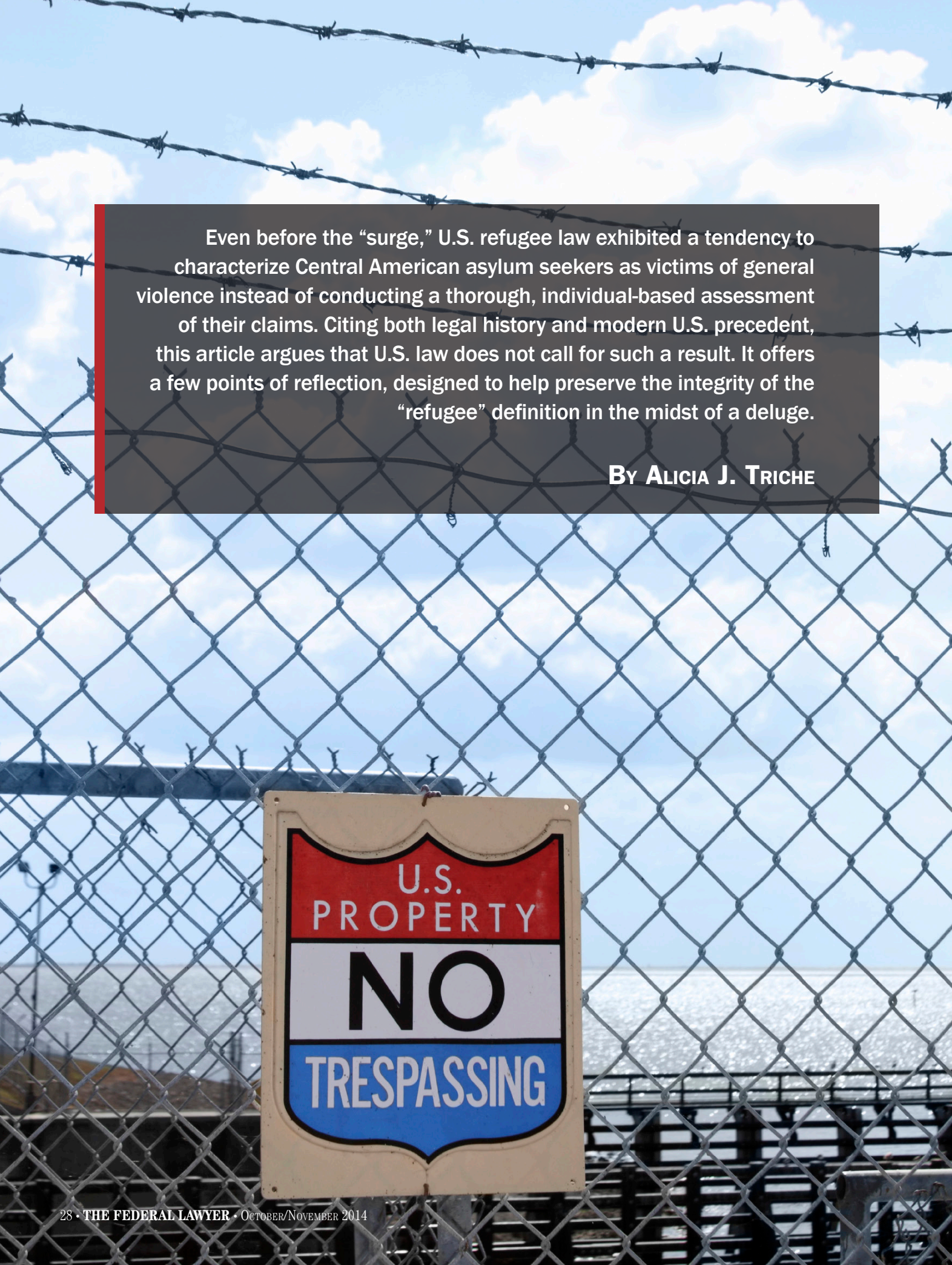


Even before the "surge," U.S. refugee law exhibited a tendency to characterize Central American asylum seekers as victims of general violence instead of conducting a thorough, individual-based assessment of their claims. Citing both legal history and modern U.S. precedent, this article argues that U.S. law does not call for such a result. It offers a few points of reflection, designed to help preserve the integrity of the "refugee" definition in the midst of a deluge.

By Alicia J. Triche

# Modern Surge, Historic Response

## *Factors to Consider in the Assessment of Mexican and Central American Refugee Claims*

As of mid-2014, the United States is experiencing a migration flow that, under international refugee law, could arguably be called a mass influx.[1] Thousands upon thousands of displaced persons are arriving in the Rio Grande Valley, with most fleeing Central America, but some also hailing from Mexico and other countries.[2] The more than 52,000 unaccompanied minors have drawn the most attention, but the surge has also included women and families.[3] The reasons for their arrival have been the cause of some speculation, especially in the political arena. However, many assessments indicate that these migrants are fleeing gang and cartel-based violence, extreme poverty, and, in some cases, isolation from family members (such as parents) who have already made it to the United States.[4]

Their numbers have overwhelmed current U.S. capacity to intercept and process unaccompanied minors and arriving asylum seekers. Regarding U.S. immigration courts, Judge Dana Leigh Marks stated: "We are reaching a point of implosion, if we have not already reached it."[5] Reportedly, as of late 2014, her court in San Francisco was setting cases as far back as 2018.[6] In a June 30, 2014, letter to Congress, President Barack Obama indicated the need for a surge response, drawing on the language of military operations and national security.[7] On July 21, 2014, Texas Gov. Rick Perry (R) dispatched 1,000 National Guard troops to the Mexican border.[8]

Such a situation undoubtedly threatens the potency of U.S. laws and policies designed to ensure refugee protection. Even where national security is legitimately at issue, our laws remain on the books, including U.S. protections against *refoulement* of *bona fide* refugees.[9] However, at times like these, the integrity of the rule of law can find itself most under the gun. Although it might seem counterintuitive, the wider the turning gyre seems to become, the more occasion there is to stop briefly and contemplate. This article suggests a few considerations toward that end, seeking to promote meaningful, lucid adjudication of U.S. refugee claims in the midst of the surge.

### One Case Is Not Every Case

In 2006, the Sixth Circuit rejected the proposed particular social group of "noncriminal informants working against the Cali drug cartel."[10] In the midst of doing so, the court indicated an unfortunately

prevalent judicial concern that certain constructions of "particular social group" might allow for a deluge. Said the court: "The risk of persecution alone does not create a particular social group within the meaning of the [Immigration and Nationality Act (INA)], as virtually the entire population of Colombia is a potential subject of persecution by the cartel."[11]

To the extent that this indicates a pure numbers concern, it is not warranted. In its earliest stages, international refugee law did, in fact, designate refugees *en masse*, defining the term by category (such as "Russian" or "Armenian").[12] However, as the law further developed, that approach was specifically rejected in favor of an individualistic determination. The UN Convention Relating to the Status of Refugees[13] (CSR) specifically rejected any group approach to refugee adjudications. Although race, nationality, and other grounds might be broad *aspects* of the definition, they are meant to be applied only in the midst of individual assessment, one case at a time.[14] In the U.S. context, the burden of proof requirement, in which an individual must meticulously prove the elements of his or her personal story, is the place where the numbers are effectively limited.

It is also important to note that precedential rules regarding the refugee definition are not the same as fact finding in an individual case. The recent Ninth Circuit decision in *Piric-Boc v. Holder* saliently makes that distinction.[15] In *Pirir-Boc*, the Board of Immigration Appeals (BIA) had held that "Salvadoran youths who have resisted gang recruitment" were essentially the same category as Guatemalan persons "who took concrete steps to oppose gang membership and gang authority."[16] The court found that an individual assessment was mandatory for the facts of each individual case. "To be consistent with its own precedent," ruled the court, "the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity. …"[17] This was especially so, ruled the court, where there was uncontroverted evidence in the record of distinct (and arguably more severe) country conditions.[18]

## Exclusion and Exception Clauses Are There for a Reason

The drafting of the refugee convention was a long and arduous process, which, as the UN High Commissioner for Refugees (UNHCR) recounts, "involved interminable fine tuning and hard bargaining."[19] The concordance that was reached at the end, including unanimous passage of the treaty by all 26 state delegates, would not have been possible if the convention did not take substantial account of state interests.[20] The requisite protections are found at Article 1F, which allows for exclusion of certain undeserving groups from the refugee definition, and Article 33(2), which is meant to protect national security and public order in the host state. Both of these articles are directly incorporated into the INA.[21] Unfortunately, they often fail to appear in the jurisprudence, even where they might really make a difference.

Perhaps the most illustrative case for this point is former gang membership. In *Matter of W-G-R-*, the BIA ruled that former gang membership was not a particular social group, even though it was demonstrably immutable.[22] However, former gang members could have more logically been excluded from the refugee definition another way. Article 1F(b) of the convention excludes those who have committed "a serious nonpolitical crime outside the country of refugee prior to being admitted". UNHCR specifically points this out in its *Guidance Note*, inviting host states to seriously consider exclusion clauses for former gang members.[23]

## The "Political Opinion" Ground Is Not Foreclosed

E-A-G- was a young man from Honduras who suffered the death of several of his brothers at the hands of Mara Salvatrucha. In the midst of continued threats to his close family, he consistently refused to join the gang and instead sought asylum in the United States.[24] In 2008, the Board of Immigration Appeals ruled that E-A-G-'s refusal to join MS, without more, does not constitute a "political opinion."[25] Especially given modern conditions in the region, this statement should not be taken as a blanket condemnation of all political opinion claims where gangs (or cartels) are concerned. As the CSR requires (and the Ninth Circuit confirmed in *Piric-Boc*), every refugee adjudication is unique and deserves assessment based upon the individual's own factual circumstances.[26]

For good reason, commentators such as Harvard Professor Debbie Anker have begun to assert that neutral and anti-gang political opinion claims should be seriously considered in light of present day developments.[27] Two years after *E-A-G*, UNHCR issued the *Guidance Note* on gang-related refugee claims. "It is important to consider," said UNHCR, "especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and *de facto* exercise power in the areas in which they operate."[28] Thus, being "critical of the methods and policies" of those gangs can "constitute a 'political opinion' within the meaning of the refugee definition."[29]

Research studies commissioned by the U.S. Army contain similar conclusions, but in much more forceful language. In 2010—again, two years after the *E-A-G* decision—the U.S. Army's Institute for Strategic Studies issued a stern warning regarding the deterioration of the rule of law in Central America.[30] Said author Hal Brands: "Guatemala is not expressing a simple problem with crime; it is immersed in a full-blown crisis of the democratic state."[31] As early as 2005, another Strategic Studies Institute report had indicated that the ultimate objective of Central American gangs was "to depose or control the governments of targeted countries."[32] It is difficult to fathom that the U.S. Board of Immigration Appeals could reasonably maintain any conclusion on country conditions that would be wholly dissonant with the opinions of the U.S. Army's Strategic Studies Institute.

## Conclusion: Protection from *Non-Refoulement* and Thoughtful Individual Adjudication

Even before the surge, there has been a marked tendency among adjudicators to characterize almost all asylum seekers who fear gangs or cartels as victims of "general lawlessness and violence,"[33] instead of conducting a thorough and individual-based assessment of their claims. I have argued above that U.S. refugee law does not call for this result and that international refugee law contains adequate protections for host states in the confines of the refugee definition. This is so not just in spite of the surge, but because of it. As Plutarch might warn, it is when the "din of arms" rattles most loudly that law and legal processes are most needed—especially for those most vulnerable, such as women and children asylum seekers. In *Matter of M-E-V-G-*, the most recent case on gang-related refugee claims, the BIA confirmed that U.S. refugee law contains no "blanket rejection of all factual scenarios involving gangs."[34] In light

of current conditions in Mexico and Central America, *bona fide* asylum seekers from those countries can only hope that this ruling holds teeth. ⊙

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## Endnotes

[1]Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law 335 (3d ed. 2007).

[2]*See, e.g.,* Haeyoun Park, *Q&A: Children at the Border* (July 15, 2014), www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?emc=eta1&_r=2 (accessed July 21, 2014).

[3]Muzaffar Chishti and Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions* (Migration Policy Institute, June 13, 2014), www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions (accessed July 22, 2014).

[4]*Id.*; *see also* Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes* (American Immigration Council, July 2014), /www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf (accessed July 20, 2014).

[5]Richard Cowan, *Wave of Migrant Children Threatens to Swamp U.S. Immigration Courts* (July 22, 2014), www.reuters.com/article/2014/07/22/us-usa-immigration-judges-insight-idUSKBN-0FR0BP20140722 (accessed July 22, 2014).

[6]*Id.*

[7]U.S. White House Office of the Press Secretary, Letter from the President—Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation's Southwest Border (June 30, 2014).

[8]Manny Fernandez and Michael D. Shear, *Texas Governor Bolsters Border, and His Profile* (July 21, 2014), www.nytimes.com/2014/07/22/us/perry-to-deploy-national-guard-troops-to-mexico-border.html (accessed July 22, 2014).

[9]INA §§ 101(a)(42) (definition of "refugee"); § 241(b)(3) (protecting refugees from return to the country of persecution).

[10]Castillo-Arias v. Attorney General, 446 F.3d 1190, 1191 (6th Cir. 1190).

[11]*Id.* at 1198.

[12]*See, e.g.*, James C. Hathaway, The Evolution of Refugee Status in International Law, 33 Int'l Comp. L. Q. 348 (1984).

[13]July 28, 1951, 189 U.N.T.S. 150. The United States is bound by Articles 2 through 34 as a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 ('Protocol').

[14]*See, e.g.*, Goodwin-Gill and McAdam (n. 1) at 35–36.

[15]___ F.3d ____ (9th Cir. 2014) (slip op.).

[16]*Id.* at 5–7.

[17]*Id.* at 13.

[18]*Id.*

[19]I recount this process in International Law and Detention of U.S. Asylum Seekers: Contrasting Matter of D-J- with the United Nations Refugee Convention, 19[4] Int. J. Ref. L. 661, 662–64 (Dec. 2007) (citations omitted).

[20]Id. at 662.

[21]INA § 241(b)(3)(B).

[22]26 I&N Dec. 208 (BIA 2014); cf. Urbina-Mejia v. Holder, 597 F.3d 360, 366–67 (6th Cir. 2009) (former membership in MS-13 is an immutable characteristic because it cannot be changed).

[23]UNHCR Guidance Note at ¶¶ 55–58.

[24]Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008).

[25]Id. at 596.

[26]*See* also *Amilcar –Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) ("Based upon the particular facts surrounding the asylum applicant's decision to report a particular crime, however, he might be able to demonstrate that he was targeted because of his actual or imputed political opinion.")

[27]*See, e.g., HIRC Co-writes Amicus Brief on Gang-Based Asylum Case*, (March 28, 2014), harvardimmigrationclinic.wordpress.com/2014/03/28/hirc-co-writes-amicus-brief-about-gang-based-asylum/ (accessed July 22, 2014).

[28]UNHCR, Guidance Note Relating to Victims of Organized Gangs (March 2010) ¶ 47.

[29]*Id.* at ¶ 46.

[30]Hal Brands, Crime, Violence and the Crisis in Guatemala: A Case Study in the Erosion of the State (U.S. Army Strategic Studies Institute May 2010).

[31]*Id.* at 3.

[32]Max G. Manwaring, Street Gangs: The New Urban Insurgency (U.S. Army, Strategic Studies Institute, March 2005) 89.

[33]In re F--- (BIA 2013) (on file with author).

[34]26 I&N Dec. 227, 251 (BIA 2014.)