

State and Non-State Actors of Persecution in Central America

Presentation by Ross Pattee, Secretary, IARLJ Americas Chapter at the 11th IARLJ World Conference,
Athens, Greece
November 29 to December 1, 2017

Good morning,

As part of my presentation this morning I will speak to state and non-state actors of persecution, gangs in Central America and the Canadian context.

1. State and non-state actors of persecution

First, I will look at references and examples of state and non-state actors of persecution.

A central question in the 1951 Convention and its Protocol is what constitutes the source of "persecution" that is included in the definition of "refugee." It is clear that the notion of the state as the agent of direct, or instigated, persecution, is included in the definition. But which acts of persecution by non-state actors can be included or excluded from this definition?¹

The state itself need not be the agent of harm as non-state actors can be the source of persecution. While noting that "[t]here is no universally accepted definition of 'persecution'," the UNHCR has stated in its *Handbook and Guideline on Procedures and Criteria for Determining Refugee Status* that even though persecution is "normally related to action by the authorities of a country," it may also originate from parts of the population that do not respect the laws of the country concerned if the acts that can amount to persecution "are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."²

¹ Bruin 2002, 452.

² UNHCR Dec. 2011, para. 65.

A research paper on non-state agents of persecution by the European Legal Network on Asylum indicates that courts have identified four situations regarding persecution by non-state actors:

- 1) Persecution is carried out by non-state agents, and instigated, condoned or tolerated by the State (the State is unwilling to protect, thus being an accomplice of the persecutors): state practice is uniform in granting refugee status in such situations.
- 2) Persecution by quasi-states or de facto authorities who have gained control over the whole or part of the territory: in spite of the fact that courts have elaborated different criteria for a group to become a de facto authority, there is uniform practice in acknowledging de facto authorities as relevant agents of persecution.
- 3) Persecution is carried out by non-state agents of persecution, against which the state is willing but unable to provide protection: in these situations, state practice lacks uniformity. The expression of the conceptual difference in approaching these situations is sometimes referred to as either the "accountability-view", or the "protection-view".
- 4) Persecution is carried out by non-state agents of persecution in situations of a total collapse of the governmental power where there are no state authorities left at all that could provide protection against persecution: Some courts argue that there cannot be persecution without a functioning state ..., whereas other courts grant refugee status also in these situations.³

Non-state actors include rebel and guerrilla organizations, religious extremists, warlords, organized crime groups and gangs, as well as perpetrators of domestic violence and violence against persons on account of their sexual orientation.

The UNHCR indicates in its *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* that, in gang-related claims, persecution emanates mostly from gangs, although state authorities have also been identified as agents of persecution when they knowingly tolerate such acts or when they refuse, or prove unable, to offer protection. Nevertheless, the harm must be considered persecution in the sense of the 1951 Convention and the state, again, must be proved to be unwilling or unable to provide protection. Also, protection must be real and effective.⁴

³ ELENA 2000, 1.

⁴ UNHCR Mar. 2010, paras. 24-27.

One of the issues that often arise when the harm is caused by a non-state actor is whether or not there is a link to one of the grounds in the refugee Convention. In recent years, with many jurisdictions that provide protection which is more expansive than that set out in the definition, this issue becomes less important. This is because, in some of those cases, protection may be granted despite their being no clear link to one of the five grounds. This is presently the situation in Canada since 2002, as I will speak about more fully in a few minutes.

In terms of the Convention refugee definition, most cases related to persecution by gangs are argued through the lens of "membership in a particular social group" (or MPSG).⁵

However, victims of gang-related violence do not always easily fit into this category. Individuals in this category include deserters of gangs, women, and children who refuse forced recruitment. To be qualified as MPSG, the individual must have the "innate" and "unchangeable" characteristics (e.g. age, gender and social status), as well as those "fundamental to identity, conscience or the exercise of [the individual's] human rights" (e.g. refusing to join a gang or pay extortion, and family membership).⁶ Some jurisdictions do not consider victims of gangs as a MPSG because they do not meet the test of "social visibility" or "social distinction."⁷ Some asylum systems also do not consider forced recruitment as "persecution" as the objective of gangs is not to harm the individual but to increase gangs' recruits, even though some authors have pointed out a link between resisting recruitment and harm.⁸

Other cases have been argued on the ground of "political opinion." When referring to "resisting recruitment", some authors indicate that refusing forced recruitment constitutes a form of "political opinion" as such action is considered a support for "peaceful ideas"⁹ or neutrality.¹⁰ The UNHCR has indicated that "[t]he 1951 Convention ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-

⁵ Reynolds 2016, 138; Rodríguez Serna 2016, 32; UNHCR Mar. 2010, para. 31.

⁶ UNHCR Mar. 2010, 34-40.

⁷ Rodríguez Serna 2016, 32, 40.

⁸ Rodríguez Serna 2016, 37.

⁹ Rodríguez Serna 2016, 37.

¹⁰ UNHCR Mar. 2010, para. 50.

cultural context of the country of origin."¹¹ In this sense, "political opinion" may encompass resistance from an individual to join gangs (a political or ideological action of opposition to gangs' practices) as well as the opposition of the individual to government's policy or authorities' investigations of gang-related crimes.¹²

However, the Tenth Circuit Court of Appeals has noted that it is the gangs' perspective that counts and gangs do not persecute because of political opinion but because the individual resists recruitment.¹³ Likewise, in Canada, victims of gang violence have not generally been found to have a nexus or link to any of the grounds in the refugee definition.

¹¹ UNHCR Mar. 2010, para. 46.

¹² UNHCR Mar. 2010, paras. 48-49.

¹³ Rodríguez Serna 2016, 37.

2. Gangs in Central America

This leads me to speak about gangs in Central America.

Given the proximity of Central America, Canada has been receiving refugee claimants in steady numbers for the past few years. Most of these claims are based on persecution by gangs. As part of a capacity building initiative with the UNHCR and the US, Canada has been providing technical assistance to our Mexican counterparts, including training in country of origin information research, one of the key elements in refugee determination procedures. In April 2016, we carried out a joint fact finding mission to El Salvador to know more about the crime situation in the country and the recourse available for victims.

Also, in April 2017, another fact finding mission was conducted in Honduras. Some of the findings are included in the next three paragraphs.

In the 1990s, the US undertook large scale deportations of non-US citizens of Central American origin back to their countries after serving time in jail.

In the case of El Salvador, for example, many of these deportees had fled that country during the civil war, went to the US and later became members of US-based gangs, the Mara Salvatrucha (MS-13) and the Barrio 18 (M-18). These gangs originated in Los Angeles, California, and spread to Central America via these deportations where they were met by weak state institutions, a social fabric that was showing signs of erosion, and poverty. In this historical context, the gang phenomenon in Central America grew and became a powerful violent force in the region. Governments' actions included "heavy handed" (*mano dura*) policies which further exacerbated the problem as gangs became even more organized from within the prisons. Central American gangs are territorial organizations that exert effective control in their areas of influence. Territory gives gangs their identity, security, income, as well as a large network of informants, collaborators and sympathizers. They derive their income mainly from extortions, commonly called "rent" (*renta*), and public transportation companies and drivers are particularly affected.

Gangs also commit crimes such as homicide, forced recruitment, forced disappearances, street-level drug trafficking, threats, and carjacking.

Gangs rely heavily on forced recruitment to maintain their networks. Recruitment into gangs usually starts as early as 11 years old, but gangs use children as young as 8 years old as look-outs to alert gangs on the presence of the police or non-residents entering the neighborhood. They also use children to collect extortion payments, eavesdrop on people, or commit crimes such as drug dealing on the street, theft, threats, and murder. Gangs target children from poor and broken families, or who live with their grandparents, children who have relatives in the US, or, those who have psychological problems or mental disabilities. Some sources indicate that gang members can quit as long as they are joining a religious organization; however, other sources indicate that the penalty for quitting the gang is death, regardless of the motive.¹⁴

The UNHCR notes the following categories of applicants in gang-related refugee applications:

- 1) Those who resist gang activity, including individuals who refuse or resist forced recruitment and/or sexual exploitation, business owners who refuse or are unable to pay extortions, witnesses of crimes committed by gangs, law enforcement officials, members of NGOs and church organizations who oppose gangs, and individuals who are perceived to be a threat or who not conform to their practices such as ethnic and sexual minorities.
- 2) Former and current gang members.
- 3) Victims and critics of State's anti-gang policies and activities, which includes individuals who due to their appearance are mistakenly associated with gangs and those who are considered "undesirable" by society such as drug addicts, street children and sexual minorities.
- 4) Family members of the above categories who can be target by gangs as a form of retaliation or to pressure them to yield to their demands.¹⁵

However, as the UNHCR also points out:

Eligibility for international protection for individuals fleeing gang-related violence will depend on a number of factors, including the risks faced by the applicant, the severity and nature of

¹⁴ Canada Sept. 2016.

¹⁵ UNHCR Mar. 2010, paras. 12-17.

the violence/human rights abuses suffered or feared, the causal link with one of the grounds enumerated in the refugee definition of the 1951 Convention, his/her involvement with gang activities as well as the level of available State protection in the country concerned.¹⁶

3. The Canadian context

In conclusion, I will say a few words about the Canadian context.

Canada has adopted the refugee definition in its domestic legislation in section 96 of the *Immigration and Refugee Protection Act* or IRPA. In addition, Canada's protection obligations under other Conventions, such as the *Convention Against Torture*, are reflected in section 97.

Section 96 of the IRPA states that:

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Section 97 (1) of the IRPA states that:

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

¹⁶ UNHCR Mar. 2010, para. 18.

- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

In Canada, non-state actors can be considered agents of persecution. The distinction between state and non-state actors when assessing a refugee claim is not relevant as the claimant needs only to demonstrate that he or she is either a "Convention refugee" or a "person in need of protection," regardless of the agent of persecution.

The distinction between state and non-state actors may be relevant when evaluating state protection, but only insofar as it may help determine whether or not adequate state protection would be available to the individual refugee claimant.¹⁷

Canadian jurisprudence has developed some unique concepts with respect to the analysis of state protection, which has elevated it to a stand-alone determinative issue. For example, the Supreme Court of Canada has stated that there is a presumption that states are capable of protecting their citizens, and this presumption must be rebutted with clear and convincing evidence.¹⁸ The ability to rebut this presumption is linked to the level of democracy of the claimant's country of nationality. "The burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her¹⁹."

Moreover, local failures by the authorities to provide protection do not mean that the state as a whole fails to protect its citizens, unless the failures form part of a broader pattern of state inability or refusal to provide protection."²⁰

¹⁷ *Hinzman, Jeremy v. M.C.I. and Hughey, Brandon David v. M.C.I.* (F.C.A, nos. A-182-06; A-185-06). Décary, Sexton, Evans, April 30, 2007; 2007 FCA 171 (leave to appeal dismissed by the SCC on November 15, 2007, [2007] S.C.C.A. No. 321).

¹⁸ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689

¹⁹ *M.C.I. v. Kadenko, Ninal* (F.C.A., no. A-388-95), Hugessen, Décary, Chevalier, October 15, 1996.

²⁰ *Zhuravlyev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3 (T.D.).

With respect to state versus non-state actors, our Courts have stated that “the state's involvement, in the persecution is not a necessary consideration. This factor is relevant, rather in the determination of whether a fear of persecution exists.”²¹

Actions carried out by Central American gangs have been recognized in Canada as persecution by non-state agents. Persecution by gangs, particularly due to extortion and forced recruitment, is the basis of claim for most of the claims referred to the IRB from Central American individuals. In Canada, the claimant must establish that the acts he or she is fleeing from amounts to persecution under one or more of the Convention grounds (particularly "member of a particular social group" and "political opinion") in order to be considered a "Convention refugee."

As mentioned earlier, unless there is a racial or other component of the extortion or recruitment, Canadian jurisprudence has generally concluded that there is no causal link under any of the grounds of the refugee definition, and, therefore protection cannot be granted on this basis.

Prior to 2002, refugee claims made in Canada were assessed only under the refugee Convention definition. Therefore, many persons claiming protection from non-state actors were not granted refugee status because they could not show a link to any of the grounds. Although there were other protection mechanisms potentially available to failed refugee claimants, they were not as robust as the refugee claim process.

In 2002 the *Immigration and Refugee Protection Act* was adopted which included the expanded section 97, which is assessed in a refugee claim at the same time as section 96. This rendered, in many cases, the discussion about whether or not there was a link with the grounds in the Convention

²¹ *Ward, supra.*

Much less important, because protection could be granted under section 97 without the need to show a causal link to any of the five grounds.

In order to be considered a "person in need of protection" from gangs, the person must satisfy the criteria set out in section 97 of the IRPA, with the exception of 97(1)(a) (which speaks to actions under Article 1 of the Convention Against Torture) as it only applies to state actors of torture. However, the burden of proof is heavier for claimants requesting protection under section 97 as they have to demonstrate that it will be *more likely than not* that the harm set out in that section will take place if they return to their country of origin or habitual residence, whereas under section 96 the claimant only needs to prove a *serious possibility* of future persecution.

This concludes my presentation.

Thank you.

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