 4 (2003) (stating that nearly two-thirds (65%) of those sentenced under California's Three Strikes laws are imprisoned for nonviolent offenses). *See also* Amanda Bailey and Joseph M. Hayes, *Who's in Prison? The Changing Demographics of Incarceration*, 8 CAL. COUNTS POPULATION TRENDS & PROFILES 1, 13 (2006), available at http://www.ppic.org/content/pubs/cacounts/CC_806ABCC.pdf (“Thirty percent of male prisoners were Latino in 1990; by 2005, Latinos constituted the largest ethnic group, at 37 percent.”).

28. Collectively referred to as the “Mara.”

29. *WOLA Report*, *supra* note 23, at 1.

30. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, §§ 321–22, 110 Stat. 3009–546 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 440, 110 Stat. 1214 (1996).

between 2000 and 2004.³¹ The majority of these deportees had settled in the slums of Los Angeles after fleeing civil war in their countries during the 1980's, and returned to their home countries with no resources, homes, or connections, other than their gang ties to MS-13.

It did not take long for the returned MS-13 members to take hold of power in El Salvador. Local governments were not stable at this time as they were still working to rebuild following the bloody civil war that had recently plagued the country.³² Furthermore, because the new U.S. laws banned the disclosure of their identities, local government officials were not aware of the potential threat that these new arrivals presented.³³ The deportations continued, however, and MS-13 began fierce recruitment campaigns of the country's populations of poor youth.

As MS-13 grew in power, it evolved from a territorial organization, focused on small "cliques" (neighborhood groups), to a more complex vertical system that allowed for communication between groups.³⁴ This shift in the power structure allowed the gang's leaders to communicate with its members while in jail and also facilitated communication between members in Central America and the United States.³⁵ It also further prevented the local governments in El Salvador and other Central American countries from controlling the growing strength of MS-13.

Currently, The National Civilian Police of El Salvador estimates that there are approximately 10,500 gang members within El Salvador's borders, and the government's National Council on Public Security (Consejo Nacional de Seguridad Pública or CNSP) calculates

31. Jonah M. Temple, *The Merry-Go-Round of Youth Gangs: The Failure of the U.S. Immigration Removal Policy and the False Outsourcing of Crime*, 31 B.C. THIRD WORLD L.J. 193, 196 (2011).

32. See Laura Pedraza Fariña et al., *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador*, HUMAN RIGHTS PRACTICE SERIES, 54 (2010), available at <http://www.law.harvard.edu/programs/hrp/ihr.html> (follow "Previous Projects" hyperlink; then follow "February 2010" hyperlink).

33. Temple, *supra* note 31, at 197 ("While communication regarding removals has improved, some countries still do not receive any information about whether returned nationals belong to a gang . . . Furthermore, while receiving countries are given information regarding the specific criminal offense causing deportation, the United States does not regularly provide full criminal records.") (internal citations omitted).

34. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 422 (2010) (internal citation omitted).

35. Cara Buckley, *A Fearsome Gang and Its Wannabes*, N.Y. TIMES, Aug. 19, 2007, at THE NATION 3, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE3DA1431F93AA2575BC0A9619C8B63&sec=&spn=&pagewanted=all> (stating that MS-13 groups communicate with each other, even internationally).

upwards of 39,000 members (22,000 in MS-13; 12,000 in M-18 and another 5,000 in other gangs).³⁶ MS-13 continuously expands its membership partly due to its fierce recruitment techniques of poor youth.³⁷ Members target young teenagers in their neighborhoods and schools and coerce them to join the gangs through intimidation and physical abuse.³⁸ When the targeted children refuse to join, MS-13 increases their threats on these children, or murders them to make a statement for other attempted converts.³⁹

MS-13's reign of torment in El Salvador, and other Central American countries has, in turn, forced many to flee their home and seek refuge in the United States. El Salvadorans currently represent the third highest nationality of immigration cases in the United States immigration system, with 23,191 pending cases.⁴⁰ This number has more than doubled since early 1998, when only 11,076 Salvadorans had immigration cases in United States courts.⁴¹ The increasing number of individuals seeking refuge from gang violence in the United States requires that the leaders and framers of the country's political and legal systems reexamine U.S. international legal obligations to provide protection to those fleeing persecution. In addition, it forces the United States to reevaluate how the country's increased post-September 11th focus on national security prevents the country from fulfilling these obligations to the international community.

III. ASYLUM LAW

A. Overview of Asylum Law

Many people fleeing gang violence in Central America attempt to gain legal status in the United States by applying for asylum. The legal formulation of asylum arises out of the United Nations

36. UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), CENTRAL AMERICA AND MEXICO GANG ASSESSMENT 45 (Apr. 2006), available at http://www.crin.org/docs/usaid_gang_assessment.pdf.

37. James Racine, *Youth Resistance to Gang Recruitment as a Particular Social Group in Larios v. Holder*, 31 B.C. THIRD WORLD L.J. 457, 459 (2011).

38. Michele A. Voss, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Young Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 239 (2005) ("Many children from Central America have complained that they cannot even perform simple daily tasks like walking to school without being harassed by gang members trying to recruit them.").

39. *Id.* at 459–60.

40. *Immigration Court Caseload Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Oct. 31, 2011).

41. *Id.*

Convention Relating to the Status of Refugees (*Convention*),⁴² adopted in 1951, and the amended United Nations Protocol Relating the Status of Refugees (*Protocol*), adopted on January 31, 1967.⁴³ The United Nations originally established the *Convention* in the wake of World War II to provide international protection for those fleeing persecution.⁴⁴ In 1980, Congress passed the 1980 Refugee Act, conveying its intent to bring the United States into compliance with both the *Convention* and the *Protocol*.⁴⁵

Because the United States has agreed to comply with the provisions of the United Nations *Protocol*, the legal standards for asylum are now included in the INA.⁴⁶ Under the INA, an individual may qualify for asylum if he or she is:

Any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁷

Therefore, in order to gain asylum, a person must convincingly show that: (1) he or she experienced past persecution/or has a well-founded fear of future persecution; (2) the government is unable or unwilling to protect him or her from that persecution; (3) he or she would not be able to re-locate within the country to avoid persecution in his or her country; and (4) he or she has been persecuted because of either his or her race, religion, nationality, political opinion or membership in a particular social group.⁴⁸ Because asylum is discretionary, the immigration judge will also base his or her decision on the perceived credibility of the respondent.⁴⁹

42. Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter *Convention*].

43. Convention and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter *Protocol*].

44. Chantal Marie-Jeanne Bostock, *The International Legal Obligations Owed to the Asylum Seekers On the MV Tampa*, 14 INT'L J. REFUGEE L. 279, 282 (2002) (internal citations omitted).

45. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citing H.R. No. 96-608 at 9 (1979)).

46. 8 U.S.C. § 1101(a)(42)(A) (2006).

47. *Id.*

48. *Id.*

49. *Id.* at § 1158(b)(1)(B).

An applicant can either make an *affirmative* or a *defensive* application for asylum.⁵⁰ For an affirmative application, the applicant must be present in the United States and initiate his or her own application for asylum with an asylum officer.⁵¹ An individual will have a defensive application if he or she is placed in removal proceedings after being found ineligible for asylum by an asylum officer, after being apprehended in the United States without proper legal documents, or after being caught by U.S. Customs or Border Protection while trying to enter the United States without proper documentation.⁵² In both forms of asylum applications, the respondent has the burden of proving his or her eligibility for asylum.⁵³

In an affirmative application, an asylum officer will first conduct an asylum interview with the applicant and will then choose to admit or deny the applicant.⁵⁴ Between 2000 and 2004, only 19% of all affirmative asylum applications were approved by asylum officers.⁵⁵ If the asylum officer denies the applicant, the officer will defer the applicant to the Department of Justice, which will place the applicant in defensive proceedings before an Immigration Judge.⁵⁶ Because the defensive asylum application process is adversarial and takes place in immigration court, the respondent has the opportunity to prepare evidence, witnesses and cross-examination.⁵⁷ From 2001–2005, almost

50. See *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 10, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> [hereinafter *Obtaining Asylum*].

51. *Id.*

52. See *id.* (explaining the multiples processes through which individuals are “generally placed” in defensive asylum proceedings).

53. 8 C.F.R. §§ 208.5, 242.17(c) (1984); *In re Acosta*, 19 I. & N. Dec. 211, 215 (BIA 1985) (holding that the Respondent has the burden of establishing support his claim by a preponderance of the evidence).

54. See *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 10, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=888e18a1f8b73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>.

55. *The Asylum Process*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/159/> (last visited Dec. 18, 2011) [Hereinafter *The Asylum Process*].

56. See *Types of Asylum Decisions*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 15, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4a49549bf0683210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>.

57. *Obtaining Asylum*, *supra* note 50.

311,000 respondents filed defensive asylum applicants in immigration courts.⁵⁸ About 71% of these applicants entered the process as referrals from asylum officers, because they had previously filed an affirmative application, while 29% of the respondents entered because they were in removal proceedings and pled to asylum as an affirmative defense.⁵⁹ Of the latter group of applicants, only 19.8% were granted asylum.⁶⁰

If the immigration court denies the respondent's application, he or she can appeal to the Board of Immigration Appeals (BIA). The BIA is a fifteen member administrative body that is appointed by the Attorney General.⁶¹ The BIA generally conducts a "paper review" of the case, rather than courtroom proceedings.⁶² BIA decisions are binding on all immigration judges and Department of Homeland Security Officers, unless modified or overruled by the Attorney General or a federal court.⁶³ If the BIA denies asylum, the respondent can then appeal the decision to the federal court of appeals in which the individual resides.

B. The Particular Social Group Protected Ground

Because many individuals fleeing MS-13 cannot demonstrate that they suffered persecution due to their race, religion, nationality or political opinion, most attempt to base their asylum claim on their membership in a *particular social group*.⁶⁴ Particular social group is one of the five protected grounds on which an individual can base an asylum claim,⁶⁵ by demonstrating a nexus between the past persecution that the individual suffered (or his or her fear of future persecution) and his or her membership in this group.⁶⁶ The particular

58. *The Asylum Process*, *supra* note 55.

59. *Id.*

60. *Id.*

61. BOARD OF IMMIGRATION APPEALS, <http://www.justice.gov/eoir/fs/biabios.htm> (last visited Nov. 25, 2011) [Hereinafter *Board of Immigration Appeals*]; 8 C.F.R. § 1003.1(a)(1) (2009) ("The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.").

62. *Board of Immigration Appeals*, *supra* note 61.

63. *Board of Immigration Appeals*, *supra* note 61.

64. *See, e.g., In re Acosta*, 19 I. & N. Dec. 211, 213, 232 (BIA 1985).

65. 8 U.S.C. § 1101(a)(42)(A) (2006).

66. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (emphasizing that the persecution suffered must be "on account of" the political opinion of the victim). *E.g., Tapiero de Orejuela v. Gonzalez*, 423 F.3d 666, 672 (7th Cir. 2005) (finding that the "educated, landowning class" constituted a particular social group); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (finding that "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice" qualified as a particular

social group protected ground came directly from the 1967 *Protocol*,⁶⁷ however it was added as an afterthought to the list of protected grounds.⁶⁸ Although there is no statutory definition of particular social group, the Office of the United Nations High Commission of Refugees' (UNHCR's) "Handbook on Procedures and Criteria for Determining Refugee Status," under the 1951 *Convention* and the 1967 *Protocol*, provides some insight into the Congressional intent behind the inclusion of this category.⁶⁹ The handbook states that membership in a particular social group "comprises persons of similar background, habits or social status."⁷⁰

In 1984, the BIA first defined the particular social group category in *Matter of Acosta*.⁷¹ The BIA based its analysis on the doctrine of *ejusdem generis* ("of the same kind") to determine that if "words used in enumeration with specific words should be construed in a manner consistent with the specific words," and reasoned that it should look to the nature of the other four grounds for asylum (race, religion, nationality, and political opinion) to establish a working definition of particular social group.⁷² Examining the other grounds, the court concluded that "[e]ach of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."⁷³ The BIA then held that persecution based on membership in a particular social group means that a person is the victim of persecution because he or she belongs to a group of people who share a "common, immutable characteristic."⁷⁴

In the years following the *Acosta* decision, the federal circuits split on how they chose to interpret the BIA's "immutability" characterization of particular social group.⁷⁵ The First, Third, Sixth,

social group); *Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008) (concluding that Lari ethnic group of the Kongo tribe is a particular social group).

67. *Id.* at 232; *Protocol*, *supra* note 43.

68. *Acosta*, 19 I. & N. Dec. at 232.

69. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES § 77 (Rev.1 1992), available at <http://www.unhcr.org/3d58e13b4.html>.

70. *Id.*

71. *In re Acosta*, 19. I. & N. Dec. 211, 213, 233 (BIA 1985).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Voss*, *supra* note 38, at 251–52.

and Seventh Circuits adopted the definition set forth in *Acosta*.⁷⁶ The Ninth Circuit, in addition, rooted its definition of immutability in the “voluntary associational relationship among the purported members,” described as a “collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”⁷⁷ The Second Circuit, in turn, followed the Ninth Circuit’s “voluntary associational relationship,” while also adding that members of the particular social group must be “recognizable and discrete.”⁷⁸ The definition of particular social group continues to evolve, as the BIA and circuit courts shift their conception of its underlying elements. The next section will examine one particular criteria of particular social group, “social visibility,” which the courts have wielded to construct an insurmountable wall to asylum for those fleeing gang violence.⁷⁹

IV. THE INTRODUCTION OF “SOCIAL VISIBILITY” AS A DEFINING CHARACTERISTIC OF PARTICULAR SOCIAL GROUP

A. The BIA Introduces “Social Visibility”

In the 2006 case, *In re C-A*,⁸⁰ the BIA introduced yet another requisite element of the particular social group protected ground for asylum: “social visibility.”⁸¹ Establishing the purpose of this requirement, the BIA stated that the existence of a claimed particular social group must be objectively recognizable by “others in the country in question” in order for an individual to reasonably suffer

76. See *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 546, 549 (6th Cir. 2003) (applying *Acosta* to find that “tattooed youth” are not a particular social group); *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998) (holding that parents of Burmese student dissidents shared a common, immutable characteristic and defined a particular social group); *Fatin v. I.N.S.*, 12 F.3d 1233, 1241 (3rd Cir. 1993) (holding that a subgroup of Iranian feminists who refuse to conform to the government’s gender-specific laws and social norms may constitute a particular social group); *Ananeh-Firempong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985) (applying *Acosta* in order to conclude that family characteristics can define a particular social group).

77. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Hernandez-Montiel v. I.N.S.*, 225 3d. 1084, 1093 (9th Cir. 2000) (holding that a particular social group is “one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it”) (internal citation omitted).

78. *Gomez v. I.N.S.*, 947 F.2d 660, 664 (9th Cir. 1991) (“Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete.”).

79. See *infra* Part III.

80. 23 I. & N. Dec. 951 (BIA 2006).

81. *Id.* at 959–61

persecution on account of membership in that group.⁸² The respondent in *In re C-A-* was a bakery owner from Cali, Colombia, which was the home of the Cali drug cartel at that time.⁸³ Although the respondent himself was not involved in cartel activity, a friend of the respondent his would often visit the respondent's bakery and talk openly about this friend's involvement with the drug cartels.⁸⁴ The respondent then passed this information on to the general counsel for the city, who was responsible for prosecuting drug traffickers.⁸⁵ Following his decision to pass along this information, various members of the drug cartels threatened the respondent and made numerous attempts to kill him, forcing the respondent to eventually flee to the United States.⁸⁶

As the basis for the respondent's asylum claim, he stated that he was a member of the particular social group "noncriminal drug informants working against the Cali drug cartel" and asserted that this qualified as a group with an immutable characteristic under *Acosta*.⁸⁷ In response, the BIA recognized that this group could be viewed as immutable because the respondent was not able to change his past decision to act as an informant.⁸⁸ However, the BIA concluded that the respondent took a calculated risk when he made the decision to act as an informant and was therefore not in a position to claim refugee status.⁸⁹

In addition to immutability, the BIA looked to the characterization of "social visibility" to determine whether the respondent qualified for asylum.⁹⁰ The Court reasoned that to determine the existence of a claimed group, it had often looked to the extent to which members of a claimed group would be recognizable to those outside of the group.⁹¹ In doing so, the BIA referenced its 1996 decision, *In re H-*,⁹² where it determined that the distinct linguistic commonalities of a Somali sub-clan helped to qualify the sub-clan as a

82. *Id.*

83. *Id.* at 952.

84. *Id.*

85. *Id.*

86. *In re C-A-*, 23 I. & N. Dec. 951, 952-53 (BIA 2006).

87. *Id.* at 957-58.

88. *Id.* at 958.

89. *Id.* at 959.

90. *Id.*

91. *Id.* at 960 ("Our other decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.").

92. *In re H-*, 21 I. & N. Dec. 337 (BIA 1996).

particular social group.⁹³ The BIA also looked to the UNHCR Guidelines, which state that “persecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.”⁹⁴ Applying this standard, the BIA denied asylum to the respondent partially because general members of society would not recognize the respondent as an informant of the Cali drug cartel.⁹⁵

Two years later, the BIA again applied the “social visibility” standard to a Salvadoran gang-based asylum claim in *Matter of S-E-G*.⁹⁶ The respondent in this case was a teenage girl who received continuous threats from MS-13 and applied for asylum under the particular social group of “young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons.”⁹⁷ When the respondent refused to join the gang, members of MS-13 threatened to rape her and then murdered a child in the neighborhood who also refused to join them.⁹⁸ To evaluate the asylum claim, the BIA heard expert testimony from a professor at Central American University, who informed the court that the police in the country were unable to control MS-13 because the gang had too much influence in the local government.⁹⁹

The expert testimony, however, had little impact on the BIA’s analysis of the claim.¹⁰⁰ The BIA focused its analysis on the “social visibility” requirement that it established in *In re C-A*.¹⁰¹ Examining the claim in this light, the BIA concluded that neither MS-13, nor society at large, would be able to distinguish the claimed group from any other individuals in the general population.¹⁰² Because the gang violence was so widespread, the court reasoned the claimed particular social group was exposed to the same degree of violence as the rest of those living in the country.¹⁰³

93. *In re C-A*-, 23 I. & N. Dec. at 959.

94. *Id.* at 960 (quoting UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, at ¶ 14, U.N. Doc. HCR/GIP/02/02 (May 7, 2002)).

95. *Id.*

96. *In re S-E-G*-, 24 I. & N. Dec. 579 (BIA 2008).

97. *Id.* at 588.

98. *Id.* at 580.

99. *Id.*

100. *See id.* at 582.

101. *Id.*

102. *In re S-E-G*-, 24 I. & N. Dec. 579, 588 (BIA 2008).

103. *Id.* at 587.

By rejecting the respondent's claimed particular social group based on the conclusion that the Central American youth fleeing gang violence failed to meet the "social visibility" requirement, the BIA created a potentially insurmountable hurdle for future gang based asylum claims; in the years since *Matter of S-E-G-*, the BIA has repeatedly reaffirmed this holding by denying subsequent claims of this kind.¹⁰⁴ Furthermore, many circuit courts have followed suit, adopting the BIA's conclusion that resisting the violence of a Central American gangs does not place one within the protected ground of a particular social group.¹⁰⁵ As such, the BIA's holding in *Matter of S-E-G-* has effectively shut the doors of the courthouse to all of the others fleeing the violence of MS-13 in El Salvador, and other Central American countries.¹⁰⁶

B. The Seventh Circuit and the UNHCR Condemn the "Social Visibility" Standard

The BIA's focus on "social visibility" has since been met with resistance by the Seventh Circuit and the United Nations High Commission for Refugees (UNHCR). In its recent decision, *Gatimi v. Holder*, the Seventh Circuit concluded that "social visibility" is not a workable standard because the BIA has failed to apply it consistently throughout its decisions, and because it does not reflect the reality of how

104. *Matter of E-A-G-*, 21 I. & N. Dec. 591, 594 (BIA 2008) (holding that Honduran males who resisted gang recruitment did not constitute a particular social group because this groups "lacks the social visibility that would allow others to identify its members as part of such a group").

105. *E.g. Rivera Barrientos v. Holder*, 658 F.3d 1222, 1235 (10th Cir. 2011) (holding that "El Salvadoran women between ages of 12 and 25 who resisted gang recruitment" did not meet the BIA's social visibility requirement, and therefore denying the petition's asylum claim); *Valdiviezo-Galdamez v. Attorney General of U.S.*, 2011 WL 5345436, *14 -*15 (3rd Cir. 2011) (acknowledging the BIA's "social visibility requirement, but remanding the decision on other grounds); *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (rejecting petitioner's asylum claim based on the finding that "young women recruited by gang members who resist such recruitment" was not socially visible); *Vasquez v. Holder*, 343 Fed.Appx. 681, 683-83 (2d Cir. 2009) (deferring to the BIA's holding in *Matter of S-E-G-* and holding that the group, "individuals who have been actively recruited by gangs, but who have refused to join because they oppose the gangs," fails to meet the "social visibility" requirement of particular social group); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745-46 (9th Cir. 2008) (describing the BIA's analysis in *Matter of S-E-G-* as "particularly helpful" and finding that the particular social group, "young men in El Salvador resisting gang violence" failed to qualify as a particular social group due to its lack of social visibility); *Sanchez-Trujillo v. INS*, 542 F.3d 738, 745-46 (9th Cir. 2008) (finding that the group of "young Salvadorans who had refused to accede to gang recruitment" lacked the requisite "social visibility" to qualify as a particular social group).

106. *Id.*

asylum applicants are forced to adapt to persecution in their countries of origin.¹⁰⁷ Furthermore, in a recent amicus brief, the UNHCR claimed the BIA misread the UNHCR guidelines when it held that an individual must be objectively visible to the general society to meet the particular social group requirement.¹⁰⁸

1. The Seventh Circuit Rejects “Social Visibility” as a Workable Standard for Determining Particular Social Group

In *Gatimi*, Judge Posner, writing for the Seventh Circuit, addressed the inconsistencies within the BIA’s “social visibility” standard.¹⁰⁹ The respondent in *Gatimi* was a former member of a tribe in Kenya, whose members were threatening his life.¹¹⁰ The BIA denied his asylum claim, based on his failure to meet the “social visibility” standard of particular social group.¹¹¹ The BIA concluded that there was no evidence that Gatimi “possesse[d] any characteristics that would cause others in Kenyan society to recognize him as a former member of [the tribe].”¹¹²

Examining the BIA’s application of the “social visibility” standard on appeal, Posner advanced two reasons why the “social visibility” requirement “makes no sense.”¹¹³ First, Posner stated that the BIA has failed to apply the “social visibility” requirement evenly to all cases.¹¹⁴ Specifically, Posner discussed a line of cases in which the BIA did not mention the “social visibility” standard when determining particular social group.¹¹⁵ These cases included *In re Kasinga*, where the BIA found that the group, “young women of a tribe that practices female genital mutilation but who have not been subjected to it,”¹¹⁶ qualified as a particular social group, and *In re Toboso-Alfonso*, in which the BIA found that the group, “homosexuals,”¹¹⁷ constituted a particular social group.¹¹⁸ In this line

107. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

108. See Brief of United Nations High Commissioner for Refugees as Amici Curiae Supporting Petitioner at 14, *Gaitan v. Holder*, No. 10-1724 (8th Cir. argued May 12, 2011), available at http://www.ilcm.org/documents/litigationseg/8CA_10_1724_Granados-Gaitan_v_Holder_amicus_UNHCR.pdf. [hereinafter *UNHCR Brief*].

109. *Gatimi*, 578 F.3d at 615.

110. *Id.* at 614.

111. *Id.* at 615.

112. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 615 (citing *In re Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996)).

117. *Id.* at 615 (citing *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (BIA 1990)).

of cases, the BIA found that a particular social group existed without applying the “social visibility” analysis that it applied in *Gatimi*.¹¹⁹ Posner concluded that this inconsistency on the part of the BIA raised questions about the rationale behind enforcing a “social visibility” standard for the particular social group requirement.

Second, Posner acknowledged that the standard does not make sense because individuals facing the threat of persecution will “take pains to avoid being socially visible.”¹²⁰ For example, Posner pointed out that homosexuals in a homophobic society will attempt to pass as heterosexual in order to avoid persecution.¹²¹ These efforts will prevent the persecuted individuals from being visible to the general society. In this way, Posner illustrated that the BIA’s “social visibility” standard places an unreasonable and unrealistic burden on the asylum applicant; it demands that the applicant place himself in increased danger by making himself more visible to the general society in order to be eligible for asylum in the United States.¹²²

2. *The United Nations High Commission For Refugees Rejects the BIA’s “Social Visibility” Standard*

On July 14, 2010, the UNHCR filed an amicus brief in the Eighth Circuit case *Granados-Gaitan v. Holder*, an El Salvadoran gang case, urging the Eight Circuit to reject *Matter of S-E-G-* and the BIA’s “social visibility” claim as inconsistent with both *Matter of Acosta* and the UNHCR’s own guidelines.¹²³ In its amicus brief, the UNHCR explained that the BIA misread the UNHCR guidelines in both *Matter of C-A-* and *Matter of S-E-G-*.¹²⁴ The UNHCR claimed that it has set forth two dominant approaches for defining social group: “protected characteristics” and “social perception.”¹²⁵ The first of these approaches, which the BIA embodied in the *Acosta* decision,¹²⁶

118. See also *In re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1996) (former members of the national police are a particular social group).

119. *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

120. *Id.* at 615.

121. *Id.*

122. See *id.* (“If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be ‘seen’ by other people in the society ‘as a segment of the population.’”).

123. *UNHCR Brief*, *supra* note 108, at 4 (explaining that the requirement of “social visibility” to identify a social group does not reflect the “text, context or object and purpose” of the 1951 Convention and its 1967 *Protocol*).

124. *UNHCR Brief*, *supra* note 108, at 15.

125. *UNHCR Brief*, *supra* note 108, at 4–5.

126. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

assessed an innate and unchangeable characteristic of the group.¹²⁷ The second approach, “social perception,” examined whether or not members of a group share a common characteristic which makes them a cognizable group, or sets them apart from the society at large.”¹²⁸ In an attempt to reconcile these two approaches, the UNHCR developed a definition of particular group that recognized both definitions.¹²⁹

In its amicus brief, however, the UNHCR explained that these tests are separate and alternative.¹³⁰ The first step for determining particular social group is to examine whether the shared characteristic is immutable and fundamental.¹³¹ If the first step is not met, the adjudicator can then look to the second “social perception” prong to determine whether the group is *nonetheless* perceived by society as a cognizable group.¹³² Therefore, the second step only plays a role in the determination of particular social group if the first step cannot be met.

The UNHCR concluded that the BIA misread the guidelines, clarifying that “social perception” does not require “visibility,” and that there is no requirement that a particular social group be visible to the society at large.¹³³ Instead, the purpose of the “social perception” requirement is to establish whether the members of the group share a characteristic that distinguishes them from the general society.¹³⁴ This analysis does not equate to the BIA’s holding that the members must be identifiable to an objective party or to the general society. Although the UNHCR guidelines address visibility, stating that “[p]ersecutory action toward a group may be a relevant factor in determining the visibility of a group,”¹³⁵ this description is only meant to illustrate how

127. UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP IN A PARTICULAR SOCIAL GROUP,” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION RELATING THE STATUS OF REFUGEES, at ¶ 6, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Guidelines*].

128. *Id.* at ¶ 7. Australia is the only common law country to use this approach, which was established by the High Court of Australia in, Applicant A and Another v. Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 (Austl.); *UNHCR Brief, supra* note 108, at 11.

129. *Id.* at ¶ 11 (noting that “a particular social group is a group of person 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.”).

130. *UNHCR Brief, supra* note 108, at 4–5.

131. *UNHCR Brief, supra* note 108, at 4–5.

132. *UNHCR Brief, supra* note 108, at 13.

133. *UNHCR Brief, supra* note 108, at 13.

134. *UNHCR Brief, supra* note 108, at 14.

135. *UNHCR Guidelines, supra* note 127, at ¶ 14.

a group can be set apart because it is being targeted.¹³⁶ Based on these findings, the UNHCR brief thereby urged the BIA to reevaluate this standard in light on the underlying purpose of Commission's guidelines, as well as the court's obligations to the International standards for the protection of refugees.¹³⁷

V. WHAT IS OUR RESPONSIBILITY?

Taking a step back from the legal framework that successfully thwarts so many gang-based asylum claims in the United States, it is also essential to consider the social and political forces that inherently influence judicial decisions and legal standards.¹³⁸ Immigration law does not exist in a vacuum, and instead is shaped by the realities of political influence,¹³⁹ as well as the imperfections of an overburdened court system.¹⁴⁰ Specifically, a recent surge in MS-13 related violence within our borders has incited many to argue that current threats to national security call for the tightening of restrictions on immigration from Mexico and Central America, rather than increasing the availability of legal status to individuals from this region.¹⁴¹ In one example of this violence, Juan Carlos Moreira was sentenced to life in prison by the U.S. District Court of Maryland, in September 2010.¹⁴² According to his own verbal statements, Moreira was responsible for four bloody murders, which occurred between January 1, 2003 and January 5, 2005.¹⁴³ A native of El Salvador, Moreira came to the United States illegally in the summer of 2000 and helped found the Sailor Locos Salvatruchos Westside (SLSW), a MS-13 clique in Silver

136. *UNHCR Brief*, *supra* note 108, at 15.

137. *UNHCR Brief*, *supra* note 108, at 28.

138. *See supra* Part III.

139. *See infra* Part IV.C.

140. *Immigration Case Backlog Still Growing in FY 2011*, TRAC IMMIGRATION, Feb. 7, 2011, <http://trac.syr.edu/immigration/reports/246/> ("The number of cases awaiting resolution before the Immigration Courts reached a new all-time high of 267,752 by the end of December 2010 . . . [t]he case backlog has continued to grow — up 2.6 percent — since Trac's last report three months ago, and more than a third higher (44%) than levels at the end of FY 2008.")

141. Associated Press, *Texas Rep. Calls for Immigration Reform, Tighter Border Security in Congressional Hearing*, FOXNEWS.COM (Sept. 19, 2011), <http://www.foxnews.com/politics/2011/09/19/texas-rep-calls-for-immigration-reform-border-security-in-congressional-hearing/>.

142. Press Release, U.S. Dept. of Justice Office of Public Affairs – Baltimore Division, MS-13 Gang Leader Sentenced to Life in Prison for Racketeering Offenses Including the Murder of a Witness (Sept. 14, 2010), *available at* <http://baltimore.fbi.gov/dojpressrel/pressrel10/ba091410.htm>.

143. *Id.*

Spring, Maryland.¹⁴⁴ These murders are just a snapshot of the MS-13 driven violence in Maryland, and across the country.¹⁴⁵

These MS-13 related murders, along with many others, raise important questions about whether the United States bears the responsibility for providing asylum to victims of a gang that currently pose an increasing national security concern within our own borders. These questions also come at a time where the numbers of backlogged federal immigration court cases are rapidly increasing,¹⁴⁶ and immigration judges must face the daily challenge of evaluating and parsing fraudulent asylum claims.¹⁴⁷ Due to the challenge of parsing the authentic gang-based asylum claims from the fraudulent claims of potential gang members, the courts have reacted by conflating all claims and building insurmountable legal hurdles, such as the “social visibility” requirement, that prevent the vast majority of Central American gang-based asylum claims from obtaining protection.¹⁴⁸ Currently, the Courts’ solution weighs heavily in favor of national security concerns,¹⁴⁹ while ignoring the country’s international obligation to provide protection to individuals fleeing persecution.¹⁵⁰

To strike a new balance, advocates and lawmakers must reexamine the original purpose of the asylum laws, take responsibility for the U.S.’s role in the creation of MS-13, and develop creative solutions for providing safe options to those seeking safety within our borders. Part A of this section provides an overview of the present

144. *Id.*

145. See Ruben Castaneda, *Witness Tells Court About Gang-Rape in MS-13 Trial*, WASHINGTON POST, Sept. 29, 2006, at B2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092801680.html?referrer=emailarticle> (describing the gang rape of a 16 year-old high school student at the hands of MS-13 members); *Man Sentenced to Life for New Jersey Schoolyard Killings*, ASSOCIATED PRESS, Nov. 4, 2010, available at <http://abclocal.go.com/wabc/story?section=news/local&id=7764823> (stating that a MS-13 member was sentenced to three consecutive life sentences after pleading guilty to the execution style killing of three college students).

146. See *supra* note 140.

147. See Sam Dolnick, *Immigrants May be Fed False Stories to Bolster Asylum Pleas*, N.Y. TIMES, July 11, 2011, available at http://www.nytimes.com/2011/07/12/nyregion/immigrants-may-be-fed-false-stories-to-bolster-asylum-pleas.html?_r=1&scp=1&sq=Immigrants%20May%20be%20Fed%20False%20Stories%20to%20Bolster%20Asylum%20Pleas&st=cse; see also Jesse Ellison, *Why the DSK Maid Lied*, THE DAILY BEAST, July 7, 2011, <http://www.thedailybeast.com/articles/2011/07/07/dominique-strauss-kahn-accuser-why-lying-on-asylum-filing-doesn-t-mean-she-s-a-liar.html>.

148. See *supra* Part II, Part III.

149. See *infra* Part IV.A.

150. See *infra* Part IV.B.

threat the MS-13 poses to the country's national security.¹⁵¹ Developing a realistic understanding of this threat is an essential element of finding a true balance with the country's responsibility to non-citizens seeking asylum under the UNHCR *Convention* and *Protocol*, described in Part B.¹⁵² Part C then contrasts the politicization of asylum adjudication throughout U.S. history with the politically neutral objectives of the UNHCR *Convention* and the *Protocol*, and argues that the BIA's "social visibility" standard is another example of a politically biased legal standard.¹⁵³ Finally, Part V of the comment proposes suggestions for addressing the current imbalance.¹⁵⁴

A. MS-13's Threat to National Security

Evaluating the extent of the threat that MS-13 poses in the United States is a crucial step in determining how to best protect the interests of both asylees and American citizens. A recent surge in MS-13 related murders has led the Department of Homeland Security to define gang activities as a threat to our national security.¹⁵⁵ According to a 2008 threat assessment, the FBI determined that MS-13 operates in forty-two states and the District of Columbia, and it has a nationwide membership of about 6,000–10,000 people.¹⁵⁶ In addition, researchers categorize MS-13 as a transnational threat, meaning that gang members commit crimes that gang leaders plan and control in more than one country.¹⁵⁷ Others describe the threat of transnational gangs, like MS-13, as "very mobile, highly adaptable to new geographic areas, and maintaining connections in their native countries."¹⁵⁸

The FBI and Department of Homeland Security (DHS) have established various programs to help combat the spread of MS-13

151. See *infra* Part IV.A.

152. See *infra* Part IV.B.

153. See *infra* Part IV.C.

154. See *infra* Part V.

155. Brett Wolf, *DHS Surge Shows National Security Threat Posed By Transnational Street Gangs; ICE Struggles with Lasting Solution*, HOMELAND SECURITY OUTLOOK (Jan. 26, 2011), <http://www.hsoutlook.com/features/features/121-dhs-surge-shows-national-security-threat-posed-by-transnational-street-gangs-ice-struggles-with-lasting-solution-.html>.

156. *The MS-13 Threat, A National Assessment*, FEDERAL BUREAU OF INVESTIGATION, Jan. 14, 2008, http://www.fbi.gov/news/stories/2008/january/ms13_011408 [hereinafter FBI].

157. CELINDA FRANCO, CONG. RESEARCH SERV., *THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS?* 7 (2010).

158. *Id.* at 5 (quoting CLAUDE ARNOLD, U.S. I.C.E. HUMAN RIGHTS VIOLATORS AND PUBLIC SAFETY OFFICE, IMMIGRATION AUTHORITIES AND GANG ENFORCEMENT, UNITED STATES ATTORNEYS' BULLETIN 42 (2006)).

activity within the United States. In 2004, the FBI established the National Gang Task Forces (NGTF) to coordinate state and federal efforts to target MS-13 members.¹⁵⁹ In 2005, Congress also provided funding (pursuant to P.L. 108-447) for a National Gang and Intelligence Center (NGIC) to centralize information on gangs and disseminate it with local law enforcement throughout the country.¹⁶⁰ More recently, Immigration and Customs Enforcement (ICE) has initiated programs, such as Operation Community Shield, which partner with local law enforcement agencies to target foreign-born gang members.¹⁶¹

B. An Obligation to the United Nations Convention

Despite the increased MS-13 activity in the past years, lawmakers must consider national security concerns in the context of the country's obligation to international conventions regarding the protection and safety of refugees. As discussed in Part II, Congress demonstrated its commitment to bringing the United States into compliance with the *Convention* and the *Protocol* when it passed the 1980 Refugee Act.¹⁶² The Supreme Court also recognized this Congressional intent in *INS v. Aguirre-Aguirre*, stating that "one of Congress' primary purposes in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations *Protocol* Relating to the Status of Refugees . . . to which the United States acceded in 1968."¹⁶³ Furthermore, Article VI of the U.S. Constitution states that treaties that the United States has acceded to "shall be the supreme [l]aw of the [l]and."¹⁶⁴ As the UNHCR noted, to fulfill this obligation, "Congress provided a path for refugees to seek asylum in the U.S." through 8 U.S.C. § 1101(a)(42), so that refugees could escape persecution in their country of origin.¹⁶⁵ The U.S. adoption of the *Convention* and *Protocol*, and the subsequent confirmation of the country's obligation to these treaties by the

159. *Id.* at 9.

160. *Id.* at 11.

161. *ICE Arrests 30 Men in Milwaukee During ICE-led Anti-Gang Operation*, MMDNEWswire, Aug. 1, 2011, available at http://finance.sfgate.com/hearst.sfgate/news/read/19115686/ice_arrests_30_men_in_milwaukee_during_ice.

162. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (internal citations omitted).

163. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1986)).

164. U.S. CONST. art. VI, § 1, Cl. 2.

165. *UNHCR Brief*, *supra* note 108, at 8.

Supreme Court, therefore requires that the United States takes proactive steps in creating a path to asylum. By ignoring these responsibilities, without attempting to strike an affirmative balance with national concerns, the United States is shirking its international duties to all individuals fleeing persecution in their countries of origin.

C. Variations from the United Nations Convention and the Politicization of Asylum Law in the United States

Lawmakers have yet to fulfill this commitment of bringing the United States into compliance with the *Convention and Protocol*, however, as apparent variations still exist between current United States asylum policies and the humanitarian, non-discriminatory language of the original United Nations documents.¹⁶⁶ These variations illustrate how the United States' political relationships with specific countries still affect our asylum system's treatment of those entering the United States.¹⁶⁷ The impact of foreign policy on asylum law is not a new phenomenon in the United States, and during the 1980's, many commentators addressed the system's historic bias towards those individuals fleeing our nation's enemies in the Cold War.¹⁶⁸

For example, in her article, *The Politicization of United States Asylum and Refugee Policies*, Victoria Rapoport finds a parallel between the United States' historical disapproval of communist regimes and high asylum grant rates from communist (or former communist) countries, such as Cuba and China.¹⁶⁹ Although the Republic of Cuba has only eleven million citizens, individuals arriving from Cuba made up 7.6% of the refugee grants in 2006.¹⁷⁰ On the contrary, Rapoport finds that adjudicators grant a low rate of asylum applications to individuals fleeing countries with which the United

166. Victoria Rapoport, *The Politicization of United States Asylum and Refugee Policies*, 11 SCHOLAR 195, 203–04 (2009).

167. *Id.* at 204.

168. Daniel L. Swanwick, *Foreign Policy and Humanitarian in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, 21 GEO. IMMIGR. L.J. 129, 131 (2006). Others argue that asylum has no inherent humanitarian value and point to asylum's ancient Greek roots to demonstrate that the concept has always maintained a primarily political purpose. Mathew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J., 277, 286 (2004) (noting “[a] decision to shelter a fugitive would be interpreted as an affront to the foreign power and could sometimes precipitate war, while a refusal to grant asylum was impious and could be construed as a sign of political weakness”).

169. Rapoport, *supra* note 166, at 221–22 (internal citation omitted).

170. *Id.* at 222 (internal citations omitted).

States has a strategically strong economic or military relationship, such as Saudi Arabia.¹⁷¹ In 2006, the United States granted asylum to only a few applicants from Saudi Arabia, despite the fact that Saudi Arabia maintains similarly high rates of human rights violations.¹⁷²

Despite governmental reforms aimed at “applying a single standard of asylum eligibility” in the past decades, specific obstacles still prevent the system from operating in an ideally humanitarian manner.¹⁷³ Changes to United States asylum law after the attacks of September 11, 2001 illustrate how national security concerns and political motivations impact discriminatory policies against asylum seekers from specific countries. Because the United States has failed to adopt the *Convention’s* non-discrimination clause,¹⁷⁴ the government can rely on the *Convention’s* national security exception to discriminate against refugees and asylum applicants based on country of origin in times “of war or other grave and exceptional circumstances.”¹⁷⁵ For example, the REAL ID Act, enacted by Congress in 2005, created the requirement that asylum seekers show that their “race, religion, nationality, membership in a particular social group, or political opinion” represented *one central reason* for the persecution that they experienced.¹⁷⁶ This represented a change from former requirements, which only required a showing that this belief was *one reason* for the persecution.¹⁷⁷ This shift in the language of the law thereby presented a heightened standard for obtaining asylum. The REAL ID Act also gave more discretionary power to immigration judges and asylum officers to make credibility judgments.¹⁷⁸ In addition, the USA PATRIOT ACT, signed into law by former President George W. Bush in 2001, broadened the category of

171. *See id.* at 230.

172. *Id.*

173. Swanwick, *supra* note 168, at 134–35 (internal citations omitted).

174. *Convention, supra* note 42, at art. 3 (requiring that member states “apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin”).

175. *Convention, supra* note 42, at art. 9 (stipulating that “[n]othing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security”).

176. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 303 (2005) (codified as amended at 8 U.S.C. § 1158).

177. *See id.*

178. *Id.* at § 101(d)(2) (codified as amended at 8 U.S.C. § 1229(a)).

inadmissible immigration applicants to include individuals involved in terrorist organizations.¹⁷⁹

Based on an analysis of recent case law, it appears that the BIA's "social visibility" standard represents another manner through which asylum judges and officers can prevent legal protection to individuals from countries that pose a national security threat to the United States.¹⁸⁰ This requirement artificially constructs a legal standard through which adjudicators can reject applicants based on past persecutions from MS-13 and other Central American gangs.¹⁸¹ Since its inception, the "social visibility" has effectively blocked the majority of Central American gang-based asylum claims in front of both the BIA and federal circuit courts.¹⁸² Furthermore, as Judge Posner pointed out in *Gatimi*, the BIA has selectively imposed the "social visibility" standard to cases from Central America, while ignoring the requirement when adjudicating asylum claims from other regions of the world.¹⁸³ As such, both the impact and the usage of "social visibility" demonstrates how the availability of the standard allows Courts to discriminate against applicants from El Salvador, and other Central American countries, based on stated national security concerns and political interests.¹⁸⁴

This politicization of asylum adjudication permits the immigration courts and asylum officers throughout the United States to avoid their duties to those fleeing persecution, and specifically, fleeing threats from MS-13 gang violence in Central America. Deferring to the BIA authority, the Supreme Court also refuses to address the issue.¹⁸⁵ In the meantime, the courts are sending hundreds of innocent individuals back to Central America where they face

179. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 345-50 (2001).

180. *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) ("But regarding 'social visibility' as a criterion for determining 'particular social group,' the Board has been inconsistent rather than silent. It has found groups to be 'particular social groups' without reference to social visibility . . . as well as, in this and other cases, refusing to classify socially invisible groups as 'particular social groups' but without repudiating the other line of cases. When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate.") (internal citations omitted).

181. *Id.*

182. *Supra* note 105.

183. *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009).

184. *Id.*; *supra* note 105.

185. *Contreras-Martinez v. Holder*, No. 09-830, 2010 U.S. LEXIS 3983, at *1 (2010).

heightened threats to their life from MS-13 and M-18.¹⁸⁶ Despite the presence of MS-13 in the United States, MS-13 related violence in this country pales in comparison to the seriousness of the threat that these individuals face upon return to their countries.¹⁸⁷ The immigration system's failure to carve a path to safety for those who have been persecuted by gang violence thereby violates the United States' legal obligations to provide safety to refugees and also directly contradicts the Congressional purpose of entering into the *Protocol* and the *Convention*.¹⁸⁸

VI. STRIKING A BALANCE AND FULFILLING OUR OBLIGATION

As illustrated in Part IV, the United States has thus far failed to strike a workable balance between the country's national security concerns and its commitment to bringing the United States into compliance with the humanitarian and politically neutral goals of the United Nations *Protocol* and *Convention*.¹⁸⁹ Lawmakers instead continue to rely on political influences to perpetuate biased asylum laws that unfairly deny victims of persecution protection within our borders.¹⁹⁰ Among these victims are the thousands of young people fleeing MS-13 gang violence in Mexico and Central America.¹⁹¹ The United States must therefore take proactive steps to regain this balance and fulfill its international obligation to these asylees.

The United States first must take responsibility for its role in the creation of MS-13. Although government agencies define MS-13 as a gang of "Central and South American immigrants,"¹⁹² it is crucial that the United States recognize that the gang was born out of Los Angeles riots in the 1990's after toughened anti-gang laws resulted in increased incarceration of young Latino men.¹⁹³ Taking a higher level of responsibility for the origins of the gang would place an increased liability on the immigration court system to provide safety to those fleeing MS-13 violence and recruitment.

186. See Julia Preston, *On Gangs, Asylum Law Offers Little*, N.Y. TIMES, June 28, 2010, at *A16, available at <http://www.nytimes.com/2010/06/29/us/29asylum.html>.

187. Funes, *supra* note 10.

188. See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

189. See *supra* Part IV.C.

190. See *supra* Part IV.C.

191. See *supra* Part I.

192. FBI, *supra* note 156.

193. Arana, *supra* note 19, at 100.

In addition, the United States should honor the United Nations *Convention* non-discriminatory provision when providing asylum and refugee status to those fleeing persecution.¹⁹⁴ Other member states that have adopted the United Nations *Convention* have entered into treaties calling for neutrality in immigration policies. For example, in 1984, Latin American member states entered into the Cartagena Declaration of Refugees, which acknowledged the “peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee[s] . . .”¹⁹⁵ Additionally, both the Organization of African Unity and the Council of Europe are signatories to treaties that define asylum as a “humanitarian act.”¹⁹⁶ The United States has failed to enter into any of these treaties, thereby maintaining a uniquely political relationship to the adjudication of asylum. Choosing to become a party to these treaties would perhaps provide the United States with a greater degree of accountability to the non-discriminatory nature of the United Nations *Convention*.¹⁹⁷

Finally, the BIA must reject the “social visibility” standard of the particular social group. The BIA must acknowledge the Seventh Circuit’s analysis of the inconsistencies that exist among the BIA’s application of “social visibility” standards for respondents from various countries.¹⁹⁸ The BIA should also consider the Seventh Circuit’s conclusion that this legal standard requires that a respondent place himself or herself in heightened danger.¹⁹⁹ Finally, asylum adjudicators must recognize the UNHCR’s conclusion that the BIA

194. Convention, *supra* note 42, at art. 3. (“The contracting parties shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin.”).

195. Cartagena Declaration on Refugees, art. III, ¶ 4, Nov. 22, 1984 reprinted in 3 UNHCR, Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR 1197 (2007).

196. Convention Governing the Specific Aspects of Refugee Problem in Africa, art. II, June 20, 1974, 1000 U.N.T.S. 45 (stating that “the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State”); EUR. PARL. ASS. DEB. 40th Sess. 1088 (Oct. 7, 1998), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta88/EREC1088.htm> (“[r]ecalling that granting the right to territorial asylum is a humanitarian act based on the principles of political freedom and human rights”).

197. Rapoport, *supra* note 166, at 232–33.

198. *Gatimi v. Holder*, 578 F.3d 611, 615–16 (2009) (recognizing a line of cases in which the BIA itself did not mention the social visibility standard when determining particular social group).

199. *Id.* at 615 (“Those former employees of the Colombian attorney general tried hard, one can be sure, to become invisible and, so far as appears, were unknown to Colombian society as a whole.”).

misread the guidelines, and that there is no requirement that a particular social group be visible to the society at large.²⁰⁰

Without the “social visibility” standard, the BIA and immigration courts can assess gang-based asylum claims on a case-by-case basis. Asylum applicants already carry a high burden when proving eligibility for asylum to the court and officers.²⁰¹ Not only must applicants illustrate past persecution and the inability to return to their home countries,²⁰² but the immigration court and asylum officers can exercise the discretion to deny applications based on credibility.²⁰³ These tools provide the immigration adjudicators sufficient opportunity to deny applicants if the court deems that the applicant’s claim is fraudulent or if the applicant will pose a national security threat by supporting MS-13 once granted asylum.

The BIA must turn its attention away from political interests and back to the individual claims of those seeking assistance in court. Approaching the asylum process in this way would allow the immigration system to regain its balance, while fulfilling its obligation to the international community and those seeking safety within our country’s borders.

VII. CONCLUSION

The BIA must carve out a path to asylum for the genuine victims of gang violence in Central America. Despite the real threats that the MS-13 pose within our borders, our immigration system has a legal obligation to the international community to provide a secure refuge to those fleeing violence and persecution.²⁰⁴ In addition, the courts have a well-established diplomatic duty, under the 1967 *Protocol*²⁰⁵ and 1951 *Convention*,²⁰⁶ to offer asylum to international refugees. To balance these competing interests, lawmakers must take responsibility for the United States’ role in the creation and increased strength of the MS-13 gang.²⁰⁷ In addition, the BIA must reject the

200. *UNHCR Brief*, *supra* note 108, at 13.

201. To establish a well-founded fear of future persecution the respondent must show (1) he has a subjective fear of persecution and (2) that the fear has an objective basis. 8 U.S.C. § 1158(b)(1)(A) (2006).

202. *Id.* at § 1101(a)(42)(A).

203. *Id.* at § 1158 (b)(1)(B).

204. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (internal citations omitted); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

205. *Protocol*, *supra* note 43.

206. *Convention*, *supra* note 42.

207. *Arana*, *supra* note 19, at 100–01.

“social visibility” standard of the particular social group ground of asylum as a legal fiction. Both the Seventh Circuit and the UNHCR have demonstrated that the standard neither reflects the realistic experiences of refugees, nor the UNHCR’s own guidelines.²⁰⁸

208. *See supra* Part III.

