

NOTES

MEANS OR ENDS? A COMPARATIVE NOTE AND REFLECTION ON “IMPUTED POLITICAL OPINION” ASYLUM IN THE UNITED STATES AND EUROPE

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NOTES

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Allison Hall*

As of January of 2017, there was a backlog of over a half of a million pending immigration matters before U.S. Immigration Courts.¹ The vast majority of these cases are individuals from Central America and Mexico, with Mexico, Honduras, Guatemala and El Salvador comprising nearly 80% of pending cases.² In December of 2015, 65% of cases pending in U.S. Immigration Court in Los Angeles, California involved individuals from only those four countries.³ Over 80,000 affirmative petitions for asylum were pending in March of 2015,⁴ an increase of over 800% in

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¹ TRAC Reports, Inc., *Immigration Court Backlog Tool*, TRAC, SYRACUSE U., http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated Apr. 2017).

² *Id.*

³ *Id.*

⁴ Jason Dzubow, *Update on the Asylum Backlog*, ASYLUMIST (May 13, 2015), <http://www.asylumist.com/2015/05/13/update-on-the-asylum-backlog/>.

the last four years.⁵ The Department of Homeland Security reports that, despite efforts, the backlog and wait times continue to mount.⁶ That figure only includes *affirmative* asylum claims that individuals may file with the United States Citizenship and Immigration Service (“USCIS”), meaning it is not included in the immigration court backlog.⁷

Not only are the courts and immigration agencies flooded with increasing numbers of cases and petitions, but also the vast majority of these individuals are unrepresented, including a significant portion that are unaccompanied minors who began streaming across the border at increasing rates in 2013 and 2014.⁸ A common narrative amongst many of the asylum seekers from Central America is that they are fleeing violence caused by the *maras*, or gangs, that have immense power throughout the region.⁹ Many of these individuals choose to illegally enter the United States in order to seek asylum, arguing that they face persecution and even death should they return to their countries.¹⁰ For some, this proves true; after asylum petitions are rejected in U.S. Courts, some have been deported back to their country only to be killed.¹¹ This devastating reality proves unsurprising in Central America and Mexico, which have some of the highest murder rates internationally; Honduras, Guatemala,

⁵ Brianna Lee, *Immigration Reform 2015: US Asylum Backlogs Soaring, Testing Patience for Those Fleeing Persecution*, INT’L BUS. TIMES (July 20, 2015), <http://www.ibtimes.com/immigration-reform-2015-us-asylum-backlogs-soaring-testing-patience-those-fleeing-2014306>.

⁶ U.S. DEP’T OF HOMELAND SEC.: CITIZENSHIP AND IMMIGRATION SERVS., ANNUAL REPORT 2015, at xi (June 29, 2015), https://www.dhs.gov/sites/default/files/publications/2015%20CISOMB%20Annual%20Report_508.pdf.

⁷ *Asylum in the United States*, AM. IMMIGR. COUNCIL 2, 4 (Aug. 22, 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf.

⁸ Am. Bar Ass’n Comm’n on Immigration, *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings Present a Critical Need for Legal Representation*, ABA 1–3 (June 3, 2015), <http://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.authcheckdam.pdf> [hereinafter *A Humanitarian Call to Action*].

⁹ Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL FOREIGN REL. (Jan. 19, 2016), <http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286>; see also Douglas Farah, *The Transformation of El Salvador’s Gangs into Political Actors*, CTR. STRATEGIC & INT’L STUD. (June 21, 2012), http://csis.org/files/publication/120621_Farah_Gangs_HemFocus.pdf.

¹⁰ See, e.g., *Deported Children Face Deadly New Dangers on Return to Honduras*, UNHCR (Jan. 29, 2015), <http://www.unhcr.org/54ca32d89.html>.

¹¹ *Id.*; see also Michele A. Voss, *Young and Marked for Death: Expanding the Definition of “Particular Social Group” in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 236 (2005).

and El Salvador, Central America's "Northern Triangle," and Mexico have all recently fallen in the top five homicide rates worldwide.¹² This reality has led the Council on Foreign Relations to conclude that El Salvador was the "the world's most violent country" not at war in 2015.¹³

Advocates have put forth creative arguments in U.S. courts that victims of this violence are entitled to refugee status under domestic and international law.¹⁴ Some have argued that these asylum seekers merit refuge from the violence in Central America due to a fear of persecution based on their membership in a "particular social group,"¹⁵ a ground for refugee status under the 1951 United Nations Convention relating to the Status of Refugees.¹⁶ Others argue that those fleeing would otherwise be in danger of persecution due to their "political opinion,"¹⁷ another ground for refugee status under the Convention.¹⁸ Although this argument has not had widespread success in the United States, advocates continue to challenge on these grounds as the situation remains dire for many individuals.¹⁹

While hundreds of thousands of Central Americans flee their countries, a similar influx of Syrians fleeing civil war in their own country are seeking refuge across Europe. At the beginning of 2016, an estimated 13 million Syrians were in need of humanitarian assistance due to violent conflict that erupted in 2011.²⁰ A large

¹² Renwick, *supra* note 9 ("Gang-related violence in El Salvador brought its homicide rate to ninety per hundred thousand in 2015, making it the most world's most violent country not at war."); Bill Chappell, *Mexico Is World's Second Most Violent Country, Report Says*, NPR (May 10, 2017), <http://www.npr.org/sections/thetwo-way/2017/05/10/527794495/mexico-is-called-worlds-second-most-violent-country>.

¹³ *Id.*

¹⁴ See, e.g., *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009); see also Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 *YALE L.J. ONLINE* 31, 35–36 (2012); Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 *BERKELEY LA RAZA L.J.* 109, 115–18 (2013).

¹⁵ Blake, *supra* note 14, at 35–36; Jeffrey D. Corsetti, *Marked for Death: The Maras of Central American and Those Who Flee Their Wrath*, 20 *GEO. IMMIGR. L.J.* 407, 420–23 (2006).

¹⁶ U.N. Convention Relating to the Status of Refugees ch. I, art. 1, § (A)(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]; 8 U.S.C. § 1101(a)(42) (2012).

¹⁷ Blake, *supra* note 14, at 36; Corsetti, *supra* note 15, at 418–19.

¹⁸ *Refugee Convention*, *supra* note 16, ch. I, art. 1(A)(2); § 1101(a)(42).

¹⁹ See generally Corsetti, *supra* note 15.

²⁰ EUR. COMM'N, SYRIA CRISIS ECHO FACT SHEET 1, 2 (Feb. 2016), https://ec.europa.eu/ec18.1ho/files/aid/countries/factsheets/syria_en.pdf.

number of these individuals are internally displaced, but significant numbers are seeking refuge in neighboring countries, and increasingly, across Europe.²¹ As a result, over one million asylum applications were brought by Syrians throughout Europe between April of 2011 and June of 2016.²² In fact, Syrians now account for at least one in three asylum seekers across Europe.²³

Syrian asylum seekers in Europe have argued similar bases for asylum as Central American gang victims. For example, many argue asylum on the basis of political or imputed political opinion; in fact the United Nations High Commissioner for Refugees (“UNHCR”) has published guidance document suggesting these grounds as a likely basis for asylum in the context of this crisis.²⁴ The argument for Syrian asylum seekers parallels that of gang victims; in the context of unstable governments, militant groups have become the *de facto* social and political order in many regions of the country. And those who do not conform to ideologies or join the ranks of ruling factions often face harassment, exploitations, or death.²⁵ Asylum seekers, thus, see their choice to reject those ideologies as a political act, based on fear of persecution by those in power.²⁶

²¹ *Id.*

²² *Syrian Regional Refugee Response: Inter-agency Information Sharing Portal*, UNHCR (Aug. 12, 2016), <http://data.unhcr.org/syrianrefugees/asylum.php>.

²³ *Asylum in EU Member States*, EUROSTAT NEWSRELEASE 1, 3 (Dec. 10, 2015), <http://ec.europa.eu/eurostat/documents/2995521/7105334/3-10122015-AP-EN.pdf/04886524-58f2-40e9-995d-d97520e62a0e>.

²⁴ UNHCR, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic, Update II* n.56 (Oct. 22, 2013) [hereinafter *UNHCR Considerations for Syria*]:

Syrian civilians are likely to have fled Syria because of a well-founded fear based on a real or imputed political opinion. In addition, Syria’s ethnic and religious minority groups are reported to be increasingly drawn into the conflict, which is increasingly sectarian in nature. Members of minority communities may have a well-founded fear of persecution for reason of (imputed) political opinion, and/or race, nationality or religion. Membership of a particular social group may be relevant as a Convention ground, too, depending on the circumstances of the individual case.

²⁵ See, e.g., U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Trafficking in Persons Report* 324 (2015) (“ISIL publicly released guidelines on how to capture, forcibly hold, and sexually abuse female slaves, including girls. Pro-government forces, armed opposition groups, and ISIL continue to forcibly recruit and use Syrian children as soldiers, human shields, and executioners, as well as in support roles.”).

²⁶ See *UNHCR Considerations for Syria*, *supra* note 24.

Despite similar arguments being brought by individuals from these two situations, the results have been vastly different; statistics show that the vast majority of petitions for asylum and subsidiary protections from Syrians in Europe have been approved,²⁷ whereas the overwhelming majority of asylum petitions both affirmative and defensive have been unsuccessful for Central American gang victims in the United States.²⁸ In fact, 9 in 10 Honduran and Salvadorian asylum claims are rejected not withstanding what some identify as “parity” between the displacement crises rooted in Syria and the Northern Triangle.²⁹ In stark contrast to European courts considering Syrian claims for asylum, U.S. courts and the Board of Immigration Appeals (“BIA”) have systematically rejected asylum for victims of gang violence, or, at the very least, greatly restricted their means of being granted asylum on these grounds.³⁰

This Note explores the potential parity between the humanitarian crises resulting from conflicts in Syria and Central America. It first surveys the conflicts and contexts of violence and coercion underlying each situation. It then proceeds with a brief analysis on the similarity of asylum claims based on imputed political opinion deriving from the two conflicts. Through this comparison, this Note will reveal that despite these similarities in the arguments available to those who have fallen victim to the *maras* in Central America and those who are fleeing the various violent conflicts in Syria, they face drastically different standards and outcomes. Notably, there is inherent variation in both the European and American contexts and success rates of asylum petitions vary amongst jurisdictions; in the case of Europe, this can vary drastically across countries.³¹ For this reason, I will limit my

²⁷ See *Annual Report on the Situation of Asylum in the European Union 2014*, EUR. ASYLUM SUPPORT OFF. 1, 22 (July 2014), <https://www.easo.europa.eu/sites/default/files/public/EASO-Annual-Report-2014.pdf>; see also *Eurostat Asylum Quarterly*, EUR. COMMISSION (June 16, 2016, 11:02 AM), http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report.

²⁸ See Brianna Lee, *Why Aren't Central Americans Getting Asylum in the U.S.?*, INT'L BUS. TIMES (Aug. 8, 2014), <http://www.ibtimes.com/why-arent-central-americans-getting-asylum-us-1653494>.

²⁹ David James Cantor, *As Deadly as Armed Conflict? Gang Violence and Forced Displacement in the Northern Triangle of Central America*, 34 AGENDA INTERNACIONAL 77, 79 (2016); Eyder Peralta, *Why a Single Question Decides the Fate of Central American Migrants*, NPR (Feb. 25, 2016), <http://www.npr.org/2016/02/25/467020627/why-a-single-question-decides-the-fates-of-central-american-migrants>.

³⁰ See Uchimaya, *supra* note 14, at 112–13.

³¹ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 1 (2008); see also Drew Desilver, *Europe's Asylum Seekers, Who are They, and Where They Want to Be*, FACTTANK

comparative analysis of political opinion jurisprudence to the Ninth Circuit in the United States and the United Kingdom in Europe. The United Kingdom often falls near the center of statistics on percentage of Asylum Requests granted.³² By selecting an “average” jurisdiction in Europe, this Note seeks to draw upon the general trend of European courts. The Ninth Circuit, by contrast, is considered one of the most “migrant friendly” jurisdictions within the United States.³³ The stark contrast in European approaches to Syrian asylum seekers in Europe and Central American asylum seekers in the United States is highlighted by juxtaposing the narrow interpretations of asylum in one of the “friendliest”³⁴ jurisdictions in the United States with the relative flexibility and openness of the “average”³⁵ asylum interpretation of British Courts in a European context.

With these case studies as a backdrop, this Note argues that U.S. standards are inadequately addressing one of the largest humanitarian crises of our time. To start, it points to how U.S. approaches are out of sync with international norms. Because the legal concept of “refugee” is a construct of international law, the U.S. interpretation should conform with international law and draw more widely from international sources, in line with the approach taken by U.K. courts. As the U.K. decision and other European decisions draw from multiple sources of international law, U.S. Courts and BIA should follow suit in order to make the standard consistent with the more flexible international norms and obligations, and recognize the legitimate claims of victims of Central American gang violence.

I. ASYLUM LITIGATION: UNITED STATES AND EUROPE

The 1951 Convention relating to the Status of Refugees defines a refugee as:

a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is

(Sept. 30, 2015), <http://www.pewresearch.org/fact-tank/2015/09/30/europes-asylum-seekers-who-they-are-where-theyre-going-and-their-chances-of-staying/>.

³² See HOUSE OF COMMONS, ASYLUM STATISTICS, 2016, Briefing Paper No. SN01403, at 17–18 [hereinafter ASYLUM STATISTICS].

³³ David North, *Immigration, the Courts, and Statistics*, CTR. IMMIGR. STUD. BLOG (Mar. 4, 2016), <http://cis.org/north/immigration-courts-and-statistics>.

³⁴ See North, *supra* note 33.

³⁵ See ASYLUM STATISTICS, *supra* note 32.

unable or unwilling to avail him—or herself of the protection of that country, or return there, for fear of persecution.³⁶

Although the United States is not party to the 1951 Convention,³⁷ it has adopted the 1967 protocol, which thereby bound the United States to the Convention's obligations.³⁸ The United States also passed the Immigration and Nationality Act in 1980 that adopted the Convention's definition of refugee through Section 101(a)15P(42).³⁹ Virtually all European Countries have signed and ratified both.⁴⁰ Furthermore, many countries have additional codified protections for refugees.⁴¹

In the United States, asylum can be asserted by “foreign nationals already in the United States or at the border who meet the international definition of a ‘refugee’” through two methods: as an affirmative claim to asylum through a petition with USCIS or as a defense to deportation in removal proceedings with the Executive Office for Immigration Review (“EOIR”).⁴² All decisions, however, are subject to final review by the BIA.⁴³ In recent jurisprudence, this unique dimension to asylum procedure has become controversial, with some courts opting to give deference to BIA decisions and interpretations as an Executive Agency charged with interpreting the INA.⁴⁴

³⁶ *Refugee Convention*, *supra* note 16.

³⁷ UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATIONS TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, <http://www.unhcr.org/3b73b0d63.pdf>.

³⁸ Collin Schueler, *An Administrative Stopgap for Migrants from the Northern Triangle*, 49 U. MICH. J.L. REFORM 213, 238 (2015).

³⁹ 8 U.S.C. § 1101(a)(42) (2012) (defining a “refugee” as a person forced outside of their 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”).

⁴⁰ *See* UNHCR, *supra* note 37.

⁴¹ *See, e.g., Temporary Protection*, EUR. COMMISSION MIGRATION HOME AFF. (2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm; *see also* Schueler, *supra* note 38, at 262–64 (discussing Temporary Protected Status as provided by the INA).

⁴² *Asylum in the United States*, AM. IMMIGR. COUNCIL (Aug. 22, 2016), <http://www.immigrationpolicy.org/just-facts/asylum-united-states>.

⁴³ *Board of Immigration Appeals*, DEP'T JUST. (2015), <https://www.justice.gov/eoir/board-of-immigration-appeals>.

⁴⁴ *See, e.g., Schueler, supra* note 38, at 242; *see generally* Bassina Farrenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059 (2011).

Although asylum procedure varies throughout Europe, the European Union (“EU”) has one unifying system that is supposed to help facilitate equitable treatment of individuals throughout the EU: the Dublin System.⁴⁵ This system was implemented to streamline the asylum process. Instead of allowing individuals to file multiple asylum claims in various European Union states, they must instead be transferred back to the port of entry where the individual initially filed for asylum.⁴⁶ Since its implementation, questions have emerged as to how effective the Dublin Regulation has been in this regard, given the variation in domestic asylum procedures.⁴⁷ For example, in addition to the Dublin System, Germany’s asylum applications are subject to the Asylum Procedure Act (*Asylverfahrensgesetz*).⁴⁸ Moreover, Germany suspended enforcement of the Dublin Protocol with regard to Syrian asylum seekers in August of 2015,⁴⁹ once again calling into question the protocol’s effectiveness. In the case of the U.K., the new decision to exit the EU could complicate this issue. As one news source reports, if the U.K. decides to completely break with all EU systems, it will no longer be subject to the Dublin Regulation and will undermine the EU’s efforts to streamline processing of migrants.⁵⁰

One ongoing challenge in asylum litigation as a result of this variation across jurisdictions is that of uniform application of the “refugee” definition.⁵¹ Since the Convention does not define many of the key terms within the definition of refugee, such as “persecution” or “particular social group,” courts and jurisdictions have

⁴⁵ UNHCR & EUROPEAN COUNCIL ON REFUGEES AND EXILES, THE DUBLIN REGULATION: ASYLUM IN EUROPE, <http://www.unhcr.org/4a9d13d59.pdf>.

⁴⁶ THE DUBLIN REGULATION, UNHCR, <http://www.unhcr.org/4a9d13d59.pdf> (last visited June 16, 2017).

⁴⁷ See Desilver, *supra* note 31; see also EUROPEAN PARLIAMENT, REFLECTION NOTE ON THE EVALUATION OF THE DUBLIN SYSTEM AND ON THE DUBLIN III PROPOSAL (2009).

⁴⁸ *Asylum and Refugee Policy in Germany*, Migration, FED. MINISTRY OF INTERIOR, <https://www.bmi.bund.de/EN/topics/migration/asylum-refugee-protection/asylum-refugee-policy-germany/asylum-refugee-policy.html> (last visited June 16, 2017).

⁴⁹ *Germany: Halt on Dublin Procedures for Syrians*, ASYLUM INFO. DATABASE (Aug. 24, 2015), <http://www.asylumineurope.org/news/24-08-2015/germany-halt-dublin-procedures-syrians>.

⁵⁰ Britte Van Tiem, *What Brexit Could Mean for Refugee Protection in Britain*, OPENDEMOCRACYUK (Aug. 8, 2016), <https://www.opendemocracy.net/britte-van-tiem/what-brexit-could-mean-for-refugee-protection-in-britain>.

⁵¹ T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group,’* UNHCR (Jan. 1, 2003), <http://www.unhcr.org/419cbe1f4.pdf>.

interpreted the meaning differently.⁵² Similarly, the national codified statutes in the United States, including the INA, do not provide definitions of such terms either.⁵³ As a result, courts across the globe and across the United States have utilized a variety of means to interpret the enumerated grounds for asylum and interpretations vary widely across borders.⁵⁴ Despite the UNHCR's guidance on how terms should be interpreted in various contexts, courts deal with these constructs in vastly different ways.

One such variation can be seen through the political opinion or imputed political opinion asylum litigation. As discussed in detail below, this ground for asylum has been invoked by Syrian asylum seekers and by Central American asylum seekers alike, each using strikingly similar arguments as a basis for asylum. Despite these similarities, these two populations face very different success rates in their claims.

II. THE CONFLICTS IN BRIEF

The narrative of Central America's most infamous gangs begins on the streets of Los Angeles, a place of refuge for many Central Americans who had fled violent conflict and civil war in their countries during the 1980s.⁵⁵ A growing gang culture in many lower-income neighborhoods in the United States led many migrants from Central America to form their own gangs as a "defense" to those that already existed.⁵⁶ In the early 1990s, however, once the civil conflicts in Central America ended and peace accords were signed, the United States began deporting incarcerated gang members back to Central America, where the gangs continued to operate and expand.⁵⁷

⁵² See Ivan Tereschenko, Note, *The Board of Immigration Appeals' Continuous Search for the Definition of "Membership in a Particular Social Group" in Matter of M-E-V-G- and Matter of W-G-R-: In the Context of Youth Resistant to Gang Recruitment in Central America*, 30 CONN. J. INT'L L. 93, 96 (2014).

⁵³ See, e.g., *Castillo-Arias v. U.S. AG*, 446 F.3d 1190, 1196 (11th Cir. 2006) ("Congress did not directly speak on the issue of what constitutes a 'particular social group,' one of the five listed categories that qualify for refugee status or withholding of deportation, within the meaning of the INA.").

⁵⁴ See generally Aleinikoff, *supra* note 51.

⁵⁵ See Voss, *supra* note 11, at 238; Uchimiya, *supra* note 14, at 121–23; Blake, *supra* note 14, at 32–33.

⁵⁶ Victor J. Blue, *Gangs Without Borders / Violent Central American Gangs Were Born in the USA, Returned to Their Homeland and Now Migrate Back and Forth Between Here and There*, SFGATE (Apr. 2, 2006, 4:00 AM), <http://www.sfgate.com/crime/article/Gangs-without-Borders-Violent-Central-American-2520854.php>.

⁵⁷ Voss, *supra* note 11, at 238–39.

The civil conflicts had destabilized political structures and resulted in a high proportion of the population being uneducated youths between 15 and 24 without prospects of employment.⁵⁸ These circumstances left individuals vulnerable to the economic and structured opportunity of gangs, making it simple for the gangs to recruit members.⁵⁹ Easy recruitment allowed larger gangs to quickly gain power, specifically in Guatemala, El Salvador, and Honduras.⁶⁰ Eventually, many of them became the “de facto social order” in regions of these countries and would “act in the place of government.”⁶¹ The UNHCR has recognized this control and power held by the *maras*, reporting that “powerful gangs, such as the *maras*, may directly control society and de facto exercise power in the areas where they operate.”⁶² Given the government’s inability to effectively combat the expansion of gangs, the *maras* are now seen by many as non-state political actors; for example, in El Salvador, the president sat down in negotiations with Mara Salvatrucha (“MS” or “MS-13”), in some ways legitimizing their political weight.⁶³

In March of 2011, protests and unrest erupted in Syria as part of the “Arab Spring.”⁶⁴ Since the beginning of this continuing conflict, the field of rebel groups and regional militant groups with control in various parts of Syria has grown more complex.⁶⁵ Where the state’s institutions have begun to erode and the Assad regime loses control,⁶⁶ various militant groups, similar to the *maras* in Central America,

⁵⁸ Uchimiya, *supra* note 14, at 122–24.

⁵⁹ *Id.*

⁶⁰ *Id.* at 123–24.

⁶¹ *Id.* at 124.

⁶² UNHCR Div. of Int’l Protection, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 47 (2010).

⁶³ Farah, *supra* note 9, at 1.

⁶⁴ AMNESTY INT’L, *Syria: The Worst Humanitarian Crisis of Our Time* (Apr. 7, 2015), <https://www.amnesty.org.nz/syria-worst-humanitarian-crisis-our-time>.

⁶⁵ U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* (Feb. 11, 2016) [hereinafter *UNHRC Syria Report*] (“The conflict has devolved into a multisided proxy war steered from abroad by an intricate network of alliances.”).

⁶⁶ Brian Michael Jenkins, *The Dynamics of Syria’s Civil War*, RAND CORP. (2014), <http://www.rand.org/pubs/perspectives/PE115.html>.

have taken over and operate as *de facto* governments.⁶⁷ Maps of the current regional “*de facto*” control demonstrate a Syria divided amongst various factions, including significant sections of the country being controlled by the Rebel Fighters, others by the Self-Proclaimed Islamic State (“ISIS”), and still others remaining under Assad’s control.⁶⁸ The expanding presence of ISIS and the proxy wars now taking place in an unstable Syria has made the conflict increasingly complex and violent.⁶⁹ Regardless of faction, international human rights organizations report that all parties in the conflict have committed war crimes and indiscriminately kill civilians at alarming rates.⁷⁰

International human rights advocates report similar human rights abuses being perpetuated by the *maras* in Central America,⁷¹ which use brutal tactics and forced membership to maintain their power throughout the region.⁷² They primarily use forced recruitment to maintain numbers, generally by threatening someone’s life or the lives of family members if the individual refuses to join.⁷³ The *maras* often specifically target vulnerable or marginalized populations, such as homeless individuals or poor youth.⁷⁴ Gangs generally perceive resisters as oppositional forces, and, as a result, extort those individuals or terrorize their families to maintain control; these tactics include widespread sexual violence against women.⁷⁵ As one author explains, “like Hamas, Islamic Jihad, the IRA, Shining Path, and the Ku Klux Klan, the *maras* perpetuate their power through fear.”⁷⁶

⁶⁷ See, e.g., Employee of New York Times & Ben Hubbard, *Life in a Jihadist Capital: Order with a Darker Side*, N.Y. TIMES (July 23, 2014), http://www.nytimes.com/2014/07/24/world/middleeast/islamic-state-controls-raqqa-syria.html?_r=0.

⁶⁸ Tim Wallace et al., *The Battle for Syria: Where Syria’s Civil War is Intensifying*, N.Y. TIMES (Apr. 28, 2016), http://www.nytimes.com/interactive/2015/09/30/world/middleeast/syria-control-map-isis-rebels-airstrikes.html?_r=0.

⁶⁹ Lucy Rodgers et al., *Syria: The Story of the Conflict*, BBC (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868>.

⁷⁰ AMNESTY INTERNATIONAL, ANNUAL REPORT: SYRIA 2013 (May 29, 2013).

⁷¹ See, e.g., AMNESTY INTERNATIONAL, ANNUAL REPORT: EL SALVADOR 2013 (May 23, 2013).

⁷² Corsetti, *supra* note 15, at 407–08.

⁷³ Uchimiya, *supra* note 14, at 126–28.

⁷⁴ *Id.* at 126.

⁷⁵ *Id.*

⁷⁶ Corsetti, *supra* note 15, at 407.

In Syria, the existence of multiple competing factions has led many combatants to view those that don't express affirmative support with similar skepticism, leaving many groups vulnerable to being perceived as enemies.⁷⁷ Anyone perceived to be in opposition to groups are often threatened, harassed, or even killed.⁷⁸ Reports also suggest that some groups, such as ISIS, conduct forced recruitment, and have reportedly vowed to "punish" those who refuse to join or conform to their beliefs.⁷⁹ "Coercion," writes one author, "is the main factor creating compliance" for *de facto* governing groups in Syria such as ISIS.⁸⁰ Those who are not explicitly forced often do not have a meaningful choice, given the current war-torn state of Syria and lack of economic opportunities.⁸¹ Unfortunately, many factions have taken advantage of the lack of real choice and targeted vulnerable populations such as children as a recruitment tactic⁸²—a war crime unto itself.

These brutal tactics and increased social control by militant groups in Central America and Syria have led individuals to risk their lives and flee their countries in large numbers. In the case of Central America, this includes thousands of minors who fled to Mexico and the United States in the summer of 2014.⁸³ They risk their lives by taking the dangerous journey through Mexico and across large swaths of

⁷⁷ UNHCR *Considerations for Syria*, *supra* note 24, at n.56.

⁷⁸ For example, the Assad regime has reportedly detained and beaten those seen as threats to his power. See Sam Dagher, *Assad Regime Fans Refugee Crisis; Syrian president fortifies strongholds while easing passport requirements to make it easier to flee*, WALL ST. J. ONLINE (Sept. 11, 2015); see also Nima Elbagir & Peter Wilkinson, *'Like coming back to life' says child soldier who escaped ISIS*, CNN (Jan. 12, 2016), <http://www.cnn.com/2016/01/12/middleeast/isis-child-soldiers/>.

⁷⁹ See, e.g., Al Souria Net, *ISIS Declares Forced Recruitment for Raqqa Youths*, SYRIAN OBSERVER (Oct. 16, 2015), http://syrianobserver.com/EN/News/29972/ISIS_Declares_Forced_Recruitment_Raqqa_Youths.

⁸⁰ Rana Khalaf, *Beyond Arms and Beards: Local Governance of ISIS in Syria*, E-INTL. RELATIONS (Jan. 7, 2015), <http://www.e-ir.info/2015/01/07/beyond-arms-and-beards-local-governance-of-isis-in-syria/>.

⁸¹ Human Rights Watch, *Syria: Armed Send Children Into Battle, Recruitment Under the Guise of 'Education'* (June 22, 2014), <https://www.hrw.org/news/2014/06/22/syria-armed-groups-send-children-battle>.

⁸² See *id.*; see also Human Rights Watch, *"Maybe We Live and Maybe We Die": Recruitment and Use of Children by Armed Groups in Syria* (June 22, 2014), <https://www.hrw.org/report/2014/06/22/maybe-we-live-and-maybe-we-die/recruitment-and-use-children-armed-groups-syria>.

⁸³ See generally Stephanie L. Canizales, *Unaccompanied Migrant Children: A Humanitarian Crisis at the U.S. Border and Beyond*, 3 POL'Y BRIEF CTR. POVERTY RES., No. 4 (2015).

desert in the United States in order to seek asylum.⁸⁴ Between October 2013 and July 2014 alone, an estimated 63,000 unaccompanied minors streamed into the United States, many citing the gangs as their reason for leaving.⁸⁵ Many Syrians had made a similar choice. The Syrian civil conflict has now entered its sixth year of conflict in violence, and has displaced millions internally and internationally from their homes.⁸⁶ Those that choose to leave face a dangerous journey across borders or the Mediterranean Sea, a voyage that often results in death.⁸⁷ Traffickers in both Syria and Central America seek to profit off these vulnerable groups, adding risk of kidnap, physical and sexual abuse, and death at the hands of smugglers to the already dangerous passage.⁸⁸ These harsh realities have led human rights organizations to describe the situations of Syrians and Central Americans as “[t]he worst humanitarian crisis of our time,”⁸⁹ and “[t]he Other Refugee Crisis,”⁹⁰ respectively.

Once in the United States, Central American gang victims seek asylum in large numbers. In fact, as stated above, they consistently are the largest group of asylum seekers in the United States. However, given the challenges of obtaining asylum without legal counsel, most fail in their claims and face eventual deportation.⁹¹ Upon return, those that resisted membership prior to fleeing their country are often targeted immediately upon return to their countries.⁹² One individual was murdered as he

⁸⁴ Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, AMNESTY INT’L (Feb. 20, 2014), <http://blog.amnestyusa.org/americas/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/>.

⁸⁵ Danielle Renwick, *The U.S. Child Migrant Influx*, COUNCIL FOREIGN REL. (Sept. 1, 2014), <http://www.cfr.org/immigration/U.S.-child-migrant-influx/p33380>.

⁸⁶ See *supra* notes 20–23.

⁸⁷ *The Mediterranean’s Deadly Migrant Routes*, BBC (Apr. 22, 2015), <http://www.bbc.com/news/world-europe-32387224>; see also BBC, *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34131911>.

⁸⁸ Charlotte McDonald-Gibson, *Refugee Crisis: Human Traffickers ‘Netted up to £4bn Last Year’*, INDEPENDENT (Jan. 16, 2016), <http://www.independent.co.uk/news/world/europe/refugee-crisis-human-traffickers-netted-up-to-4bn-last-year-a6816861.html>; UN Office on Drugs and Crime, *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment* 45 (2012).

⁸⁹ AMNESTY INT’L, *supra* note 64.

⁹⁰ Clara Long, *The Other Refugee Crisis, from Central America to the U.S.*, HUMAN RIGHTS WATCH (Sept. 21, 2015), <https://www.hrw.org/news/2015/09/21/other-refugee-crisis-central-america-U.S.> (comparing the Central American refugee crisis to the humanitarian crisis resulting from Syria).

⁹¹ See *A Humanitarian Call to Action*, *supra* note 8, at 1.

⁹² UNHCR, *supra* note 10.

boarded the bus the day he arrived after being deported by the United States government.⁹³ Syrians have similarly become the largest group of asylum seekers in European courts.⁹⁴ Unlike people fleeing the Northern Triangle, however, Syrian Asylum seekers have succeeded at high rates.⁹⁵ This act of seeking asylum abroad, unto itself, has reportedly served as grounds for detainment and harassment by various Syrian militant groups, who often target those deported by European countries as an opposition group.⁹⁶

III. COMPARATIVE ANALYSIS OF “IMPUTED POLITICAL OPINION” ASYLUM: A CASE FOR RECONCILING DIFFERENCES IN INTERNATIONAL ASYLUM LITIGATION

Both Syrian asylum seekers in Europe and Central American asylum seekers in the United States have invoked similar grounds for asylum.⁹⁷ In particular, the notion of imputed political opinion has been commonly used by both populations, which argue that the armed groups that have *de facto* control of any given region target those who have not outwardly expressed support for their group. Just as the *maras* target those individuals who refuse to join or cooperate,⁹⁸ ISIS, for example, has reportedly directed violence at those who do not join its ranks or embrace its beliefs.⁹⁹ This section highlights one case in the Ninth Circuit Court of Appeals involving a Central American gang victim, and one case coming out of the United Kingdom involving a political asylum seeker from Syria. Plaintiffs have invoked similar arguments to appeal their denials of asylum, but only one of their decisions was eventually reversed.

⁹³ *Id.*

⁹⁴ *Asylum Decisions in the EU: EU Member States Granted Protection to More Than 185 000 Asylum Seekers in 2014*, EUROSTAT NEWSRELEASE (Eurostat, Luxembourg), May 12, 2015, at 1.

⁹⁵ *Id.*

⁹⁶ Australian Government Refugee Review Tribunal, *Country Advice Syria* (Apr. 15, 2011), <http://www.refworld.org/pdfid/4e6dea522.pdf>.

⁹⁷ U.S. scholarship discussing gang victim asylum claims commonly analyzes “particular social group” claims, “political opinion claims,” and a lesser amount of “*religion*” claims. *See, e.g.*, Blake, *supra* note 14; Uchimaya, *supra* note 14; Corsetti, *supra* note 15. Likewise, the UNHCR guidance document cites to “political opinion” and “particular social group” as potential grounds Syrian asylum claims. *See UNHCR Considerations for Syria*, *supra* note 24, at 8–9.

⁹⁸ *See generally* Uchimaya, *supra* note 14.

⁹⁹ *See* Elbagir & Wilkinson, *supra* note 78; Net, *supra* note 79.

Erik Ramos-Lopez, a Honduran National, first fled his country in January of 2005 due to harassment by *Mara Salvatrucha* (“MS” or “MS-13”).¹⁰⁰ He first experienced problems with the violent gang when he was 16 years old.¹⁰¹ A gang member approached Ramos and a friend with a gun and prompted him to steal on behalf of the gang.¹⁰² When Ramos did not do as he was told, the gang member threatened Ramos, saying if Ramos wanted to live, the gang member would be waiting.¹⁰³ The gang member continued to give Ramos the same ultimatum: either join, or be killed.¹⁰⁴ In fear for his life, Ramos fled the country the first time, but was stopped in Mexico and deported back to Honduras later that month.¹⁰⁵ The gang then began threatening Ramos’ family members as well, so he once again fled the country in May of 2005, and ultimately entered the United States on May 17, 2005.¹⁰⁶ He was quickly placed in removal proceedings where he asserted a defensive claim of asylum.¹⁰⁷

The Ninth Circuit categorically refused Ramos’ claim for asylum under both a “particular social group” and “political opinion” analysis.¹⁰⁸ On whether Ramos faced persecution based on ‘political opinion,’ the court put it simply: “[in previous cases] we [have] deferred to the BIA’s determination that ‘resistance to a gang’s recruitment efforts alone [does not] constitut[e] political opinion.’”¹⁰⁹ The court continued, “Ramos’ case is indistinguishable [from previous cases]. He alleges no facts in support of a political opinion, actual or imputed, beyond his refusal to join the MS-13. Thus, the [immigration judge’s] determination that Ramos did not prove persecution on account of a protected ground is supported by substantial evidence.”¹¹⁰ In other words, refusing to join a gang is not a political act.

¹⁰⁰ Ramos-Lopez v. Holder, 563 F.3d 855, 857 (9th Cir. 2009).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 858–62.

¹⁰⁹ *Id.* at 862.

¹¹⁰ *Id.*

The important BIA decision upon which the Circuit based its decision was *In re S-E-G-*, in which the BIA held that resisting membership in an armed group or refusing to join a gang did not constitute a political opinion.¹¹¹ In its analysis, the BIA cited to a previous decision in which it found “guerrilla attempts to forcibly compel a person to join them, absent additional evidence that the conscription was motivated by that person’s political opinion, are insufficient to compel a finding of persecution on account of political belief.”¹¹² In line with its previous decision, the BIA concluded that the respondent in *S-E-G-* had not provided the necessary evidence of being politically active or making “anti-gang” statements, so he had not expressed a political opinion in refusing to join.¹¹³ Decisions like these, along with the nexus-requirement that the BIA established in the seminal *Elias* case, have made it incredibly hard for victims or targets of gang violence in Central America to be granted asylum.¹¹⁴ Further confounding this is the fact that the BIA, being an executive agency, prompts Circuit Courts, like the Ninth Circuit in *Ramos*, to apply broad deference to the agency’s interpretation of the INA, given the Court’s relationship to the executive branch.¹¹⁵

Two months before *Ramos*’ asylum claim was denied on appeal, the police in the United Kingdom detained a Syrian who had fled his home in 2007.¹¹⁶ He also claimed asylum, arguing that he had a well-founded fear of persecution because of political opinion.¹¹⁷ He had no ties to a political party, but had allegedly attended an anti-Assad rally, and when the police broke up the demonstration, he stated that he feared retaliation by the regime.¹¹⁸ The first judge to hear his case concluded, however, that he was not threatened or singled out by a group; “[h]is account of his political activities has been vague and his actions in obtaining a passport and

¹¹¹ *In re S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008).

¹¹² *Id.* at 589 (citing the holding in *Bartolo-Diego v. Gonzales*, 490 F.3d 1024 (8th Cir. 2007)).

¹¹³ *Id.*

¹¹⁴ See generally *Uchimaya*, *supra* note 14.

¹¹⁵ Many authors have explored this dimension of U.S. Asylum Litigation and pointed out how this relationship limits courts’ abilities to consider international instruments and ultimately hurts asylum seekers. See, e.g., Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT’L L. 1, 3 (1997); John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 516 (2008).

¹¹⁶ KB Syria CG [2012] UKUT 00426, [3] (IAC).

¹¹⁷ See generally *id.*

¹¹⁸ *Id.* at [5].

applying for entry clearance do not indicate that he was of any interest to the authorities at the time”; the judge concluded that “[h]is actions show that his main motivation for coming to the U.K. appears to have been to learn English and find work.”¹¹⁹

On appeal, however, the Court found that the risk of detention or harassment as a result of his filing asylum abroad was sufficient to be granted asylum.¹²⁰ The appellate court found it irrelevant that he had not provided evidence of his participation in the demonstration, or that he had not manifested a political opinion against any of the factions in Syria, but rather, the Court reframed the questions as whether the risk of begin a failed asylum seeker was sufficient, unto itself, to merit asylum.¹²¹ Ultimately, the Court concluded that it was enough that failed asylum seekers risked likely harassment or detention upon return to the country, summarizing that “it is likely that a failed asylum seeker or forced returnee would, in general, on arrival face a real risk of arrest and detention and of serious mistreatment during that detention as a result of imputed political opinion. That is sufficient to qualify for refugee protection.”¹²²

These vastly different standards established by the U.K. and U.S. courts have been the result of very different analytical approaches. Where the Ninth Circuit felt it must defer to the limiting BIA decisions, only citing to statutes and case law from within the United States, the U.K. stands in stark contrast, drawing upon a wide range of sources. Despite being a common law jurisdiction, the U.K. referred to sources of law from a broad range of international entities outside of the U.K., including, but not limited to, reports written by Amnesty International,¹²³ litigation from Zimbabwe,¹²⁴ findings from the Danish Refugee Council,¹²⁵ an Austrian-Danish Report,¹²⁶ and reports written by the U.S. Department of State.¹²⁷ The Ninth Circuit,

¹¹⁹ *Id.* at [7].

¹²⁰ *Id.* at [35].

¹²¹ *Id.* at [17].

¹²² *Id.* at [b].

¹²³ *Id.* at [15]–[16].

¹²⁴ *Id.* at [18].

¹²⁵ *Id.* at [21]–[22].

¹²⁶ *Id.* at [22].

¹²⁷ *Id.* at [31].

however, cited only U.S. precedent, meaning it did not even reflect upon the UNHCR guidance that was published on the gang violence in the Northern Triangle.¹²⁸

The standard in the U.K. seems to reflect a similar standard as many other European countries, which have afforded asylum on similar grounds of political opinion or imputed political opinion and drawn on sources from around the world.¹²⁹ These European court decisions are in line with UNHCR guidance on the conflict in Syria and the resulting asylum seekers.¹³⁰ The UNHCR suggests that Syrians will generally qualify for asylum based on the 1951 definition of a refugee, most often based on “political opinion” and in fewer cases, “religion” or “particular social group.”¹³¹

By contrast, the U.S. court decisions not only largely ignore international sources of law, but also conflict with the conclusions made by the UNHCR in its reports on asylum claims resulting from organized gang violence.¹³² The UNHCR, the international agency uniquely tasked with international refugee determinations, recommends recognizing victims of gang violence as refugees under dire circumstances; in this guidance note, the agency details that the *maras*’ violent tactics of forced recruitment generally amounts to persecution,¹³³ and both “particular social group” and “political opinion” will likely serve as a ground of relief for “gang

¹²⁸ See generally *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009).

¹²⁹ See, e.g., GREECE—ATTICA REG’L ASYLUM OFFICE, APPLICATION NO. 95/000186182 (2013) (summarizing a Greek Asylum Case); HUNG.—METRO. COURT, M.A.A. V. OFFICE OF IMMIGRATION AND NATIONALITY (OIN), 6.K.31830/2013/6 (July 11, 2013) (summarizing a Hungarian Asylum Case).

¹³⁰ UNHCR takes the position that “considers that most Syrians seeking international protection are likely to fulfill the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees, since they will have a well-founded fear of persecution linked to one of the Convention grounds.” *UNHCR Considerations for Syria*, *supra* note 24, at ¶ 14.

¹³¹ *Id.*

¹³² See UNHCR, Note, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 65 (Mar. 2010) (“UNHCR’s perspective is that the interpretation of the 1951 Convention grounds needs to be inclusive and flexible enough to encompass emerging groups and respond to new risks of persecution. Young people, in particular, who live in communities with a pervasive and powerful gang presence but who seek to resist gangs may constitute a particular social group for the purposes of the 1951 Convention. Additionally, people fleeing gang-related violence may have a well-founded fear of persecution on account of their political opinion, especially where criminal and political activities heavily overlap. In the absence of effective State protection, individuals may also fear persecution at the hands of gangs which pursue religious or ethnic ideologies through violent means.”).

¹³³ *Id.* at ¶ 22.

resisters.”¹³⁴ In more certain terms, the agency concluded the following general rule in guidelines for determining eligibility for Salvadorian asylum-seekers: “UNHCR considers that persons perceived by a gang as contravening its rules or resisting its authority may be in need of international refugee protection on the grounds of their (imputed) political opinion . . . or on the basis of other Convention grounds.”¹³⁵ The Agency urges governments that “best-interests determination procedures need to be in place to ensure that they are not returned to persecution.”¹³⁶

Ultimately, the variation in claims amongst these populations prevents a categorical comparative analysis of the types of claims outlined above. There is no way to perfectly align claims made by those fleeing violence born out of vastly different circumstances. Particularly in the Syrian conflict, ethnic and religious factionalism and tensions in the region are playing out, which can support arguments of other grounds for asylum.¹³⁷ These claims have also been based on persecution due to membership in a “particular social group,” or others on “religion,” grounds that have served as the basis for Central American gang victims as well, though not often.¹³⁸ As a result of this variation, European Courts and American Courts alike recognize the need for case-by-case analysis, given the highly factual and circumstantial nature of an asylum claim.¹³⁹ Another confounding limitation to a comparative analysis is the procedural variation and different legal standards inherent to likening decisions across jurisdictions.¹⁴⁰

¹³⁴ *Id.* at ¶¶ 31, 33–51.

¹³⁵ UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* 30 (Mar. 2016).

¹³⁶ Nora Sturm, *UNHCR Calls for Urgent Action as Central America Asylum Claims Soar*, UNHCR (Apr. 5, 2016), <http://www.unhcr.org/en-us/news/latest/2016/4/5703ab396/unhcr-calls-urgent-action-central-america-asylum-claims-soar.html>.

¹³⁷ See Rodgers et al., *supra* note 69.

¹³⁸ See *UNHCR Considerations for Syria*, *supra* note 24, at ¶¶ 14–16.

¹³⁹ See, e.g., Home Affairs Committee, *Written Evidence Written by the Home Office*, U.K. PARLIAMENT (Apr. 2013), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71we.htm> (“Every asylum application is carefully considered on a case by case basis in line with UN High Commission for Refugees guidance.”); see also Department of Justice EOIR, *Fact Sheet: EOIR At a Glance* (updated Jan. 8, 2016), <https://www.justice.gov/eoir/eoir-at-a-glance> (“Immigration judge decisions are made on a case-by-case basis according to U.S. immigration law, regulations and precedent decisions.”).

¹⁴⁰ For a more extensive exploration of potential limitations on comparative analyses in asylum litigation, see Nicole Ostrand, *The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States*, 3 J. MIGRATION & HUM. SEC. 256, 260–62 (2015).

If you zoom out, however, and focus on the ends faced by many asylum seekers from Syria and Central America, the narratives become strikingly similar. Based on the snapshots discussed above, the following picture unfolds: Syria and the Northern Triangle are defined by unstable government structures that have been unable to harness armed conflicts within their borders, and the resulting violence has devastated local populations. Armed groups have taken advantage of this instability to become the *de facto* social order for many regions in both Syria and Central America. These groups, then, use their *de facto* political power as a means to manipulate and recruit membership. Given the instability of the governing structures, these armed groups are able to act largely with impunity and coerce others into joining, by threatening violence or death should they refuse. This forces families, individuals, even children, to make the difficult decision to leave their homes and embark on a dangerous journey across land and sea in the hopes of finding refuge from this persecution abroad.

Refusing to outwardly support armed groups that are *de facto* governing bodies and control of the social order should be seen as a *political* act; by not joining a side, individuals are, in essence, condemning the practices and views of a governing power. Therefore, individuals who fit this narrative should generally be entitled to asylum based on *imputed* political opinion given that they are perceived as political enemies regardless of ever having manifest a political identity or opinion. In a seminal Supreme Court decision on political opinion asylum, Justice Stevens wrote in his dissent:

A political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause—by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center—can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one’s family, it is the kind of political expression that the asylum provisions of the [INA] were intended to protect.¹⁴¹

He continued: “Choosing to remain neutral is no less a political decision than choosing to affiliate with a particular political faction.”¹⁴² Those who face ill treatment or even death based on their refusal to affirmatively support a socially and

¹⁴¹ INS v. Elias-Zacarias, 502 U.S. 478, 486 (1992) (Stevens, J., dissenting).

¹⁴² *Id.* (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985)).

politically powerful group should thusly be entitled to asylum based on fear of imputed political persecution regardless of where they find themselves seeking asylum in the world.

CONCLUSION

Given the international nature of “refugee” as a construct, codified by the United Nations in 1951,¹⁴³ standards for asylum should be more in sync across borders. Although the goal of perfect uniform application of a construct as subjective and circumstantial as a “refugee” is not realistic, courts should still focus on consistency in asylum litigation. The UNHCR articulates that the 1951 Convention “was drafted to confer a right to protection on persons made otherwise exceptionally vulnerable through being temporarily outside the normal framework of national state protection.”¹⁴⁴ Keeping in mind this purpose, U.S. courts and policy makers should find the tragic murder of even one deported gang victim to be troubling, particularly given the international obligation of *non-refoulement* that aims to protect against such fates.¹⁴⁵ Clearly if our standards for asylum do not protect these vulnerable individuals outside the protection of their states, then the standards should be reevaluated with an eye to their purpose in the context of international law.

The imperative to address inconsistent asylum standards only grows more acute in a world facing increasing numbers of refugees and internal conflicts that continue to displace millions of individuals. In the summer 2015, the UNHCR reported an estimated around 65 million forcibly displaced people around the world, reaching a “record high.”¹⁴⁶ The two populations highlighted in this Note demonstrate particularly alarming realities. As one headline puts it, “Europe’s refugee crisis is

¹⁴³ For example, Uchimaya’s article argues, in part, that the U.S. asylum litigation is out of sync with international law, despite the concept’s “international roots.” See generally Uchimaya, *supra* note 14.

¹⁴⁴ Erika Feller (Assistant High Commissioner (Protection), UNHCR), *Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity* (May 2, 2011).

¹⁴⁵ *Non-refoulement* is codified in United Nations Conference on the Status of Refugees and Stateless Persons, Convention Relating to the Status of Refugees, art. 33(1), July 25, 1951, 189 U.N.T.S. 137, as: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

¹⁴⁶ *Global Trends 2015: Forced Displacement Reaches Record High*, UNHCR, <http://www.unhcr.org/en-us/global-trends-2015.html> (last visited June 16, 2017).

making headlines, but Latin America's is just as alarming."¹⁴⁷ Inconsistent application of the current definition of "refugee" leaves many fleeing persecution, particularly from Latin America, with an uncertain future. This inconsistency has led some in the international community to advocate to rewrite the definition in order for it to reflect the realities of modern conflicts.¹⁴⁸ In short, some feel the current definition does not capture the nature and full range of vulnerable and displaced people in the world.¹⁴⁹ For example, a colloquium in 1984 in Columbia, produced what is now referred to as the *Cartagena Declaration*, which attempted to redefine what constitutes a refugee so as to be more inclusive of the world's vulnerable populations.¹⁵⁰

Although there is no evidence to suggest the international community, let alone the United States, is planning to rewrite its applied definition of "refugee," U.S. courts and the BIA should, at the very least, reevaluate their standard for analyzing persecution based on "political opinion" or "imputed political opinion" as grounds for asylum. Given the dire situation for so many who live in various parts of the world and the reality they face if deported by the countries where they seek refuge, consideration for international instruments and their purpose in an analysis of these grounds is a necessary component of the just application of international and domestic law in asylum litigation. Reframing the approach to asylum law in this way may initiate the process of recognizing the rightful claims of many seeking refuge in the United States from across Central America and continue to recognize the persecution faced by Syrians fleeing violence around the world.

¹⁴⁷ Robert Muggah, *Europe's Refugee Crisis Is Making Headlines, but Latin America's Is Just as Alarming*, WORLD ECON. FORUM (Mar. 27, 2017), <https://www.weforum.org/agenda/2017/03/refugee-crisis-migration-europe-latin-america/>.

¹⁴⁸ See, e.g., Daniyal Shajar, *Redefining Refugees: Updating the "Refugee" Definition (Part 1)*, Blog, INST. FOR ISLAMIC STRATEGIC AFFS. (Nov. 5, 2016), <http://iisa.org.uk/blog/refugee-report-articles/2016/11/redefining-refugees-updating-the-refugee-definition-part-1/>.

¹⁴⁹ See, e.g., *Would a New UN Convention Help Refugees*, BBC (May 25, 2016), <http://www.bbc.com/news/world-36321685> ("The definition of the refugee is problematically narrow, and that sometimes leads to problematic distinctions between people fleeing political types of persecution and people fleeing indiscriminate risks.").

¹⁵⁰ UNHCR, HANDBOOK, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 13–15 (2001).