

# Fleeing the Drug War Next Door: Drug-related Violence as a Basis for Refugee Protection for Mexican Asylum-Seekers

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## Keywords

Refugee, Asylum-seeker, Immigration, Asylum, Non-refoulement, Drug Trafficking, Mexico, Corruption, Drug-related Violence.

## Abstract

The death toll in Mexico due to drug-related violence has continued to rise since President Felipe Calderón initiated the Mexican Government's crackdown on drug trafficking organizations in 2006. Pervasive corruption among state and local government officials and alleged human rights violations by the Mexican military have added to the gravity of the endemic drug-related violence in Mexico. In response to the continuous violence in Mexico perpetrated by drug trafficking organizations, a substantial number of Mexican citizens have fled to the United States seeking asylum. Due to the strict requirements for refugee status under international law and asylum protection under U.S. law, individuals seeking protection based on drug-related violence face several legal obstacles. This Article addresses the extent to which drug-related violence may constitute a basis for refugee status protection under international refugee law and U.S. asylum law. It seeks to provide insight into the potential viability of claims for refugee status brought by Mexican asylum-seekers fleeing drug-related violence. This article concludes with a discussion on complementary protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for Mexican asylum-seekers.

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## I. Introduction

Drug-related violence perpetrated by drug trafficking organizations against police officers, the Mexican military and the general population have become frighteningly common throughout Mexico.<sup>1</sup> Nearly 23,000 people in Mexico have died in drug-related violence since Mexican President Felipe Calderón initiated the crackdown on drug trafficking organizations in 2006, with 3,365 deaths occurring within the first three months of 2010 alone.<sup>2</sup> While drug violence may not necessarily be extreme enough to constitute a war in some situations, there is a violent drug war going on in Mexico among drug trafficking organizations and the Mexican government with no end in sight.<sup>3</sup> The endemic violence in Mexico has been exacerbated by the widespread corruption among state and local government officials and allegations of human rights violations by members of the Mexican military.<sup>4</sup> In response to the spiraling drug-related violence, Mexican citizens continue to flee to the U.S.<sup>5</sup> While many who have fled to the U.S. have entered legally under special visas or based on other lawful immigration status,<sup>6</sup> an increasing number have urgently fled to the U.S. without lawful entry, seeking asylum.<sup>7</sup> Thus far, the results of these asylum-seekers' refugee claims have been mixed, with some granted asylum while others have been forced to return to Mexico.<sup>8</sup> The question thus becomes, to what extent may drug-related violence constitute a basis for refugee status under international refugee law and U.S. asylum law?

This Article will address this question with respect to asylum-seekers from Mexico who have fled the drug-related violence in their home country. Part II provides an overview of the widespread and increasing drug-related violence occurring in Mexico and how this violence has created an influx of Mexican asylum-seekers seeking refuge in the U.S. Part III introduces the foundations of the international refugee law regime, namely the 1951 Convention Relating to the Status of Refugees (hereinafter "1951 Convention") and its 1967 Protocol Relating to the Status of Refugees (hereinafter "1967 Protocol"),<sup>9</sup> as well as, the United Nations High Commissioner for Refugees (hereinafter "UNHCR"). Part IV provides a brief description of two potential avenues of relief – asylum and withholding of removal – in the U.S. for individuals fleeing the extensive drug-related violence in Mexico. Part V analyzes the extent to which Mexican citizens fleeing drug-related violence may qualify for refugee status under international and U.S. law. This section proposes that while not all individuals fleeing generalized drug-related violence qualify for refugee status under the applicable law, individuals belonging to certain sectors of society in Mexico are potentially eligible for refugee status. Part VI discusses the concept of internal flight or relocation alternative, which if applicable may bar refugee protection to Mexican asylum-seekers who are able to seek effective protection in a proposed area of relocation within Mexico. This Article concludes with Part VII which proposes that complementary protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "CAT") may be a worthwhile alternative for Mexican citizens fleeing drug-related violence.<sup>10</sup>

1 For example, on March 26, 2010, the decapitated body of Heriberto Cerda, the police chief of a small town in Northern Mexico, was found along with the letters "C.D.G.", an acronym for the Gulf drug cartel, written in blood on the windshield of his patrol truck. Mark Walsh, *Mexican Police Chief Decapitated by Drug Cartel*, Huffington Post, Mar. 27, 2010, available at [http://www.huffingtonpost.com/2010/03/27/mexican-police-chief-deca\\_n\\_515767.html](http://www.huffingtonpost.com/2010/03/27/mexican-police-chief-deca_n_515767.html).

2 Q&A: *Mexico's Drug-related Violence*, BBC NEWS, Apr. 15, 2010, available at <http://news.bbc.co.uk/2/hi/7906284.stm> [hereinafter Q&A: Mexico].

3 As one Mexican journalist explained, "[t]his is an emergency situation, a war[.]. . . it's a question of life or death for [Mexicans fleeing the drug violence]. James C. McKinley Jr., *Fleeing Drug Violence, Mexicans Pour into U.S.*, N.Y. TIMES, Apr. 17, 2010, available at <http://www.nytimes.com/2010/04/18/us/18border.html>.

4 June S. Beittel, *Mexico's Drug-Related Violence*, CRS REPORT FOR CONGRESS, R40582, 9, May 27, 2009, available at <http://www.fas.org/sgp/crs/row/R40582.pdf>; Human Rights Watch, *Uniform Impunity: Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations*, Apr. 29, 2009, available at <http://www.hrw.org/en/reports/2009/04/28/uniform-impunity> [hereinafter *Uniform Impunity*].

5 McKinley, *supra* note 3.

6 *Id.*

7 *Id.* Approximately 896 Mexican citizens applied for asylum in the U.S. between January and April 2009, compared to 586 in 2006 when President Calderón began the government's crackdown on drug cartels. Todd Bensman, *Mexico Drug War: Asylum Seekers Increasingly Turned Away by U.S. Immigration Courts*, Huffington Post, July 15, 2009, available at [http://www.huffingtonpost.com/2009/07/15/mexico-drug-war-asylum-se\\_n\\_234022.html](http://www.huffingtonpost.com/2009/07/15/mexico-drug-war-asylum-se_n_234022.html). These asylum applicants include, among others, lawyers, journalists, and businesspeople. *Id.*

8 Bensman, *supra* note 7. Many immigration court records are unpublished, which makes it difficult to report the amount of successful asylum claims by Mexican asylum-seekers fleeing the drug violence in Mexico. *Id.* However, attorneys in Texas and Washington have reported many losses and only a few wins in their recent asylum cases for Mexican citizens. *Id.*

9 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6276, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

10 The potential relief that Mexican citizens may obtain under CAT is protection from *refoulement* pursuant to Article 3. Article 3 provides that, "[n]o State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85. [hereinafter CAT]. Furthermore, while outside the scope of this Article, it is important to note that in addition to potential relief pursuant to CAT, there are other mechanisms for the protection of individuals who do not qualify for refugee status under the 1951 Convention. For example, under international human rights law, the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights provide potential grounds

## II. Pervasive Drug-Related Violence in Mexico

In recent years, drug-related violence in Mexico has been on the rise with drug trafficking organizations, or cartels,<sup>11</sup> competing for control of routes for smuggling drugs across the border into the U.S.<sup>12</sup> Mexico is home to high levels of drug trafficking because the country is a leading producer and supplier of heroin, marijuana, and methamphetamine to the U.S. market.<sup>13</sup> Additionally, Mexico is the principal transit country for the trafficking of cocaine from South America to the U.S.<sup>14</sup> Mexican drug trafficking organizations display characteristics of organized crime and have been identified “as the greatest drug trafficking threat to the United States worldwide.”<sup>15</sup> A small number of drug trafficking organizations currently control drug trafficking routes between Mexico and the U.S.<sup>16</sup> Through these corridors, drugs flow from Mexico to the U.S. while firearms and drug profits, which support the drug trade, flow from the U.S. to Mexico.<sup>17</sup> Drug trafficking from South America to the U.S. controlled by Mexican drug trafficking organizations is a lucrative business with an estimated value of \$13 billion per year.<sup>18</sup> The extremely profitable business of drug trafficking has led to competition among drug trafficking organizations over control of drug trafficking routes.<sup>19</sup> This competition has fueled widespread violence between rival drug trafficking organizations and against Mexican citizens and the Mexican government.<sup>20</sup>

### A. Mexican Drug Trafficking Organizations and Areas of Influence

The major Mexican drug trafficking organizations are involved in “polydrug operations,” meaning that they handle cocaine,

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of complementary protection for individuals who are unable to obtain protection pursuant to the 1951 Convention. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 3 of CRC, which requires that the best interests of a child shall be a primary consideration in all actions concerning the child, may provide a complementary ground of protection. JANE McADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 173-74 (2007). More specifically, Article 3 may provide a mechanism for the protection of children who have fled generalized violence because this provision arguably involves a duty on the States Parties to protect children, regardless of whether a well-founded fear of persecution or possibility of serious harm exists. *Id.* Therefore, in addition to requiring that children’s best interests shall be a primary consideration in a determination under Article 1(A)(2) of the 1951 Convention, Article 3 of CRC may in itself provide a ground of complementary protection. *Id.* at 174. However, since the U.S. has not ratified CRC, this ground of protection would not be relevant with respect to Mexican citizens seeking protection in the U.S. United Nations Treaty Collection, Ch. IV: Human Rights, No.11: Convention on the Rights of the Child, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en). In addition, Article 7 of ICCPR provides that “[no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” ICCPR, *supra*, art. 7. Since the Human Rights Committee has interpreted this provision as prohibiting *refoulement* to a place where an individual faces a real risk of a violation of rights under ICCPR, Article 7 provides a form of complementary protection. *GT v. Australia*, Nov. 4, 1997, Comm. No. 706/1996, U.N. Doc. CCPR/C/61/D/706/1996; GUY S. GOODWIN-GILL and JANE McADAM, THE REFUGEE IN INTERNATIONAL LAW 306 (3rd ed. 2007). Article 7 of ICCPR provides an important ground for complementary protection because, unlike CAT, ICCPR extends the principle of *non-refoulement* to prohibit removal to a State where there is a risk that an individual will be subjected to inhuman or degrading treatment or punishment as well. McADAM, *supra*, at 136. While these alternative mechanisms for international protection, including protection pursuant to CAT, are important, they do not confer upon the beneficiary the significant rights provided in the 1951 Convention. Therefore, protection under the 1951 Convention, if possible, is a better option for individuals seeking international protection. *Id.* at 17. See also *infra* note 316.

- 11 The terms drug cartel and drug organization have been used to identify Mexican drug trafficking groups. While the term drug cartel has been used more often, particularly by the media, some believe the term drug organization is more appropriate because the term “cartel” frequently refers to groups that set prices and it has not been clearly established that Mexican drug organizations actually set illicit drug prices. Colleen W. Cook, *Mexico’s Drug Cartels*, CRS REPORT FOR CONGRESS, RL34215, 1 n.1, Oct. 16, 2007, available at <http://ftp.fas.org/sgp/crs/row/RL34215.pdf>.
- 12 Beittel, *supra* note 4, Summary.
- 13 *Id.* For at least the past forty years, Mexico has been one of the leading suppliers of heroin and marijuana to the U.S. *Id.*
- 14 *Id.* Based on a 2009 Department of State report, up to 90% of cocaine trafficked into the U.S. transits through Mexico. *Id.* at 1. (citing the Department of State’s 2009 International Narcotics Control Strategy Report).
- 15 *Id.* (citing the U.S. Department of Justice’s National Drug Threat Assessment 2009). Mexico’s prominence as a transit country is the result of the closure of the Caribbean drug trafficking route, which provided a channel for movement of drugs from South America, particularly Colombia, to the U.S. *Id.* After the U.S. government increased anti-narcotics efforts with regard to smuggling in the Caribbean and Florida, Colombian drug cartels negotiated subcontracts for the smuggling of cocaine into the U.S. with Mexican drug trafficking organizations. *Id.* After gaining a substantial market share of cocaine trafficking into the U.S., the Mexican drug trafficking organizations gained dominance over the “wholesale illicit market in the United States.” *Id.*
- 16 *Id.* According to a report of March 2009 by the Mexican Attorney General’s Office, the six main Mexican drug trafficking cartels are the Sinaloa cartel, Beltrán Leyva cartel, Gulf cartel, Tijuana cartel or Arellano Felix cartel, Carrillo Fuentes cartel, and La Familia. Q&A: Mexico, *supra* note 2. However, another report replaces the La Familia cartel with Los Zetas as one of the six most dominant drug trafficking organizations in Mexico. See source cited *infra* note 22.
- 17 Beittel, *supra* note 4, Summary; Q&A: Mexico, *supra* note 2.
- 18 Q&A: Mexico, *supra* note 2. The Mexican government has insisted that unless efforts are made within the U.S. to reduce the demand for drugs, actions taken against the drug cartels will fail because drug cartels will continue to earn billions of dollars by trafficking illicit drugs into the U.S. Cook, *supra* note 11, Summary.
- 19 Cook, *supra* note 11, Summary.
- 20 *Id.* For example, drug trafficking organizations, namely the Gulf and Sinaloa cartels, have perpetuated violence and intimidation of Mexican citizens and public officials through the use of “enforcer gangs.” *Id.*

marijuana, heroin and methamphetamine.<sup>21</sup> According to a 2009 Congressional Research Service Report for Congress, entitled Mexico's Drug-Related Violence, the major drug trafficking organizations that currently control the market in Mexico are: Sinaloa Federation and cartel, Gulf cartel, Beltrán Leyva Organization, Arrellano Felix Organization/Tijuana cartel, Vicente Carrillo Fuentes Organization/Juárez cartel, and Los Zetas.<sup>22</sup> The power of these organizations fluctuates depending on factors such as government targeting and arrest of high ranking leaders.<sup>23</sup> Some organizations are more well-known than others for their violence, in particular Los Zetas. Los Zetas, formerly the paramilitary force behind the Gulf cartel, consists of former Mexican military counter-narcotics commandos and is known for being extremely violent.<sup>24</sup> These organizations also recruit "enforcer gangs" and contract with Central American gangs for distribution.<sup>25</sup> Furthermore, drug trafficking organizations have expanded their operations to include additional lucrative criminal activities such as human trafficking, extortion, and kidnapping.<sup>26</sup>

Based on the recent increase in drug-related violence, there appears to have been a realignment of control over Mexican drug markets and transport routes among drug trafficking organizations.<sup>27</sup> For example, some previous alliances, such as "The Federation," have broken up into several different cartels.<sup>28</sup> By 2008, "The Federation" had split into three different organizations — Sinaloa cartel, Beltrán Leyva Organization and the Carillo Fuentes or Juárez cartel.<sup>29</sup> Mexican drug trafficking organizations maintain influence and control over different regions throughout Mexico.<sup>30</sup> With the ongoing turf wars and changing alliances between these organizations, however, these areas of influence remain fluid.<sup>31</sup> Although some areas in Mexico are under a stronger influence of Mexican drug trafficking organizations than others, the influence and control of these organizations extends throughout the entire country.<sup>32</sup>

### B. *Mexico: In Danger of Becoming a Failed State?*

Some observers have questioned the strength of the Mexican government based on the "increase and dramatic character of the violence, the targeting of civil and law enforcement officials, and the direct battle with police and military units."<sup>33</sup> Some have even suggested that the Mexican government's inability to ensure personal security to its citizens demonstrates that Mexico is in danger of becoming a failed State.<sup>34</sup> The Mexican government has persistently denied claims that Mexico is at risk of becoming a failed State, asserting that Mexico has a functioning State despite the significant challenges it faces.<sup>35</sup> However, there is widespread corruption among public officials and law enforcement and drug cartels have infiltrated many

21 Beittel, *supra* note 4, at 3.

22 *Id.* at 3-4. *But see supra* note 16 (stating that La Familia, rather than Los Zetas is one of the dominant Mexican drug cartels). Additionally, there are also several emerging cartels and other groups involved in drug trafficking in Mexico, such as La Familia Michoacana. Beittel, *supra* note 4, at 5-6.

23 Beittel, *supra* note 4, at 4-5.

24 *Id.* at 5. As noted by Beittel, the violent precedent set by drug trafficking organizations within the border region of Mexico and the U.S. "demonstrates the inherent violence of drug gangs." *Id.*

25 *Id.*

26 *Id.* at 6.

27 *Id.* at 3. The seven drug trafficking organizations that at one time controlled the Mexican drug trade have reconfigured and now the six organizations noted above dominate the market in Mexico. *Id.* at 3-4. Additionally, the dominant Mexican drug trafficking organizations have formed alliances with each other and they often engage in turf wars against competing alliances. Cook, *supra* note 11, at 1. For example, the Tijuana cartel formed an alliance with the Gulf cartel after the leaders of these organizations negotiated an agreement in prison. *Id.* at 1.

28 Beittel, *supra* note 4, at 4; Cook, *supra* note 11, at 1. Although the leaders of several different organizations controlled "The Federation," each organization maintained its independence. *Id.*

29 Beittel, *supra* note 4, at 4. As a result of this split, the Sinaloa cartel lost control of some of its territory in Mexico to its rivals, but still maintains a dominant organization with effective control in trafficking from South America to the U.S. *Id.* Similarly, as noted above, Los Zetas recently split from the Gulf cartel and now contracts with other Mexican drug trafficking organizations, in particular, the Beltrán Leyva Organization. *Id.* at 5.

30 *Id.* at 7. The Sinaloa Cartel maintains influence in Sinaloa, Jalisco, Colima, Michoacán, Western Sonora, Oaxaca, Chiapas, Yucatan Peninsula, and Federal District. *Id.* The Beltrán Leyva Organization has an influence in Eastern Sonora, Chihuahua, Northeastern Mexico, Guerrero, and Federal District. *Id.* The Arrellano Felix Organization/Tijuana cartel has an influence in Tijuana/Ensenada. *Id.* The Gulf cartel maintains influence over Northeastern Mexico, Gulf Coast, and Yucatan Peninsula. *Id.* Los Zetas control areas in Northeastern Mexico, Gulf Coast, Yucatan Peninsula, the Southern border and contract elsewhere in Mexico. *Id.* The Vicente Carrillo Fuentes Organization/Juárez cartel operates in the northern part of the state of Chihuahua and in areas of Nuevo Leon and Sonora states. *Id.* at 4. One of the smaller drug trafficking organizations, La Familia Michoacana, has an influence in Michoacán and Federal District. *Id.* at 7.

31 Cook, *supra* note 11, at 3; Beittel, *supra* note 4, at 3 n.16. For example, there have been notable turf wars in Nuevo Laredo, Guerrero, and Michoacán. Cook, *supra* note 11, at 11.

32 *See* Beittel, *supra* note 4, at 7.

33 *Id.* at 8.

34 *See id.* at 8.

35 Embassy of Mexico, Washington DC, *Mexico and the Fight Against Drug-Trafficking and Organized Crime: Setting the Record Straight*, at 13 Mar. 2009, available at <http://portal.sre.gob.mx/eua/pdf/SettingTheRecordStraightFinal.pdf>.



institutions.<sup>36</sup> Corruption has exacerbated the government's problems in combating drug trafficking organizations because corrupt government officials actively assist and protect these organizations.<sup>37</sup> Since 2008, there has been a dramatic upsurge in drug-related violence, characterized by kidnappings, gruesome murders, and death threats, which does not appear likely to subside at any time in the near future.<sup>38</sup>

### 1. *The Mexican Government's Anti-Drug Efforts*

For several years prior to the election of former Mexican President Fox in 2000, the Mexican government tolerated the export of illegal drugs to the U.S.<sup>39</sup> While former President Fox initiated anti-drug efforts, much of his efforts were aimed at cartel leaders which did not help eliminate the organizations.<sup>40</sup> President Calderón launched an unprecedented crackdown on drug trafficking organizations after being elected in 2006.<sup>41</sup> As a result, thousands of troops and federal police officers have been dispatched to combat drug cartels in high drug trafficking areas.<sup>42</sup> Soldiers and federal police officers are responsible for destroying marijuana and opium fields, interdicting drug shipments, and arresting traffickers.<sup>43</sup> According to the Mexican government, record high amounts of drugs have been seized and high-ranking drug trafficking leaders have been killed.<sup>44</sup> However, another result of the crackdown on drug cartels is an escalation in violence throughout Mexico, with drug trafficking organizations fighting both the military and rival organizations.<sup>45</sup>

### 2. *Drug Trafficking and Widespread Corruption*

President Calderón's decision to deploy the military in the fight against the drug trafficking organizations was due in part to the widespread corruption present among municipal and state police departments.<sup>46</sup> The high profits generated by the drug trade have enabled drug trafficking organizations to infiltrate underpaid local, state, and federal police and public officials.<sup>47</sup> Corrupt public officials and law enforcement officers facilitate drug trafficking by tolerating such activities, actively supporting and protecting drug cartels, and carrying out crimes on behalf of these organizations.<sup>48</sup> Due to the pervasive corruption among law enforcement officers, the government has turned to retired military officers to lead municipal and state police.<sup>49</sup> Furthermore, government officials, including a unit within the Federal Attorney General's Office, have been arrested or fired for their ties to drug cartels and, in some cases, for accepting bribes.<sup>50</sup> While the federal government has taken strong measures against corruption, such as restructuring and retraining police forces, corruption among public officials and police remains a persistent impediment in the fight against drug trafficking organizations.

36 David Luhnnow and José De Cordoba, *The Perilous State of Mexico*, WALL ST. J., Feb. 21, 2009, available at <http://online.wsj.com/article/SB123518102536038463.html>.

37 Beittel, *supra* note 4, at 9.

38 *Id.* at 10-11.

39 *Id.* at 3. Under this system, the government essentially accommodated drug trafficking organizations and there were Mexican officials that reportedly had a working relationship with drug lords. *Id.* at 2.

40 Q&A: Mexico, *supra* note 2. However, former President Fox did employ some successful counternarcotics efforts, such as purging the federal police force of corrupt officers and increasing drug shipment seizures. Beittel, *supra* note 4, at 3.

41 Beittel, *supra* note 4, at 2.

42 *Id.* at 3.

43 *Id.*

44 Q&A: Mexico, *supra* note 2.

45 Beittel, *supra* note 4, at 3.

46 Steve Fainaru and William Booth, *As Mexico Battles Cartels, the Army Becomes the Law*, WASH. POST, Apr. 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040104335.html>.

47 *Id.* See also Q&A: Mexico, *supra* note 2; *Ramirez-Peyro v. Holder*, 574 F.3d 893, 898 (8th Cir. 2009). As one state police officer put it, "the police don't make enough money to either resist being corrupted by the criminals or care enough to risk their lives going after them." Luhnnow and De Cordoba, *supra* note 36.

48 Fainaru and Booth, *supra* note 46. The government is in the process of restructuring the entire police force by retraining and evaluating 450,000 police officers to eliminate corrupt officers. *Id.* Many of the officers that have been examined so far have failed. *Id.* Furthermore, this process is expected to take up to fifteen years, as projected by the attorney general Mr. Medina Mora. Luhnnow and De Cordoba, *supra* note 36.

49 Fainaru and Booth, *supra* note 46.

50 Beittel, *supra* note 4, at 9. According to a statement by President Calderón in December 2008, "11,500 public employees had been sanctioned for corruption in the two years since he took office." *Id.* In May 2009, in the state of Michoacán, the federal government detained ten mayors and eighteen other government and police officials for their alleged connection to drug cartels. *Id.* These officials included, among others, heads of state and state prosecutors. *Id.*

### 3. Escalating Drug-Related Violence

Since 2007, Mexico has experienced a significant breakdown in security and a dramatic increase in drug-related violence.<sup>51</sup> The highest concentration of violence has occurred in towns along the U.S. – Mexico border.<sup>52</sup> In 2008, a majority of drug cartel-related killings occurred primarily in Baja California, Sinaloa and Chihuahua.<sup>53</sup> One of the most dangerous battlegrounds for drug trafficking organizations is Ciudad Juárez, Chihuahua, across from El Paso, Texas.<sup>54</sup> This location provides a strategic site for the trafficking of drugs and weapons.<sup>55</sup> While the statistics on the number of individuals killed in drug-related violence vary, a reported 6,800 drug-related killings occurred in Mexico in 2008<sup>56</sup> and in 2009, the worst year thus far for drug-related violence, there were 9,635 deaths.<sup>57</sup> In the first three months of 2010 alone, 3,365 people died from drug-related violence in Mexico.<sup>58</sup> The major drug trafficking organizations are equipped with up to 100,000 employees, which is a substantial concern because this number is on par with the number of Mexican soldiers responsible for combating these organizations.<sup>59</sup>

Drug cartels have used violence as a tool for intimidating the government and the public at large.<sup>60</sup> Additionally, the drug cartels' surge in violence may be a strategy for regaining influence over public officials through corruption.<sup>61</sup> While many of the deaths that have occurred as a result of drug-related violence involve law enforcement officers and people connected to drug trafficking, drug cartels have also targeted the general public. Cartels often kidnap victims for ransom, which in some cases has ended in murder.<sup>62</sup> Abducted victims include wealthy Mexican business people and their children, as well as, working class citizens.<sup>63</sup> Moreover, some kidnappings have involved the assistance of corrupt law enforcement officers.<sup>64</sup>

#### C. The Effect of Drug-Related Violence on Migration from Mexico

As the drug-related violence continues to increase in frequency and intensity, there has been an influx of Mexican citizens seeking protection in the U.S.<sup>65</sup> Some Mexican citizens have escaped to the U.S. legally, for example by using Border Crossing Cards, a special type of visa for Mexican citizens.<sup>66</sup> Many others have fled to the U.S. seeking asylum without any legal documents granting permission to enter the U.S., despite the risk of being detained while their asylum claims are pending.<sup>67</sup> The number of asylum-seekers<sup>68</sup> from Mexico seeking refuge in the U.S. has raised the important question of

51 Vanda Felbab-Brown, *The Violent Drug Market in Mexico and Lessons from Colombia*, The Brookings Institution, Policy Paper, No. 12, Washington, DC, Mar. 2009, at 1, available at [http://www.brookings.edu/~media/Files/rc/papers/2009/03\\_mexico\\_drug\\_market\\_felbabbrown/03\\_mexico\\_drug\\_market\\_felbabbrown.pdf](http://www.brookings.edu/~media/Files/rc/papers/2009/03_mexico_drug_market_felbabbrown/03_mexico_drug_market_felbabbrown.pdf).

52 Q&A: Mexico, *supra* note 2.

53 Beittel, *supra* note 4, at 13. Within these states, the highest concentration of killings was in Tijuana, Culiacán and Ciudad Juárez. *Id.*

54 *Id.* The violence within Ciudad Juárez led to the resignation of the police chief after cartel gunmen left a written threat on the bodies of a murdered police officer and prison guard warning that every forty-eight hours an officer would be killed until he resigned. *Id.*

55 *Id.*

56 *Id.* at 1.

57 Q&A: Mexico, *supra* note 2. It is important to note that the Mexican government continuously insists that the number of drug-related deaths be viewed in the proper context, stating that most of these deaths involve law enforcement officers or people connected with drug trafficking. *Id.*

58 *Id.*

59 Beittel, *supra* note 4, at 11.

60 *Id.* According to some analysts, “drug cartels prefer to intimidate and subvert a government rather than to bring it down . . . because an intimidated government can deflect effective law enforcement initiatives and it allows the drug cartels to operate largely undisturbed.” *Id.*

61 *Id.* at 11-12.

62 *Id.* at 12. A reported 1,028 people were kidnapped in Mexico in 2008 and at least 69 of these victims were murdered. *Id.*

63 For example, a five-year-old boy from a poor family was kidnapped while selling fruit at a market in Mexico City and was later killed by an injection of acid into his heart. *Killing of 5-Year Old Kidnapped from Market Shocks Mexico*, N.Y. TIMES, Nov. 4, 2008, available at <http://www.nytimes.com/2008/11/04/world/americas/04mexico.html>.

64 *Id.*

65 McKinley, *supra* note 3.

66 *Id.* The Border Crossing Card is a type of B1/B2 visitor visa issued to individuals who meet the requirements for a B1 or B2 visa and are citizens of and resident in Mexico. Travel.State.Gov., U.S. Department of State, Visas, [http://travel.state.gov/visa/temp/types/types\\_1266.html](http://travel.state.gov/visa/temp/types/types_1266.html). Additionally, some have married U.S. citizens but had never applied for permanent residency in the U.S. and are now doing so. McKinley, *supra* note 3.

67 McKinley, *supra* note 3.

68 It is important to note the difference between asylum-seekers and refugees because these two concepts are often incorrectly used interchangeably. In this Article, “[a]sylum seekers are people who have moved across international borders in search of protection under the 1951 Refugee Convention, but whose claim for refugee status has not yet been determined.” DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 9 (2007). The term refugee, on the other hand, refers to an individual who has satisfied all requirements for refugee status under the 1951 Convention and/or 1967 Protocol relating to the Status of 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*, 1979 (re-edited 1992), para. 28, available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> [hereinafter UNHCR, *Handbook*]. See also 1951 Convention Relating to the Status of Refugees, *supra* note 9, art. 1(A)(2); 1967 Protocol, *supra* note 9, art. 1(2).

whether Mexican citizens fleeing drug-related violence may qualify for refugee status in the U.S. The U.S. is a Party to the 1967 Protocol<sup>69</sup> and has adopted the definition of the term “refugee” under the 1951 Convention<sup>70</sup> and 1967 Protocol.<sup>71</sup> Therefore, asylum-seekers from Mexico fleeing drug-related violence must satisfy specific criteria to be eligible for refugee status in the U.S.<sup>72</sup>

Although the Mexican government, at least at the federal level, has expressed a strong stance on the fight against drug trafficking organizations, drug-related violence has continued to increase. Widespread corruption at the local and state level has been a substantial obstacle in the federal government’s efforts to combat drug trafficking. Mexican drug trafficking organizations continue to maintain substantial influence throughout Mexico and are heavily armed and well-equipped with manpower, which has further exacerbated the level of violence between these organizations and the Mexican government.<sup>73</sup> Drug trafficking organizations have also stepped up their terror efforts by turning to gruesome murder tactics, such as decapitations.<sup>74</sup> While drug trafficking organizations have largely targeted members of rival cartels and law enforcement officers, they have also inflicted violence on the general public. As a result of this ongoing violence, the U.S. is now confronted with an influx of Mexican asylum-seekers at its doorstep.

### III. Overview of the International Refugee Law Regime

The principal international law instruments relating to the legal status of refugees are the 1951 Convention and 1967 Protocol. These instruments, which have been adopted within the United Nations’ framework, define the term “refugee” and set forth the rights of refugees and the obligations of the States Parties with respect to individuals who qualify for refugee status.<sup>75</sup> There is no formal United Nations treaty body charged with interpreting and applying the 1951 Convention and 1967 Protocol.<sup>76</sup> However, the UNHCR provides the principal guidance for the interpretation and application of these instruments.<sup>77</sup>

#### A. 1951 Convention and 1967 Protocol Relating to the Status of Refugees

In the aftermath of the Second World War, several nations came together to devise a plan for the protection of the hundreds of thousands of persons displaced by the War.<sup>78</sup> Pursuant to a decision by the United Nations General Assembly,<sup>79</sup> a convention on the legal status of refugees was drafted.<sup>80</sup> The outcome was the adoption of the 1951 Convention.<sup>81</sup> The 1951 Convention originally applied only to individuals that had become refugees as a result of events occurring prior to January 1, 1951.<sup>82</sup> However, in consideration of the fact that new situations giving rise to refugees had occurred after 1951, the 1967 Protocol eliminated this date requirement.<sup>83</sup> The 1967 Protocol also incorporates the substantive provisions of the 1951 Convention.<sup>84</sup> Therefore, the primary international law instruments governing the protection of refugees are the 1951 Convention and its 1967 Protocol.<sup>85</sup> With respect to an analysis of whether asylum-seekers fleeing drug-related violence

69 States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, *available at* <http://www.unhcr.org/protection/PROTECTION/3b73b0d63.pdf>.

70 1951 Convention, *supra* note 9.

71 INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (2009).

72 Although the U.S. is not a Party to the 1951 Convention, the 1967 Protocol includes the substantive provisions of the 1951 Convention. Therefore, by acceding to the 1967 Protocol, the U.S. has undertaken an obligation to apply the substantive provisions of the 1951 Convention. 1967 Protocol, *supra* note 9, art. I(1).

73 Beittel, *supra* note 4, at 7; Sara A. Carter, *100,000 Foot Soldiers in Mexican Cartels*, WASH. TIMES, Mar. 3, 2009, *available at* <http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels/>.

74 Luhnnow and De Cordoba, *supra* note 36.

75 UNHCR, *Handbook*, *supra* note 68. See also 1951 Convention, *supra* note 9; 1967 Protocol, *supra* note 9.

76 KEES WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 37 (2009).

77 See *Id.* at 39-44. For a discussion of the UNHCR, see *infra* notes 95-104 and accompanying text.

78 Marilyn Achiron, *A ‘Timeless’ Treaty Under Attack*, REFUGEES MAG., July 2001, vol. 3 No. 123, at 4, *available at* <http://www.unhcr.org/publ/PUBL/3b5e90ea0.pdf>.

79 G.A. Res. 429(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 14, 1950).

80 1951 Convention, *supra* note 9, Introductory Note.

81 *Id.*

82 *Id.* art. 1(A)(2).

83 1967 Protocol, *supra* note 9, art. I(2).

84 *Id.*

85 1951 Convention, *supra* note 9, art. 1(A)(2); 1967 Protocol, *supra* note 9, art. I(2). It is important to note that the 1951 Convention and 1967 Protocol do not deal with the issue of granting asylum. UNHCR, *Handbook*, *supra* note 68, para. 25. However, the High Commissioner for Refugees “has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum.” *Id.*

qualify for refugee status and protection, the relevant provisions of the 1951 Convention and the 1967 Protocol include the definition of “refugee” under Article 1(A)(2) and the prohibition of refoulement contained in Article 33 of the 1951 Convention.

### 1. *The Meaning of “Refugee” Under the 1951 Convention and 1967 Protocol*

Under the 1951 Convention and 1967 Protocol, a refugee is defined as:

[A person who,] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>86</sup>

This definition was purposely restricted so as not to apply to every conceivable type of refugee.<sup>87</sup> However, with the adoption of the 1951 Convention, the Conference of Plenipotentiaries recommended that the States Parties expand the application of the 1951 Convention beyond the specific definition provided.<sup>88</sup> Furthermore, the lack of universally accepted definitions for the general terms of the refugee definition under the 1951 Convention and 1967 Protocol provides the States Parties with the flexibility to determine whether individuals qualify for refugee status.<sup>89</sup> As discussed below in relation to asylum-seekers fleeing drug violence, UNHCR documents and U.S. asylum jurisprudence have elaborated on the interpretation of the requirements for refugee status under the above definition.

### 2. *The Principle of Non-Refoulement Under the 1951 Convention*

Article 33(1) of the 1951 Convention states that “[n]o Contracting State shall expel or return (“refouler”) a refugee . . . to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”<sup>90</sup> This principle is referred to as the prohibition of refoulement, or non-refoulement. The similar language in the refugee definition under Article 1(A)(2) and the prohibition of refoulement in Article 33 leads to the assumption that a person who qualifies as a refugee has a right to be protected under the principle of non-refoulement.<sup>91</sup> Article 33(1) was drafted with the intent that the terms “life and freedom” be interpreted broadly, such that all forms of persecution by reasons of any of the five enumerated grounds should constitute a threat to life or freedom.<sup>92</sup> Since the States Parties are not obligated under the 1951 Convention and 1967 Protocol to grant asylum to individuals who satisfy the criteria set out in Article 1(A)(2), the prohibition of refoulement is extremely important.<sup>93</sup> It follows that while States Parties are under no obligation to grant asylum to refugees, they are prohibited under Article 33(1) from expelling or returning refugees to a country where their life or freedom would be threatened on account of one of the five enumerated grounds.<sup>94</sup>

86 1951 Convention, *supra* note 9, art. 1(A)(2); 1967 Protocol, *supra* note 9, art. I(2). According to the UNHCR Handbook, [a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

UNHCR Handbook, *supra* note 68, para. 28.

87 GUY S. GOODWIN-GILL and JANE McADAM, *supra* note 10, at 36. For example, economic migrants and climate change refugees do not qualify for refugee status under the definition of refugee contained in the 1951 Convention and 1967 Protocol. UNHCR, Handbook, *supra* note 68, paras. 62-64; UNHCR, UNHCR and Climate Change: Involvement, Challenges and Response, Environment, Oct. 2009, available at <http://www.unhcr.org/4ad5820f9.html>.

88 GOODWIN-GILL and McADAM, *supra* note 10, at 36. Whether to expand the application of the 1951 Convention to individuals outside the scope of the refugee definition is left to the States Parties in their domestic implementation of the 1951 Convention and 1967 Protocol.

89 Since this Article focuses on asylum-seekers from Mexico seeking protection in the U.S., U.S. asylum case law will be discussed in order to analyze whether these asylum-seekers qualify for refugee status.

90 1951 Convention, *supra* note 9, art. 33(1).

91 Since only individuals who qualify for refugee status under Article 1(A)(2) are protected under the 1951 Convention, an individual must be a refugee to receive protection against refoulement. WOUTERS, *supra* note 76, at 56. *Id.* at 37

92 *Id.* at 57.

93 The 1951 Convention and 1967 Protocol do not address the granting of asylum. UNHCR, Handbook, *supra* note 68, para. 25.

94 1951 Convention, *supra* note 9, art. 33(1).



The 1951 Convention failed to establish an international treaty body to impose legally binding determinations on the interpretation and application of the Convention.<sup>95</sup> Therefore, it is difficult to establish the international meaning of various provisions of the 1951 Convention and 1967 Protocol.<sup>96</sup> However, the UNHCR provides the foremost guidance on the interpretation and application of the 1951 Convention and 1967 Protocol. The UNHCR was established pursuant to United Nations General Assembly Resolution 319(IV)<sup>97</sup> and provides the UNHCR with an important supervisory function with regard to the interpretation and application of the provisions of the 1951 Convention.<sup>98</sup>

As a supplementary organ of the United Nations General Assembly, the UNHCR has a mandate to provide international protection to refugees, which includes supervising States' implementation of international conventions concerning refugees, including the 1951 Convention.<sup>99</sup> The purpose of the supervisory role of the UNHCR is to facilitate harmonized interpretation and application of the principles contained in the 1951 Convention among the States Parties.<sup>100</sup> In order to exercise its supervisory role, the UNHCR has provided the States Parties with legal views on the interpretation and application of the 1951 Convention.<sup>101</sup> The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereinafter "UNHCR Handbook") provides significant guidance to governments for determining who qualifies for refugee status.<sup>102</sup> Furthermore, the UNHCR issues many other documents presenting international legal guidelines for the interpretation of the 1951 Convention.<sup>103</sup> Additionally, Article 35 of the 1951 Convention obligates the States Parties to cooperate with the UNHCR to facilitate the UNHCR's supervisory role.<sup>104</sup> Overall, the UNHCR, while lacking enforcement power, is an important source for the interpretation and application of the 1951 Convention.

The 1951 Convention is the foremost international instrument setting forth the criteria for refugee status, the rights of refugees and the obligations upon States Parties with respect to refugees.<sup>105</sup> The 1967 Protocol was adopted to expand the reach of protection under the 1951 Convention to refugees created as a result of new refugee situations throughout the world.<sup>106</sup> These two instruments represent the foundation of the international refugee law regime. Many of the provisions of the 1951 Convention and 1967 Protocol are couched in vague terms, particularly the refugee definition. Therefore, interpretation of such terms inevitably varies among the States Parties. The UNHCR plays an important role as the primary source of guidance on the interpretation and application of the 1951 Convention and 1967 Protocol.<sup>107</sup> The UNHCR also supervises States Parties' implementation of these instruments and issues guidelines and other documents relating to interpretive issues, which promotes harmonized application of the 1951 Convention and 1967 Protocol.<sup>108</sup>

#### IV. Refugee Status and Asylum within the United States: Potential Avenues of Relief

As a Party to the 1967 Protocol, the U.S. is obligated to recognize valid asylum claims under the 1951 Convention and 1967 Protocol. The Refugee Act of 1980 (hereinafter "the Refugee Act") is the domestic legislation governing asylum law in the

95 WOUTERS, *supra* note 76, at 37.

96 *Id.*

97 G.A. Res. 319(IV), 4(a), 4th Sess. (Dec. 3, 1949). The General Assembly adopted the Statute of the Office of the High Commissioner for Refugees (hereinafter "UNHCR Statute") a year later. G.A. Res. 428(V), U.N. Doc. A/RES/428(V) (Dec. 14, 1950).

98 WOUTERS, *supra* note 76, at 39. As the preamble to the 1951 Convention notes, "the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the cooperation of States with the High Commissioner." 1951 Convention, *supra* note 9.

99 Therefore, this mandate, as set forth in the UNHCR Statute, is broader than the scope of refugees defined in the 1951 Convention. UNHCR Statute, *supra* note 97.

100 *Id.* para. 1. See also WOUTERS, *supra* note 76, at 39.

101 See eg. UNHCR, *Handbook*, *supra* note 68; UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, Sept. 1, 2005, available at <http://www.unhcr.org/4316f0c02.html>.

102 Although not binding, the UNHCR Handbook is regarded as an important source of guidance and some portions, based on State practice, may possibly be considered customary international law. WOUTERS, *supra* note 76, at 43.

103 These regularly published guidelines are written by the UNHCR's Department of International Protection Services and serve as supplements to the UNHCR Handbook. WOUTERS, *supra* note 76, at 43. The UNHCR also submits amicus curiae briefs in important domestic and international legal proceedings. *Id.*

104 1951 Convention, *supra* note 9, art. 35.

105 UNHCR, *Handbook*, *supra* note 68, Foreword.

106 *Id.* para. 8.

107 WOUTERS, *supra* note 76, at 39-44.

108 *Id.*

U.S.<sup>109</sup> The Refugee Act codifies the obligations of the U.S. under the 1951 Convention and 1967 Protocol.<sup>110</sup> The Refugee Act adopts the refugee definition contained in the 1951 Convention and 1967 Protocol.<sup>111</sup> Asylum-seekers in the U.S. have three potential avenues for relief: application for asylum under the Immigration and Nationality Act (INA),<sup>112</sup> withholding of removal,<sup>113</sup> and protection under CAT.<sup>114</sup> As with the exclusions from refugee status under the 1951 Convention, under U.S. law, certain individuals are ineligible for asylum and withholding of removal, including individuals who have been convicted of serious crimes.<sup>115</sup>

#### A. *Asylum Under the Immigration and Nationality Act*

Under U.S. law, asylum refers to permission for the asylum applicant to remain, at least temporarily, in the U.S.<sup>116</sup> Asylum applicants must establish that they qualify for refugee status under the refugee definition. Therefore, the applicant must establish that he or she has suffered past persecution or has a well-founded fear of persecution on account of one of the five statutorily enumerated grounds.<sup>117</sup> With respect to a well-founded fear of persecution, an applicant must establish that “[t]here is a reasonable possibility of suffering such persecution if he or she were to return to that country.”<sup>118</sup> Asylum applicants may make an affirmative claim for asylum before an asylum officer.<sup>119</sup> If an asylum officer does not grant an asylum application after conducting an asylum interview, and the applicant appears to be inadmissible or deportable,<sup>120</sup> the officer shall refer the application to an immigration judge for review in removal proceedings.<sup>121</sup> Once the application has been referred to an immigration judge, the applicant may make a defensive claim for asylum before the judge.<sup>122</sup> Decisions by asylum officers and immigration judges on whether to grant asylum applications are discretionary.<sup>123</sup> Therefore, even if an applicant establishes that he or she is a refugee pursuant to the refugee definition, the asylum application may still be denied.<sup>124</sup>

#### B. *Withholding of Removal: Implementation of the Principle of Non-Refoulement*

Withholding of removal implements the obligation of non-refoulement contained in Article 33 of the 1951 Convention into U.S. law.<sup>125</sup> Section 241(b)(3) of the INA provides that a person may not be removed to a country where his or her life or freedom would be threatened because of his or her race, religion, nationality, membership in a particular social group or political opinion.<sup>126</sup> Unlike relief under an application for asylum, relief granted pursuant to withholding of removal is not

109 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 108 (codified as amended at 8 U.S.C. § 1158(a)(2008)) [hereinafter Refugee Act of 1980].

110 *Id.*

111 However, the U.S. version of the refugee definition replaces the more passive causal link language of “for reasons of,” with “on account of.” INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (2009).

112 Refugee Act of 1980, *supra* note 109.

113 8 U.S.C. § 1227 (2010).

114 CAT, *supra* note 10, art. 3.

115 8 U.S.C. §§ 1158(b)(2) (2010); 1231(b)(3) (2010). *See infra* note 142 discussing exclusions from refugee status under Article 1(F) of the 1951 Convention.

116 Unlike asylum, withholding of removal, which is discussed below, only provides protection from removal to a country where the applicant is at risk of persecution, but not necessarily to a third country. 8 C.F.R. § 208.16(f) (2010). Asylum is the most coveted form of relief because it grants significant benefits, including legal status in the U.S., an opportunity to apply for a change of status to a lawful permanent resident in the U.S. after one year of continuous presence in the U.S., and work authorization. 8 U.S.C. §§ 1158(c)(1)(A) (2010); 1158(c)(1)(B) (2010); 1159(a)(1) (2010).

117 8 C.F.R. § 208.13(b) (2010).

118 8 C.F.R. § 208.13(b)(2) (2010).

119 8 C.F.R. § 208.9 (2010).

120 Sections 212(a) and 237(a) of the Immigration and Nationality Act set forth the classes of individuals who are inadmissible and deportable.

121 8 C.F.R. § 208.14(c)(1) (2010).

122 8 C.F.R. § 208.14(a) (2010). A determination by an immigration judge is appealable to the Board of Immigration Appeals. 8 C.F.R. § 1003.1(b) (2010). Additionally, if the Board of Immigration Appeals denies the application, the applicant may appeal to the federal court of appeals. 8 U.S.C. § 1252(b)(2) (2010) (effective May 11, 2005).

123 8 U.S.C. § 1158(b)(1)(A) (2010); 8 C.F.R. § 208.14(a), (b) (2010).

124 8 C.F.R. § 208.14(a), (b) (2010). As discussed above, the 1951 Convention and 1967 Protocol do not obligate States Parties to grant asylum to individuals who qualify for refugee status. *See source cited supra* note 85. However, these instruments do set forth specific rights of such individuals and obligations on the States Parties with respect to those who qualify for refugee status, such as the prohibition of *refoulement*. Therefore, while the U.S. is required, pursuant to the 1951 Convention and 1967 Protocol, to recognize individuals who satisfy the criteria set forth in the definition of a refugee contained in Article 1(A)(2) as refugees, the U.S. is not required to grant asylum to these individuals under the 1951 Convention and 1967 Protocol.

125 8 U.S.C. § 1227 (2010). *See also* Elyse Wilkinson, *Examining the Board of Immigration Appeals’ Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 395 n.70 (2010). Under INA Section 241(b)(3), a person may not be removed to a country where the persons’ life or freedom would be threatened because of his or her race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3) (2010); 8 U.S.C. § 1231(b)(3) (2010).

126 INA § 241(b)(3) (2010); 8 U.S.C. § 1231(b)(3) (2010). Although the statutory language of Section 241(b) does not require that an individual must qualify

discretionary.<sup>127</sup> As opposed to asylum, which permits a person to remain in the U.S., withholding of removal only prohibits the forcible removal of a person from the U.S. to a country where his or her life or freedom would be threatened on account of one or more of the five enumerated grounds.<sup>128</sup> Therefore, withholding of removal does not necessarily grant a person permission to remain in the U.S; it only prohibits removal to certain countries.

The statutory foundation for asylum and withholding of removal are the same, however, the burden of proof is higher for a claim under withholding of removal.<sup>129</sup> The burden of proof on an applicant for asylum requires the applicant to establish that he or she is a refugee pursuant to the statutory definition, including that he or she has experienced past persecution or has a well-founded fear of persecution based on one of the five eligible grounds.<sup>130</sup> The burden of proof under withholding of removal requires the applicant to establish that it is “more likely than not” that the individual will be subjected to persecution if removed or that there is a “clear probability of persecution.”<sup>131</sup> The applicant must also provide objective evidence to meet this burden under withholding of removal as the applicant’s testimony alone is not sufficient.<sup>132</sup>

Asylum is the most desirable form of relief for asylum-seekers in the U.S. because it provides important benefits to the individual, including legal work authorization and the opportunity to become a lawful permanent resident of the U.S.<sup>133</sup> Withholding of removal provides less protection than asylum because it only prevents the removal of an individual to a country where his or her life or freedom would be threatened on account of an enumerated ground. Therefore, withholding of removal may provide only temporary protection and there is a possibility that the individual could be removed to a third country where the risk to life or freedom does not exist.<sup>134</sup> Both of these forms of relief require the applicant to establish a connection between the feared persecution or threat to life or freedom and one of the statutorily enumerated grounds, which is a difficult burden.<sup>135</sup> In addition to potential relief under asylum and withholding of removal, an individual may seek relief under CAT, in the form of withholding or deferral of removal, which is discussed below as a complementary form of protection.

## V. Mexican Cases in Perspective: Refugee Status Determination of Mexican Asylum-Seekers Fleeing Drug-Related Violence

The drug-related violence in Mexico continues to produce thousands of victims each year, which has resulted in thousands of asylum claims by Mexican citizens in the U.S.<sup>136</sup> Since the U.S. has adopted the definition of a refugee contained in the 1951 Convention and 1967 Protocol, the analysis for whether an individual satisfies the criteria for refugee status is essentially the same under both international law and U.S. domestic law. However, since there is no international treaty body to interpret and apply the provisions of the 1951 Convention and 1967 Protocol, U.S. case law will be used to evaluate the possibility that asylum-seekers fleeing drug-related violence may meet the criteria contained in the definition of a refugee.<sup>137</sup> To qualify for refugee status, a person must establish four main elements: (1) he or she is outside his or her country of origin; (2) he or she is unable or unwilling to avail himself or herself to the protection of that country or to return; (3) this inability or unwillingness is due to a well-founded fear of being persecuted; and (4) the persecution is based on one of the five enumerated grounds.<sup>138</sup>

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as a refugee to be protected under withholding of removal, the similar language implies that this is the case. If an individual qualifies for withholding of removal then the individual would also qualify for refugee status pursuant to the definition of a refugee because the person would have a well-founded fear of persecution, namely a threat to life or freedom, based on one of the five enumerated grounds.

127 INA § 241(b)(3) (2010); 8 U.S.C. § 1231(b)(3) (2010). See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987) (the granting of withholding of removal is mandatory if the requisite elements have been met).

128 See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419-420 (1999).

129 INA § 241(b)(3) (2010); 8 U.S.C. § 1231(b)(3) (2010).

130 8 U.S.C. § 1101(a)(42)(A) (2010). See also Wilkinson, *supra* note 125, at 396 n.74.

131 8 C.F.R. § 1208.16(b)(2) (2009); *Cardoza-Fonseca*, 480 U.S. at 430. See also Wilkinson, *supra* note 125, at 396 n.74.

132 8 C.F.R. § 1208.16(b)(2) (2010); *Cardoza-Fonseca*, 480 U.S. at 430. See also Wilkinson, *supra* note 125, at 396 n.74. Unlike withholding of removal, an asylum applicant’s testimony alone, if credible, may be sufficient to establish a well-founded fear of persecution. 8 C.F.R. 208.13(a) (2010).

133 8 U.S.C. §§ 1158(c)(1)(A); 1158(c)(1)(B) (2010); 1159(a)(1) (2010).

134 8 C.F.R. § 208.16(f) (2010).

135 8 C.F.R. §§ 208.13(b) (2010); 208.16(b) (2010).

136 McKinley, *supra* note 3. A reported 9,317 requests for asylum by Mexican citizens in the U.S. have been heard by immigration judges within the last three years. *Id.* Asylum applications are higher in certain areas of the U.S. near the border, including El Paso and Fort Hancock in Texas. *Id.*

137 Other sources of interpretation for evaluating refugee claims of asylum-seekers fleeing drug-related violence include UNHCR publications and Executive Committee of the Programme of the United Nations High Commissioner for Refugees Conclusions.

138 GOODWIN-GILL and McADAM, *supra* note 10, at 37.

Eligibility for asylum in the U.S. requires an asylum-seeker to prove that he or she is a refugee.<sup>139</sup> The traditional notion of a refugee brings to mind an individual who has been or has a well-founded fear of being persecuted by his or her government.<sup>140</sup> Additionally, under this view, the individual is clearly targeted by the government on account of one of the five enumerated grounds. However, the reality of the current refugee situation does not reflect this traditional perception. An increasing number of individuals have been forced to flee their homes and even their countries for fear of being persecuted, often indiscriminately, by armed militias or other non-State actors.<sup>141</sup> An emerging potential basis for refugee status is drug-related violence. Mexico serves as a prime example for analyzing whether this basis may fit within the definition of a refugee due to the endemic drug violence occurring in Mexico and the controversial debate within the U.S. over whether Mexican asylum-seekers fleeing such violence may qualify as refugees. There are several difficulties inherent in the refugee status determination of Mexican asylum-seekers due to their wide-ranging profiles.<sup>142</sup> The following analysis evaluates the criteria for refugee status determination as applied to Mexican asylum-seekers fleeing drug-related violence. Specifically, this analysis addresses whether Mexican asylum seekers are unable or unwilling to avail themselves to the protection of their country, whether such inability or unwillingness is attributable to a well-founded fear of being persecuted, and whether the persecution is based on one of the five enumerated grounds. Finally, this section concludes with a brief discussion of the alternative protection offered under the principle of non-refoulement.

### A. *Well-Founded Fear of Persecution*

The UNHCR Handbook recognizes the “well-founded fear of being persecuted” requirement as the key component of the refugee definition.<sup>143</sup> This requirement includes both a subjective and objective element.<sup>144</sup> By providing that fear – “a state of mind and subjective condition” – is the relevant motive, this phrase adds a subjective element.<sup>145</sup> This subjective element requires an evaluation of the applicant’s testimony for determining whether the applicant has the requisite motive of fear.<sup>146</sup> In addition, the “well-founded” criterion combined with the fear element requires an objective situation supporting the applicant’s fear.<sup>147</sup> Generally, refugee status determination must be made on an individual basis, requiring that an applicant have good cause for why he or she individually fears persecution.<sup>148</sup> However, the objective and subjective considerations need not be based on the applicant’s personal experiences.<sup>149</sup> Persecution of his or her family or friends, for example, may be sufficient to establish that the applicant has an objective fear that he or she will also be persecuted.<sup>150</sup>

A number of asylum-seekers from Mexico seeking refugee status based on the drug-related violence occurring in their country of origin may arguably satisfy the “well-founded fear of persecution” requirement despite the fact that much of the drug-related violence in Mexico is generalized violence used to intimidate or retaliate against Mexican citizens.<sup>151</sup> According to

139 INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (2009).

140 See UNHCR, *Handbook*, *supra* note 68, para. 65.

141 Elizabeth A. James, *Is the U.S. Fulfilling its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33 N.C. J. INT’L L. & C. REG. 455, 457 (2008).

142 While outside the scope of this Article, it is important to note that some Mexican citizens who may otherwise qualify for refugee status may be ineligible for such status if they have participated in the drug-related violence in Mexico. With respect to such individuals, exclusion from refugee status under Article 1(F) of the 1951 Convention is relevant. Article 1(F) provides that the 1951 Convention “shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to his administration to that country as a refugee.” The determination of whether an asylum-seeker has committed a serious non-political crime is difficult because there is not a common definition of such crimes due to the different definitions of the term “crime” in different legal systems. UNHCR, *Handbook*, *supra* note 68, para. 155. The U.S. has, however, confirmed that drug trafficking is a particularly serious crime under U.S. immigration law. *Y-L*, 23 I & N Dec. 270, 274 (BIA 2002). The UNHCR has elaborated on the application of the exclusion clause by instructing States Parties to “strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared.” UNHCR, *Handbook*, *supra* note 68, para. 156. Additionally, the UNHCR states that mitigating circumstances and all other relevant factors must be considered when evaluating the crime committed. *Id.* para. 157. This issue is especially relevant to Mexicans who have fled drug violence because some of the individuals who have sought protection in the U.S. were in fact involved in the drug business in Mexico. McKinley, *supra* note 3.

143 This phrase adds the notion of fear as the relevant motive, which replaced the former process of defining refugees by categories. UNHCR, *Handbook*, *supra* note 68, para. 37.

144 *Id.*

145 *Id.*

146 *Id.* Since fear is the only acceptable motive under the definition of refugee, any other motive, such as economic reasons, are immaterial to the definition. *Id.* para. 39.

147 *Id.* para. 38.

148 *Id.* para. 45.

149 *Id.* para. 43.

150 *Id.* This may be the case when, for example, members of the applicant’s racial or social group have been persecuted. *Id.*

151 See McKinley, *supra* note 3. For example, one tactic used by drug trafficking organizations is to threaten to kill everyone in an entire village if they do not



the U.S. Board of Immigration Appeals decision in *Matter of Mogharrabi*,<sup>152</sup> the threshold for establishing a well-founded fear of persecution requires a showing “that a reasonable person in the same circumstances would fear persecution if removed to his or her home country.”<sup>153</sup> A reasonable person would likely fear persecution if removed to Mexico after receiving threats of violence and even death.<sup>154</sup> As noted above, asylum-seekers must show that they individually fear persecution. Although generalized threats of violence do not target a specific person, an individual who receives such threats does have an individualized fear.<sup>155</sup> This argument is stronger for certain groups of individuals, such as journalists, police officers and businesspeople, because they are exposed to a differential risk and have been specifically targeted by drug trafficking organizations.<sup>156</sup> Furthermore, a lack of government protection can support a finding of a well-founded fear of persecution, which is relevant in the case of Mexican asylum-seekers because, as discussed below, the government is arguably unable to provide effective protection to victims of drug violence.<sup>157</sup>

### 1. Persecution

The 1951 Convention does not define “persecution” and there is no universally accepted definition for this term.<sup>158</sup> The UNHCR Handbook provides that “[f]rom Article 33<sup>159</sup> of the 1951 Convention, it may be inferred that a threat to life or freedom” for reasons of one of the five enumerated grounds constitutes persecution.<sup>160</sup> Additionally, other serious human rights violations amount to persecution.<sup>161</sup> Despite the lack of a clearly accepted definition of persecution, this term denotes a certain level of seriousness or severity.<sup>162</sup> While not providing a clear definition of persecution, U.S. courts have held that mere harassment or discrimination and generalized conditions of violence do not constitute persecution.<sup>163</sup> As discussed in Part III, an asylum-seeker may also qualify for refugee status under U.S. law based on past persecution.<sup>164</sup> If an asylum-seeker establishes past persecution there is a rebuttable presumption that he or she also has a well-founded fear of future persecution on the basis of the original claim.<sup>165</sup>

The requisite severity and seriousness inherent in the term persecution will likely bar refugee status based on drug-related violence with respect to claims that allege mere harassment by drug trafficking organizations.<sup>166</sup> However, specific death threats, such as those received by one Mexican journalist, Jorge Aguirre, appear likely to rise to the level of a well-founded

vacate immediately. *Id.* A drug trafficking organization recently hung a banner in the central square of El Porvenir threatening to kill anyone who remained in the town on Easter. *Id.* Or as one Mexican citizen who fled the violence explained, “[t]hey are killing people over there who have nothing to do with drug trafficking . . . [t]hey kill you just for having seen what they are doing.” *Id.*

152 19 I & N Dec. 439 (BIA 1987).

153 *Id.* at 445.

154 It is important to note that the requirement of a well-founded fear of persecution entails a “future-oriented and hypothetical assessment.” GOODWIN-GILL and McADAM, *supra* note 10, at 57.

155 See Jens Vedsted-Hansen, *Refugees, Asylum-Seekers and Migrant Workers*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 301, 303 (Catarina Krause and Martin Scheinin, eds., 2009). It is often assumed that victims of armed conflict and other widespread violence cannot comply with the definition of refugee under the 1951 Convention. *Id.* This assumption is sometimes based on the view that “persons who have been displaced by large-scale events are not at risk of individualized persecution.” *Id.* However, this assumption appears to misinterpret the wording and purpose of the 1951 Convention by arguing that “when infringements are perpetrated on many persons at the same time and in the same way, there is no persecution of a personal or individual nature.” *Id.* The text of the 1951 Convention does not appear to have intended to protect only those subjected to persecution based on individualized matters exclusive to that person. *Id.*

156 Bensman, *supra* note 7. See also Vedsted-Hansen, *supra* note 155, at 303.

157 See WOUTERS, *supra* note 76, at 99; *infra* notes 180-199 and accompanying text, discussing the agents of persecution and the Mexican government’s failure to provide protection to victims of drug violence.

158 UNHCR, *Handbook*, *supra* note 68, para. 51.

159 The UNHCR’s reference to Article 33 refers to the prohibition of *refoulement* where a person’s life or freedom would be threatened on account of one of the five enumerated grounds. 1951 Convention, *supra* note 9, art. 33(1).

160 UNHCR, *Handbook*, *supra* note 68, para. 51.

161 *Id.*

162 WOUTERS, *supra* note 76, at 58. For example, the UNHCR Handbook states that not all forms of discrimination will rise to the level of persecution.

UNHCR, *Handbook*, *supra* note 68, para. 54. However, it is also important to note that the Handbook recognizes the possibility that measures of discrimination may constitute persecution if, for instance, a person is the victim of cumulative discriminatory measures. *Id.* para. 55.

163 James, *supra* note 141, at 478 (citing Regina Germain, *AILA’s Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* 28-30 (4th ed. 2005)).

Scholars, such as J.C. Hathaway have also developed their own definitions of persecution. Hathaway defines persecution as “the sustained or systematic violation of basic human rights demonstrative of failure of state protection.” WOUTERS, *supra* note 76, at 59 (quoting J.C. Hathaway, *THE LAW OF REFUGEE STATUS* 104-05 (1991)).

164 U.S. Code of Federal Regulations Section 208.13(b) provides that an applicant “may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.” 8 C.F.R. § 208.13(b) (2010).

165 8 C.F.R. § 208.13(b)(1) (2010).

166 James, *supra* note 141, at 478.

fear of persecution.<sup>167</sup> According to Mr. Aguirre, while he was walking to a fellow journalist's funeral, whom Aguirre believes was murdered for the critical stories he wrote about the drug war, he received a telephone call threatening to kill him next.<sup>168</sup> Mr. Aguirre later discovered that the source of the threat was a representative of the State of Chihuahua and that the threat was in response to the critical statements Mr. Aguirre had written about a Chihuahua state prosecutor.<sup>169</sup>

There are numerous other examples of Mexican citizens receiving death threats from drug trafficking organizations, and even government officials, often in conjunction with murders of relatives, neighbors, or colleagues.<sup>170</sup> While mere threats alone may not rise to the level of persecution, when these threats are combined with acts of violence, including extremely gruesome murders<sup>171</sup> of others, the seriousness and severity of the threats substantially increases. Likewise, the UNHCR Handbook expressly recognizes that there can be a well-founded fear of persecution in situations where an asylum-seeker is subjected to measures that in and of themselves do not rise to the level of persecution if these measures are combined with other adverse measures.<sup>172</sup>

## 2. *Agents of Persecution*

The refugee definition states that a refugee must have a well-founded fear of being persecuted based on one of the five enumerated grounds and must be unable or unwilling to avail himself to the protection of his country. The risk of persecution must be due to the actions or inactions of individuals, which are attributable to a country's failure to provide protection.<sup>173</sup> It follows that the 1951 Convention implies that there must be a persecutor, or agents of persecution.<sup>174</sup> However, the 1951 Convention does not address the issue of who constitutes a possible agent of persecution.<sup>175</sup> Persecution under the 1951 Convention's definition of a refugee often relates to acts perpetrated by the government.<sup>176</sup> Nevertheless, the UNHCR Handbook recognizes that agents of persecution "may also emanate from sections of the population that do not respect the standards established by laws of the country concerned."<sup>177</sup> According to the UNHCR, the definition of a refugee recognizes both State and non-State agents of persecution<sup>178</sup> if persecution by non-State agents is "knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection."<sup>179</sup>

167 Ed Lavandera, *Mexicans Seeking Asylum: 'The Fear Never Ends'*, CNN.com, Mar. 25, 2009, available at <http://edition.cnn.com/2009/US/03/25/mexico.political.asylum/index.html>.

168 *Id.*

169 Testimony of Jorge Luis Aguirre, Journalist, U.S. Congress, Senate, Senate Judiciary Committee, Subcommittee on Crime and Drugs; with the Senate Caucus on International Narcotics Control, *Law Enforcement Responses to Mexican Drug Cartels*, Joint Hearing held Mar. 17, 2009, available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3718&wit\\_id=7716](http://judiciary.senate.gov/hearings/testimony.cfm?id=3718&wit_id=7716) [hereinafter Testimony of Jorge Luis Aguirre].

170 For example, a family seeking asylum in the U.S. received death threats from drug traffickers after they killed the husband and three others. Bensman, *supra* note 7. In addition, some Mexican asylum-seekers have suffered past persecution, which under U.S. law may establish that they also have a well-founded fear of future persecution.

171 Beittel, *supra* note 4, at 5 & n.22; Luhnnow and De Cordoba, *supra* note 36. As discussed in Part II, drug trafficking organizations have also expanded their criminal activities beyond drug trafficking to include kidnappings, extortion, and human trafficking. Beittel, *supra* note 4, at 6.

172 UNHCR, *Handbook*, *supra* note 68, para. 53. Although U.S. regulations regarding refugee status do not specifically endorse this opinion, the fact that there is no agreed upon definition of "persecution" among U.S. courts leads to the conclusion that measures, which in and of themselves do not amount to persecution may, if combined with other adverse measures, rise to the level of persecution. James, *supra* note 141, at 478-479. See eg. *Osaghae v. I.N.S.*, 942 F.2d 1160, 1163 (7th Cir. 1991) (defining persecution as "punishment for political, religious or other reasons that our country does not recognize as legitimate"); *Matter of Acosta*, I & N Dec. 211, 234 (BIA 1985) (defining persecution as "the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome").

173 WOUTERS, *supra* note 76, at 80.

174 *Id.* "The ordinary meaning of the term 'persecution' includes all persecutory acts and is neutral as to the source of the persecution." *Id.* Additionally, under the "protection view," the essential element is the lack of protection provided by the country, rather than the source of the persecution. *Id.* at 80 n.280.

175 *Id.* at 80. See also *MIMA v. Kawar* (2002), 210 C.L.R. 1, HCA 14 (High Court of Australia noting that the 1951 Convention refers to persecution generally, rather than certain types of persecution, which may include persecution by non-State agents).

176 UNHCR, *Handbook*, *supra* note 68, para. 65.

177 *Id.* Because the language of Article 1(A)(2) of the 1951 Convention states that a refugee must be unable or unwilling to avail himself or herself to the protection of his or her country, a common misperception is that the persecution must be at the hands of the government. Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misrepresentation of the Refugee Convention's "Nexus" Requirement*, 15 MICH. J. GENDER & L. 453, 474-75 (2010). However, refugee status under the 1951 Convention extends its protection beyond individuals who have been or are at risk of being persecuted by a government to protect individuals from persecution by non-State agents. *Id.* at 475. In addition to claims for refugee status based on drug-related violence, persecution by non-State agents is particularly relevant to victims of domestic violence and victims of human trafficking, among others, seeking protection under the 1951 Convention. *Id.* at 474-79.

178 UNHCR *Handbook*, *supra* note 68, para. 65; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, May 7, 2002, U.N. Doc. HCR/GIP/02/01, available at <http://www.unhcr.org/3d58ddef4.html>. See also WOUTERS, *supra* note 76, at 81. According to Wouters, "anyone can commit acts of persecution within the meaning of the Refugee Convention." *Id.*

179 UNHCR, *UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on Fear of Persecution Due to*

In the case of Mexican asylum-seekers, the alleged agents of persecution include both State and non-State agents. The non-State agents of persecution are members of drug trafficking organizations. The Mexican government arguably is unable to protect individuals from drug-related violence by drug trafficking organizations.<sup>180</sup> Despite President Calderón's crackdown on drug trafficking, which began in 2006, the violence in Mexico continues to spiral out of control.<sup>181</sup> There is evidence that the areas of conflict are spreading to different regions of the country.<sup>182</sup> Furthermore, the major drug trafficking organizations in Mexico employ up to an estimated 100,000 "foot soldiers."<sup>183</sup> This number is significant because it is nearly on par with the estimated 130,000 Mexican armed forces deployed in the fight against drug trafficking organizations.<sup>184</sup> It has also been estimated that the firepower of these organizations may be able to match that of units within the Mexican military or law enforcement in small-scale combat.<sup>185</sup> The number of "foot soldiers" employed by drug trafficking organizations and their substantial firepower, along with the increase in drug-related violence even after the deployment of the armed forces, support the argument that the Mexican government is unable to provide adequate protection against drug violence.<sup>186</sup> Mexican drug trafficking organizations clearly do not respect the standards established by the laws of Mexico.<sup>187</sup> Therefore, in the current situation in Mexico, acts perpetrated by or attributable to Mexican drug trafficking organizations may be considered persecution within the meaning of the refugee definition given the inability of the Mexican government to provide protection.<sup>188</sup>

*an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, para. 9, Mar. 17, 2006, available at [http://www.unhcr.se/Pdf/Position\\_countryinfo\\_papers\\_06/Membership\\_clan\\_family\\_blood\\_feud.pdf](http://www.unhcr.se/Pdf/Position_countryinfo_papers_06/Membership_clan_family_blood_feud.pdf). Although this position paper focuses on membership of a family or clan engaged in a blood feud, the general principle that persecution by non-State agents may lead to recognition of refugee status under the 1951 Convention is relevant to other claims for refugee status. Furthermore, the U.S. has recognized that an asylum-seeker may qualify as a refugee when the alleged agents of persecution are non-State actors. *Matter of McMullan*, 17 I & N 542 (BIA 1980).

- 180 The fact that drug violence has been on the rise in Mexico despite the federal government's efforts to combat this violence supports the argument that the government is unable to protect individuals from drug violence perpetrated by drug trafficking organizations. See Beittel, *supra* note 4, at 9-11.
- 181 *Id.* at 10-11. However, Mexican officials continue to argue that the increase in violence is a result of the government's success in disturbing the drug trafficking routes and that the drug violence is primarily contained within cities near the U.S. – Mexico border. *Id.* at 10.
- 182 *Id.* at 11.
- 183 Carter, *supra* note 73. Furthermore, drug trafficking organizations can quickly recruit new 'foot soldiers' within Mexico. Luhnnow and De Cordoba, *supra* note 36. For example, Los Zetas can easily find new recruits in areas of high unemployment, such as the barrios of Monterrey. *Id.*
- 184 Carter, *supra* note 73. Furthermore, with the massive supply of arms trafficked from the U.S. to Mexico, drug trafficking organizations are heavily armed with automatic weapons and grenades and are prepared to battle the military. *Id.* "The number of weapons confiscated last year from drug gangs in Mexico could arm the entire army of El Salvador, by one estimate." Luhnnow and De Cordoba, *supra* note 36. Additionally, some members of the drug trafficking organizations, primarily Los Zetas, are former elite Mexican soldiers. *Id.* These former soldiers reportedly include lieutenants and sub-lieutenants who left the military's Special Air Mobile Force Group to join the drug trade. Beittel, *supra* note 4, at 5 n.23. Los Zetas therefore have "military-level expertise in intelligence, weaponry and operational tactics." *Id.* at 5. Other members of these organizations include current and former police officers. Luhnnow and De Cordoba, *supra* note 36.
- 185 As noted by Beittel, Mexican drug trafficking organizations "are purchasing semiautomatic versions of AK-47 and AR-15 style rifles and other military-style weapons including .50 caliber snipers rifles in the United States." Beittel, *supra* note 4, at 12.
- 186 The balance of power between drug trafficking organizations and the Mexican government is further shifted in favor of drug traffickers based on the substantial revenue generated by the Mexican drug trade, which is estimated at \$13 billion a year, compared to the government's estimated budget of \$1.2 million for federal law enforcement, excluding the army. Luhnnow and De Cordoba, *supra* note 36. However, the U.S. has provided approximately \$400 million per year to the Mexican government for training and military equipment in the fight against drug trafficking. *Id.*
- 187 As noted above, according to the UNHCR Handbook, agents of persecution may emanate from sections of society that fail to comply with such standards. UNHCR *Handbook*, *supra* note 68, para. 65. See *supra* notes 11-74 and accompanying text, describing the widespread drug violence in Mexico. Mexican drug trafficking organizations are responsible for widespread violence against numerous sectors of civil society, including journalists, lawyers, and Mexican citizens generally. Alicia A. Caldwell, *More Seeking Asylum on U.S.-Mexico Border*, USA Today, [http://www.usatoday.com/news/nation/2008-07-11-438649345\\_x.htm](http://www.usatoday.com/news/nation/2008-07-11-438649345_x.htm); Beittel, *supra* note 4, at 12; Andrew Becker and Patrick J. McDonnell, *Drug War Creates New Class of Refugees*, LOS ANGELES TIMES, Mar. 4, 2009, available at <http://articles.latimes.com/2009/mar/04/nation/na-asylum4>. Drug trafficking organizations have expanded their business to include other criminal activities and their violent tactics have also become increasingly gruesome. Beittel, *supra* note 4, at 6; Carter, *supra* note 73. For example, victims have been found beheaded and bodies have been dissolved in acid. Carter, *supra* note 73.
- 188 See UNHCR, *International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees*, 18 INT'L J. REFUGEE L. 182, 209-10 (2006) [hereinafter UNHCR, *Colombia*]. The current situation in Mexico in relation to non-State agents of persecution is comparable to the ongoing armed conflict in Colombia in relation to the non-State armed groups. *Id.* at 210. Throughout the past four decades, Colombia has been plagued with armed conflict between various irregular armed groups, including guerrilla groups, paramilitary groups, and organized crime gangs and drug traffickers, which have ties to guerrilla and paramilitary groups. *Id.* at 184-85. Although the armed conflict occurring in Colombia varies significantly from that occurring in Mexico, there are important similarities between the two conflicts. For example, as noted, both conflicts involve violent acts by non-State agents and these acts include indiscriminate violence against the general population, including kidnapping, extortion and murder. *Id.* at 185-87. See *supra* notes 11-74 and accompanying text for a discussion of the drug-related violence in Mexico. The similarities between these cases are also reflected in the fact that asylum claims by asylum-seekers from both Mexico and Colombia based on the violence in these countries have been contentious. See generally James, *supra* note 141; Bensman, *supra* note 7.

Additionally, due to the widespread corruption of Mexican government officials, Mexican authorities frequently knowingly tolerate drug violence perpetrated by drug trafficking organizations.<sup>189</sup> Corrupt government officials refuse to provide protection against acts perpetrated by drug trafficking organizations, and in some cases actively participate in drug-related violence by carrying out crimes on behalf of drug cartels.<sup>190</sup> The high profits generated from drug sales provide the necessary means to corrupt government officials, some of whom are easily overcome by the prospect of large sums of money and others who may be too afraid to refuse such bribes.<sup>191</sup> The government's reliance on the military, rather than local and state police forces, in combating drug trafficking organizations in Mexico exemplifies the extensive corruption among government authorities.<sup>192</sup>

The effective control that drug trafficking organizations have over a wide-range of government officials substantially contributes to the government's failure to protect against violence perpetrated by these organizations. According to one estimate, in some 8% of the total number of counties in Mexico, drug trafficking organizations "wield more influence behind the scene than the authorities."<sup>193</sup> In some situations, victims of drug violence are unwilling to seek assistance from government officials because they are unable to distinguish which officials are working with the drug trafficking organizations.<sup>194</sup> Furthermore, in situations where government authorities have actively supported and protected drug trafficking organizations, persecution by these organizations could arguably be attributed to the State.

The continuous drug violence in Mexico generated by armed drug trafficking organizations demonstrates that the government is unable to effectively protect against threats of violence by these non-State agents. Due to the widespread corruption among Mexican government officials, many officials knowingly tolerate the actions of drug trafficking organizations or support and protect them.<sup>195</sup> Therefore, although most of the active participants in the drug violence in Mexico are non-State agents, namely members of drug trafficking organizations, corrupt officials may also constitute indirect<sup>196</sup> agents of persecution in situations where they tolerate or actively support the actions of drug traffickers. Furthermore, serious human rights violations, including rape, torture, enforced disappearances, and arbitrary detentions have been alleged against the Mexican military.<sup>197</sup> A report by Human Rights Watch documenting seventeen such cases, involving over seventy victims, found that none of the military investigations into these cases had thus far resulted in a conviction for any soldiers.<sup>198</sup> According to Mexico's National Human Rights Commission, there has been a surge in human rights violations by Mexican armed forces.<sup>199</sup> It follows that agents of persecution in Mexico within the context of the drug war include both non-State agents and State agents, including corrupt government officials and members of the Mexican military.

## B. *Grounds of Persecution*

The requirement that persecution must be by reason of, or on account of,<sup>200</sup> one of the five enumerated grounds is frequently

189 See *supra* notes 46-50 and accompanying text, discussing the pervasive corruption among local and state officials, including police officers, officials within the Federal Attorney General's Office, and various other public employees.

190 Beittel, *supra* note 4, at 9. There are countless examples of the prevalent corruption among government officials. For example, in November 2008, the former head of the Federal Attorney General's Office (SIEDO) was arrested based on accusations that he had taken bribes from a drug trafficking organization. *Id.* In the same month, two former officials of Interpool in Mexico were arrested for their alleged connection to the Sinaloa cartel. *Id.* An extreme example of corrupt government officials is the case of a recently retired army general that was working in the city of Cancun to combat drug violence that was tortured and killed. Luhnnow and De Cordoba, *supra* note 36. The primary suspect in the case is the Cancun police Chief. *Id.*

191 Beittel, *supra* note 4, at 9.

192 *Id.*

193 Luhnnow and De Cordoba, *supra* note 36.

194 Moreover, even if they are willing to seek assistance from government officials, such as local or state police officers, corrupt officers will likely refuse to help these victims. Even a senior state official admitted privately that he does not trust any local police commanders because of the pervasive corruption among law enforcement officers. Luhnnow and De Cordoba, *supra* note 36. As Jorge Aguirre explained in his testimony before the U.S. Senate:

[o]n a daily basis, ordinary citizens in [Ciudad] Juárez are condemned to die, to be kidnapped, to be assaulted, to suffer extortion or to be exiled at any moment. Who can help them if they are persecuted and threatened? Criminals, police and politicians are often one and the same. People are more afraid of the police than of the drug cartels.

Testimony of Jorge Luis Aguirre, *supra* note 169.

195 Beittel, *supra* note 4, at 9.

196 Many government officials constitute indirect agents of persecution by knowingly tolerating acts of non-State agents of persecution and by protecting these agents.

197 *Uniform Impunity, supra* note 4.

198 *Id.*

199 Comisión Nacional de Derechos Humanos, (Mexico), *Informe de Actividades del 1 de enero al 31 de diciembre de 2008*, Mexico, 2009, at 36. See also Beittel, *supra* note 4, at 14.

200 The U.S. consistently uses the phrase "on account of" as opposed to the "by reasons of" language in the refugee definition contained in the 1951 Convention and 1967 Protocol. INA § 101(a)(42)(A) (2010); 8 U.S.C. § 1101(a)(42)(A) (2010).



problematic for asylum-seekers. Changing circumstances in the world have given rise to many different grounds upon which asylum-seekers have claimed refugee status.<sup>201</sup> Although asylum-seekers from Mexico are likely able establish that they have a “well-founded fear of persecution,” by drug trafficking organizations, and in some cases State agents, their claims are likely to be denied because they do not fit precisely within any of the five enumerated grounds.<sup>202</sup> Therefore, Mexican asylum-seekers must frame their refugee claims within one of the five enumerated grounds, which can prove difficult and potentially impossible. The most significant obstacle for Mexican asylum-seekers fleeing drug-related violence is establishing that their past persecution or fear of persecution is linked to one of the enumerated grounds.<sup>203</sup> In particular, since much of the drug-related violence on behalf of the drug trafficking organizations is indiscriminate, asylum-seekers must prove that they have been singled out for persecution on account of an eligible ground.<sup>204</sup> For asylum-seekers basing their claims on drug-related violence in Mexico, the two potential grounds for persecution are membership of a particular social group and political opinion.<sup>205</sup>

### 1. *Membership of a Particular Social Group*

The protected ground of membership of a particular social group is extremely ambiguous, which provides an important opportunity for asylum-seekers who do not fit neatly within any of the other four categories.<sup>206</sup> However, the vagueness of this concept also makes it difficult to predict whether an asylum-seeker’s proposed social group constitutes a “particular social group” within the meaning of the 1951 Convention. This is especially the case for asylum-seekers who base their claims for refugee status on new forms of alleged persecution, such as drug-related violence.<sup>207</sup> There is no consensus on the definition of “social group” within the U.S.<sup>208</sup> or the international community generally.<sup>209</sup> The UNHCR Handbook notes that a particular social group “normally comprises persons of similar background, habits, or social status.”<sup>210</sup> Additionally, in 2002 the UNHCR issued guidelines on the meaning of “membership of a particular social group” and adopted the following

- 201 Whether a basis of persecution is included within an enumerated ground under the definition of a refugee depends on whether the States Parties interpret these terms broadly or narrowly. Arguments in favor of the expansion of the eligible grounds of persecution suggest that the refugee definition should be expanded to include additional grounds. See Maria Stavropoulou, *Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 105, 120 (1994); Maria Stavropoulou, *Drowned in Definitions?*, FORCED MIGRATION REVIEW: Climate Change and Displacement, Oct. 2008, at 11.
- 202 Bensman, *supra* note 7. See *supra* notes 143-99 and accompanying text, discussing the requirement of a “well-founded fear of persecution.” In this sense, claims for asylum based on drug-related violence are similar to claims based on gang violence, which for the most part have been unsuccessful because these asylum-seekers have been unable to establish that they fit within one of the five enumerated grounds. Monica Fanesi, *Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the “Consent or Acquiescence” Requirement*, 13 ROGER WILLIAMS U. L. REV. 308, 314-15 (2008).
- 203 Bensman, *supra* note 7. As Bensman notes, “Mexico’s profit-hungry drug traffickers aren’t known to target people because of race, religion, nationality or political opinion. So some of the attorneys [for asylum-seekers from Mexico] admit they’re hunting for ways to stretch the definition of the one of the five categories – ‘social group’ – to cover their clients.” *Id.*
- 204 See *Ochave v. I.N.S.*, 254 F.3d 859, 865 (9th Cir. 2001).
- 205 The grounds of race, religion and nationality can be ruled out automatically because drug trafficking organizations are not known to target people for reasons of race, religion, or nationality. Bensman, *supra* note 7.
- 206 GOODWIN-GILL and MCADAM, *supra* note 10, at 73-76. The vague nature of the concept of a social group provides “an open-endedness capable of expansion . . . in favor of a variety of different classes susceptible to persecution.” *Id.* at 76. For example, it has been suggested by one commentator with regard to claimants that do not fit neatly within one of the five enumerated grounds that the particular social group category is the easiest way to overcome the asylum barrier that U.S. federal courts have erected. Jeffrey D. Corsetti, *Marked for Death: The Mans of Central America Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 422 (2006). See also Fanesi, *supra* note 202, at 315. Although this commentator specifically referred to claimants from Central America fleeing gang violence, this opinion is also applicable to claimants fleeing drug-related violence.
- 207 GOODWIN-GILL and MCADAM, *supra* note 10, at 79. The *travaux préparatoires* of the 1951 Convention provide little to no guidance on interpreting the notion of “social group” as an eligible ground for persecution under the Convention. *Id.* Therefore, it is unclear whether the drafters intended or expected the concept of “social group” to apply to new types of groups and forms of persecution. *Id.*
- 208 U.S. courts have provided various interpretations of the notion of “particular social group” with little consensus on the issue. One of the first key decisions addressing this issue is the Board of Immigration Appeals’ (BIA) decision in *Matter of Acosta*, in which the BIA set forth what is referred to as the “immutable approach.” Wilkinson, *supra* note 125, at 401; *Acosta*, I & N Dec. 211 at 233-34. Under this approach, the characteristics making up the particular social group must be immutable, such as sex, kinship ties, and even past experiences. *Acosta*, I & N Dec. 211 at 233-34. Essentially, the common characteristic “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Id.* U.S. federal circuit courts have also been split on the issue of whether it is the external or internal characteristics of a group that qualify it as a particular social group. James, *supra* note 141, at 493.
- 209 Wilkinson, *supra* note 125, at 401. Some courts have argued for a broad interpretation of the “social group” category under the 1951 Convention. For example, in *Islam v. Secretary of State for the Home Department*, [1999] 2AC 629, 651, Lord Hoffman stated that “the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the [1951] Convention may have had in mind.” Lord Hoffman went on to explain that if the framers had intended the notion of “social group” to be interpreted narrowly, they would have listed specific types of eligible social groups. *Id.*
- 210 UNHCR, *Handbook*, *supra* note 68, para. 77.

definition of “particular social group”:

a group of persons 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.<sup>211</sup>

Defining a particular social group as all Mexican citizens who fear drug-related violence perpetrated by drug trafficking organizations, corrupt government officials and the military<sup>212</sup> is clearly too broad to constitute an acceptable ground for refugee status. Furthermore, the social group cannot be based solely on the fact that the members are targeted for persecution and the social group must exist independently from the persecution.<sup>213</sup> Consequently, a successful claim for refugee status based on generalized drug-related violence in Mexico will be difficult because this violence is often indiscriminate.<sup>214</sup> The fact that much of the drug violence in Mexico is aimed at intimidating the government and the general population<sup>215</sup> has serious implications with respect to Mexican asylum-seekers, including those who are specifically targeted by violence, because this violence often appears indiscriminate.<sup>216</sup>

However, specific sectors of society, particularly those that are at a greater risk of violence by drug trafficking organizations and State agents based on common characteristics, have a viable argument that they constitute a particular social group. For example, drug trafficking organizations have specifically directed their violence against journalists,<sup>217</sup> law enforcement officers, businesspeople<sup>218</sup> and other professionals.<sup>219</sup> Although the persecutory actions of drug trafficking organizations against these groups of individuals cannot define them as a social group, such conduct can serve to identify or create particular social groups.<sup>220</sup> Therefore, while the common targeting of journalists, law enforcement officers, businesspeople and other professionals by drug trafficking organizations cannot define these groups, this persecution identifies these sectors of society as particular groups by singling them out based on their common characteristics. It would thus be the attribute of their professions, rather than persecutory acts, which would identify them as a social group.<sup>221</sup>

- 211 UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, para. 11, May 7, 2002, U.N. Doc. HRC/GIP/02/02, available at <http://www.unhcr.org/3d58de2da.html> [hereinafter UNHCR, *Guidelines on PSG*].
- 212 For example, in *Delgado-Ortiz v. Holder*, the U.S. Court of Appeals for the Ninth Circuit found that the proposed social group of ‘returning Mexicans from the United States’ is too broad to constitute a particular social group. 600 F.3d 1148 (9th Cir. 2010). Similarly, the Ninth Circuit has held that other broadly defined social groups, including business owners in Colombia that had rejected drug traffickers’ demands to participate in illegal drug activities and young men in El Salvador who refused to participate in gang violence, do not qualify as cognizable social groups. See *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745-46 (9th Cir. 2008); *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005).
- 213 UNHCR, *Guidelines on PSG*, *supra* note 211, paras. 2, 14; McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997), 190 C.L.R. 225, 264, 142 A.L.R. 331 (Austl.).
- 214 See Bensman, *supra* note 7 (noting that drug violence in Mexico generally is not aimed at people based on their race, religion, nationality or political opinion).
- 215 See *supra* notes 11-74 and accompanying text, discussing the drug-related violence in Mexico.
- 216 This issue is similar to the difficulties that Colombian asylum-seekers have faced with regard to the widespread and often indiscriminate violence by guerilla and paramilitary forces. James, *supra* note 141, at 497-98. In the context of one Colombian asylum-seeker, the BIA concluded that since drug traffickers in Colombia often resort to terror to intimidate the government and the population in general, it is hard to see how any group, aside from the general population, is perceived by the drug cartels. *In re C-A*, 231 I & N Dec. 951, 961 (BIA 2006) (the Seventh Circuit, in *Benítez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) has disagreed with this decision with respect to the “social visibility” requirement). See also James, *supra* note 141, at 497-98.
- 217 Journalists, such as Jorge Aguirre, have been targeted by both corrupt government officials and drug trafficking organizations for their reports on the drug violence in Mexico. Lavandera, *supra* note 167. Journalists play an important role in society, especially during times of conflict or civil unrest. UNHCR, *Colombia*, *supra* note 188, at 220. Journalists in Mexico have a key function in society by informing the public about the drug violence, investigating government corruption, and exposing the violence perpetrated by drug traffickers and the government. *Id.* Mexican journalists have been killed or disappeared after reporting on drug trafficking in Mexico. As a result, many journalists now have resorted to self-censorship for fear of being killed or kidnapped by drug trafficking organizations and corrupt government officials in retaliation for their news coverage. Ioan Grillo, *Journalist Murders in Mexico Hit New Record*, GLOBAL POST, Nov. 14, 2009, <http://www.globalpost.com/dispatch/mexico/091110/journalist-murders-mexico-hit-new-record?page=0,0>. In other cases of retaliation against journalists, such as in Colombia, this type of self-censorship has been referred to as ‘self-regulation in order to survive.’ UNHCR, *Colombia*, *supra* note 188, at 221. Mexican journalists who are seeking refugee status could potentially satisfy the “by reason of” requirement of the refugee definition by arguing that they are persecuted or have a fear of being persecuted by reason of their membership in a particular social group. Such a social group could be defined, for example, as Mexican journalists who currently report on and investigate matters relating to the drug violence and corruption in Mexico or have done so in the past and still fear persecution.
- 218 Businesspersons and their children have been kidnapped, held for ransom, and often killed if their families do not pay the demanded amount. Caldwell, *supra* note 187.; Beittel, *supra* note 4, at 12.
- 219 Becker and McDonnell, *supra* note 187. Many of the Mexicans seeking asylum in the U.S. are journalists, law enforcement officers, businesspersons and other professionals. *Id.* For example, professionals, such as one Mexican mechanic who fears persecution by drug traffickers after refusing to build a special compartment in their vehicles for smuggling drugs, are specifically targeted by drug-related violence. Alfonso Chardy, *Asylum Approvals for Mexicans Up*, MIAMI HERALD, Apr. 2, 2010, available at <http://www.miamiherald.com/2010/04/02/v-fullstory/1559475/asylum-approval-for-mexicans-up.html>.
- 220 McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997), 190 C.L.R. 225, 264, 142 A.L.R. 331 (Austl.).
- 221 As noted above, Mexican journalists who report on the drug violence in Mexico could arguably constitute a particular social group under the 1951 Convention and the drug-related violence targeted specifically at members of this social group is apparent. See *supra* note 217. For example, a message

Asylum-seekers fleeing the drug-related violence in Mexico have attempted to define their social groups in various ways, such as a wealthy class of merchants and specific families targeted by drug cartels.<sup>222</sup> The success of lawyers' creative attempts to fit the persecution feared by asylum-seekers fleeing the drug violence in Mexico within the "membership of a particular social group" category under U.S. asylum law is uncertain at this point.<sup>223</sup> However, the targeting of certain sectors of society based on their membership in certain groups, such as journalists, businesspeople, and other professionals by drug trafficking organizations and government officials creates a potentially successful avenue for obtaining refugee status.<sup>224</sup>

## 2. Political Opinion

Another potentially viable argument for Mexican asylum-seekers is fear of persecution on account of political opinion. The concept of "political opinion" under the 1951 Convention has been interpreted in a broad sense to include "any opinion on any matter in which the machinery of the State, government, and policy may be engaged."<sup>225</sup> The most common type of political refugee is one who has been persecuted or has a well-founded fear of being persecuted by the government or other entity for reasons of his or her political opinion, which are a threat or perceived to be a threat to the government or entity.<sup>226</sup> A fear of persecution on account of political opinion presumes that the opinion held is critical of and not tolerated by the authorities and that the opinion has come to the attention of the authorities.<sup>227</sup> Although a claim of persecution for reasons of political opinion implies that the asylum applicant has an opinion that he or she has expressed or that has somehow come to the attention of the authorities, there are situations in which the applicant may not have expressed such opinion.<sup>228</sup> In such situations, it may be reasonable to assume that due to the strength of the applicant's convictions, his or her opinion will eventually find expression and the applicant will consequently come into conflict with the authorities.<sup>229</sup> A person can be considered to fear persecution by reason of political opinion where such a situation can be reasonably assumed.<sup>230</sup> Furthermore, an individual may have a well-founded fear of persecution by reason of political opinion if he or she has expressed a political opinion and the individual, or others similarly situated, have suffered repressive measures or been threatened with such measures.<sup>231</sup>

In the context of Mexican asylum-seekers, a claim based on a fear of persecution by reason of political opinion may be a plausible argument for refugee status. Although each case is based on an individual set of facts, with regard to Mexican asylum-seekers, it will generally be difficult to establish the required nexus between the past persecution or fear of future persecution and the asylum-seeker's political opinion or imputed political opinion.<sup>232</sup> It is not required, however, that an asylum-seeker's political opinion be the persecutor's sole motive.<sup>233</sup> This could prove important for claims of refugee status

written on cardboard was left next to the body of one Mexican journalist, who was murdered by a drug trafficking cartel, warning '[t]his is what happened to me for giving information to the military and writing what I shouldn't. Take care of your texts before you do your story.' Grillo, *supra* note 217.

222 According to one report, a Mexican citizen was granted asylum in the U.S. after he was kidnapped and held for ransom for \$250,000. Bensman, *supra* note 7. The attorney for the asylum-seeker won the case by arguing that the victim belonged to a social group defined as a wealthy class of merchants. *Id.*

223 However, there have been reports of an increase in the approval of asylum petitions in the U.S. by Mexican citizens fleeing the drug violence. Chardy, *supra* note 219. The Miami Herald has reported that the combined approval by asylum officers and immigration judges in the U.S. of asylum applications from Mexican citizens have increased from 133 in 2006 to 250 in 2008. *Id.* However, these reports do not specify the grounds upon which these approved asylum applications were based. See Bensman, *supra* note 7.

224 Because of the continuously evolving nature of the definition of what constitutes a "social group," this concept provides a more flexible approach for refugee status than the other four eligible grounds. James, *supra* note 141, at 499.

225 GOODWIN-GILL and McADAM, *supra* note 10, at 87 (citing the Supreme Court of Canada's decision in *Attorney General v. Ward* [1993] 2 S.C.R. 689 (Can.)).

226 *Id.*

227 It is not necessary that the individual actually hold the opinion, it is sufficient if the authorities attribute such opinion to him or her. UNHCR, *Handbook*, *supra* note 68, para. 82.

228 *Id.*

229 *Id.* Although the UNHCR Handbook refers to State agents of persecution with regard to the protected ground of political opinion, it is now well-established that persecution by non-State agents also falls within the 1951 Convention's refugee definition. See *supra* notes 177-79 and accompanying text. It follows that the fact that the UNHCR refers to an asylum-seeker coming into conflict with "the authorities" does not preclude a finding of persecution based on political opinion by non-State agents. See GOODWIN-GILL and McADAM, *supra* note 10, at 89.

230 UNHCR, *Handbook*, *supra* note 68, para. 82. Goodwin-Gill and McAdam refer to individuals in this situation as a potential political refugees. GOODWIN-GILL and McADAM, *supra* note 10, at 90.

231 GOODWIN-GILL and McADAM, *supra* note 10, at 87. For example, in *Osorio v. I.N.S.*, 18 F.3d 1017 (2d Cir. 1994) the court found that a union leader from Guatemala was eligible for refugee status on the ground of a fear of persecution on account of political opinion where groups of similarly situated individuals had suffered a pattern of persecution on account of their political opinions.

232 Asylum-claims based on fear of gang-related violence also encounter difficulty establishing the required nexus of "by reasons of" or "on account of." The main challenge is establishing that the persecution or threat of persecution was on account of political opinion rather than simply a personal vendetta. Alexandra M. Gonçalves-Pena, *Challenging the "Political": U.S. Asylum Law and Central American Gang Warfare*, 65 GUILD PRAC. 242, 245 (2008).

233 It has been recognized that "there is no requirement in the Convention, Protocol, Handbook or Executive Committee documents that one of the protected grounds be central to the persecutor's motivation." Guenet Guebre-Christos, Regional Representative, UNHCR Regional Office for the United States of

by Mexican citizens because persecutors' other motives, such as retaliation for refusal to cooperate and financial motives, including extortion, may be mixed with political motives.<sup>234</sup>

As with claims alleging persecution on account of membership of a particular social group, claims based on political opinion will more likely qualify for refugee status with respect to certain sectors of society, such as law enforcement personnel. According to the information available, political asylum claims by Mexican citizens in the U.S. have been filed largely by police officers.<sup>235</sup> Mexican police officers who refuse to cooperate with drug trafficking organizations may fear persecution from both corrupt State agents and non-State agents.<sup>236</sup> The case is more apparent with respect to police officers who resist corruption by drug cartels. In such cases, police officers can argue that by reason of their political opinion to not associate or cooperate with the drug trafficking business, they have been persecuted or have a fear of persecution.<sup>237</sup> This is a plausible argument given that the concept of political opinion is defined broadly and that some drug trafficking cartels are effectively a political force in that they continuously seek to infiltrate government institutions, particularly law enforcement departments.<sup>238</sup> Similarly, police officers may face persecution or threats of persecution from corrupt police officers or other government officials.<sup>239</sup> The key issues in such cases are establishing both that refusal to cooperate with drug trafficking organizations and corrupt officials constitutes a political opinion and that the persecution or threat of persecution that results from such a refusal is on account of this opinion rather than a different motive, such as pure retaliation.<sup>240</sup>

The protected ground of political opinion is difficult in the case of asylum-seekers fleeing drug-related violence because these cases do not fall within the scope of the traditional political refugee who is persecuted through oppressive government measures. Rather, asylum-seekers fleeing drug-related violence are frequently targeted by drug trafficking organizations and corrupt government officials. While many Mexicans live in fear of drug-related violence and may disagree with the actions of both drug trafficking organizations and even the military, it is difficult to frame this fear within the political opinion category of the refugee definition. Furthermore, although the concept of "political opinion" has been interpreted broadly, this protected ground is reasonably settled, as opposed to the ever-evolving ground of "membership of a particular social group."<sup>241</sup> Therefore, the emerging argument for drug-related violence as a basis for refugee status will likely find greater flexibility within the "particular social group" category.

### C. *Alternative to Asylum: Withholding of Removal*

The principle of non-refoulement contained in Article 33 of the 1951 Convention, and withholding of removal with respect to U.S. law, prevents States from expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of one of the five enumerated grounds.<sup>242</sup> This prohibition of refoulement is important because the

America & the Caribbean, *Comments on Proposed Rule Regarding Asylum and Withholding Definitions*, 7, Jan. 22, 2001.

234 Similarly, this mixture of motives for persecution has been relevant to cases of Colombian asylum-seekers. James, *supra* note 141, at 501.

235 Andrew Becker, *Mexican Police Fleeing Cartels Find U.S. Reluctant to Grant Asylum*, LOS ANGELES TIMES, June 15, 2009, available at <http://articles.latimes.com/2009/jun/15/local/me-mexico-police15>. Family members of police officers have also brought political asylum claims. For example, one Mexican asylum applicant filed an asylum claim in the U.S. after her father, a Mexican police officer, was disappeared. *CNN American Morning: Mexicans Fleeing Drug War Seek U.S. Political Asylum* (CNN television broadcast May 13, 2010), available at <http://amfx.blogs.cnn.com/2010/05/13/mexicans-fleeing-drug-war-seek-u-s-political-asylum/>.

Other Mexican government officials, such as mayors and prosecutors, may also have viable claims for refugee status based on the ground of political opinion. Additionally, Mexican journalists have also begun filing applications for political asylum in the U.S. Mexican journalists have been threatened in response to their coverage of the drug war, including reports criticizing the Mexican military's actions in combating the drug violence. Becker and McDonnell, *supra* note 187. The Mexican government has threatened journalists, which has led to self-censorship. U.S. DEPARTMENT OF STATE, 2009 HUMAN RIGHTS REPORT: MEXICO, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE, Mar. 11, 2010, <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136119.htm> [hereinafter MEXICO COUNTRY REPORT].

236 Becker, *supra* note 235.

237 *Id.*

238 Luhnow and De Cordoba, *supra* note 36. An additional indication that drug trafficking organizations play a political role is that the 2006 mayoral and parliamentary races involved an estimated \$5 million to \$10 million in drug money. Fainaru and Booth, *supra* note 46.

239 Becker, *supra* note 235.

240 While each individual claim for refugee status will depend on the specific facts involved, Mexican police officers who have refused to cooperate with drug trafficking organizations and corrupt police officers or other government officials appear to have a strong case for refugee status based on the ground of political opinion. However, in the case of *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992), the United States Supreme Court held that resisting guerillas' forced recruitment, based on the facts involved, did not necessarily involve a political opinion. GOODWIN-GILL and McADAM, *supra* note 10, at 169 & n.171. This case is similar to the situation wherein Mexican police officers have refused to cooperate with drug trafficking organizations, which could be interpreted as a type of forced recruitment by these organizations.

241 James, *supra* note 141, at 499. However, this does not mean that there are not still disputed issues related to the political opinion ground. For example, issues of neutrality and imputed political opinion continue to remain a topic of discussion among circuit courts in the U.S. *Id.*

242 1951 Convention, *supra* note 9, art. 1(A)(2); INA § 241(b)(3) (2010); 8 U.S.C. § 1231(b)(3) (2010). Therefore, in order to receive protection under Article



States Parties are under no obligation under the 1951 Convention or 1967 Protocol to grant asylum to individuals who qualify for refugee status.<sup>243</sup> However, the States Parties do have an obligation to determine the refugee status of those who claim to be refugees. As a result, despite the fact that a grant of asylum may be discretionary, even if an asylum applicant is eligible for refugee status, as is the case in the U.S., once an individual is determined to be a refugee, certain protections must be afforded to him or her. Arguably, the most important of these protections is the prohibition of refoulement. Therefore, if Mexican asylum-seekers fleeing drug-related violence are able to establish that their life or freedom would be threatened on account of one of the enumerated grounds if returned to Mexico, they cannot legally be forced to return. However, as the above analysis demonstrates, whether such asylum-seekers can establish the required nexus on account of one of the enumerated grounds is contentious.<sup>244</sup>

In conclusion, Mexican citizens fleeing drug-related violence represent an emerging class of asylum-seekers, which have, and will likely continue to encounter difficulties satisfying the restrictive criteria under the refugee definition. The “membership of a particular social group” and “political opinion” grounds of persecution appear to be the only viable options for these asylum-seekers. While, in many cases, these asylum-seekers should be able to establish that they have a well-founded fear of persecution, the nexus requirement between this fear and an enumerated ground of persecution is a potentially impossible obstacle for Mexican citizens to overcome. However, specific sectors of society within Mexico, namely journalists and police officers, have a much higher probability of qualifying for refugee status than members of the general population who have suffered indiscriminate persecution or threats of persecution. Nevertheless, as discussed below, Mexican asylum-seekers’ claims for refugee status may be denied based on the concept of internal flight or relocation alternative.

## VI. Internal Flight or Relocation Alternative: A Potential Bar to Refugee Status for Mexican Asylum-Seekers

The 1951 Convention does not require or even propose that an asylum-seeker’s fear of persecution must extend throughout the whole of his or her country of origin.<sup>245</sup> There are many possible explanations for why it may be impossible or impracticable for an asylum-seeker to relocate internally rather than seek asylum across international borders.<sup>246</sup> However, the internal flight or relocation alternative is commonly applied to deny refugee status to individuals at risk of being persecuted in one localized part of their country, but who are considered to have the ability to find protection in another part.<sup>247</sup> The notion of internal flight or relocation alternative emerged from State practice, but without a clear understanding.<sup>248</sup> The lack of universal application by States has resulted in divergent approaches to analyzing this concept.<sup>249</sup> Some States have found that the concept is located in the “well-founded fear” criteria of the refugee definition while others have found it in the clause stating

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33, an individual must qualify for refugee status under the definition of a refugee. Article 33(1) of the 1951 Convention specifically refers to “refugees,” whereas the U.S. law regarding withholding of removal does not expressly state that an individual must qualify as a refugee to be protected under this law. However, the threat to life or freedom of an applicant for withholding of removal must be on account of one of the five enumerated grounds in the refugee definition.

243 See *supra* note 85, discussing the fact that the 1951 Convention and 1967 Protocol do not address the issue of asylum.

244 Furthermore, under some jurisdictions, such as the U.S. the standard for granting of withholding of removal is more stringent than the standard for the granting of asylum. Therefore, if an individual is denied asylum despite qualifying for refugee status, he or she will most likely be denied withholding of removal as well. See *supra* notes 118, 129-32 and accompanying text, explaining the different burdens of proof for these two avenues of relief in the U.S.

245 UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, para. 6, July 23, 2003, U.N. Doc. HCR/GIP/03/04, available at <http://www.unhcr.org/3f28d5cd4.html> [hereinafter UNHCR, *Guidelines No. 4*]; GOODWIN-GILL and McADAM, *supra* note 10, at 123; Reinhard Marx, *The Criteria of Applying the “Internal Flight Alternative” Test in National Refugee Status Determination Procedures*, 14 INT’L J. REFUGEE L. 179, 180-81 (2002). Furthermore, under international law, asylum need not be the last resort, meaning an individual is not required to exhaust all possible options within his or her own country prior to seeking asylum. UNHCR, *Guidelines No. 4*, *supra* note 245, para. 1:

246 GOODWIN-GILL and McADAM, *supra* note 10, at 123-24.

247 Ninette Kelley, *Internal Flight/Relocation Protection Alternative: Is it Reasonable?*, 14 INT’L J. OF REFUGEE L. 4 (2002). The UNHCR has criticized the emphasis that many States have put on the notion of internal flight or relocation alternative and the increasing use of this concept as a bar to even considering refugee status claims. UNHCR, *Guidelines No. 4*, *supra* note 245, para. 1.

248 Marx, *supra* note 245, at 179-80; UNHCR, *Guidelines No. 4*, *supra* note 245, para. 1.

249 Marx, *supra* note 245, at 179-80; UNHCR, *Guidelines No. 4*, *supra* note 245, para. 1. While it is acceptable and logical to consider the concept of internal flight or relocation alternative within the context of refugee status determination, the confusing manner in which States have applied this concept has created issues of interpretation and application. Marx, *supra* note 245, at 180. These issues have resulted from the lack of a consistent approach to this concept and States’ increasingly common use of this notion to deny refugee status to claimants that are unable to refute the possibility of an internal flight or relocation alternative. *Id.* Therefore, while State practice with regard to the internal flight or relocation alternative is a matter of treaty interpretation, there is no consensus on the proper approach for applying this concept. Due to the inconsistent application of this concept, it arguably does not constitute subsequent State practice under Article 31 of the Vienna Convention on the Law of Treaties because there is not a general agreement regarding this interpretation. Vienna Convention on the Law of Treaties, art. 31(3)(b), May 22, 1969, 1155 U.N.T.S. 331.

that the claimant is unable or unwilling to avail himself or herself to the protection of the country of origin.<sup>250</sup> Although the concept of an internal flight or relocation alternative is not referred to in the criteria set forth in the refugee definition of Article 1(A)(2) of the 1951 Convention, it may arise as part of the holistic refugee status determination analysis.<sup>251</sup> The internal flight or relocation alternative advocates that an individual remain within his or her own country and seek safety therein, rather than seeking asylum in another country.<sup>252</sup> The refugee jurisprudence of some States requires that under the concept of internal flight or relocation alternative, a claimant seeking refugee status must establish that a well-founded fear of persecution exists in their case country-wide.<sup>253</sup> However, since this notion is contrary to the underlying principles of refugee protection, it should be applied in a manner that does not undermine the right to seek asylum and protection against non-refoulement and only in certain circumstances based on the individual facts of the case.<sup>254</sup> An internal flight or relocation alternative analysis is most likely appropriate in the context of Mexican citizens claiming refugee status based on the drug-related violence in Mexico because much of this violence has been concentrated in certain areas of the country.<sup>255</sup> Therefore, even if Mexican asylum-seekers are able to establish that they have a well-founded fear of being persecuted for reasons of one of the enumerated grounds, they will be confronted with the obstacle of an internal flight or relocation alternative.

A determination on an internal flight or relocation alternative is dependent on the effectiveness of the protection against persecution provided in the proposed area of relocation.<sup>256</sup> The amount of protection required by this area, in particular with regard to socio-economic rights such as access to employment and social assistance, remains a subject of controversy.<sup>257</sup> While there is no general consensus on the approach for determining the effectiveness of protection in the proposed area of relocation, the UNHCR has provided the approach set forth below to the internal flight or relocation alternative as part of the holistic assessment of refugee status.<sup>258</sup> This approach is relevant in assessing the likelihood that Mexican asylum-seekers' claims for refugee status will be denied based on this concept because it provides a general overview of the pertinent issues to be addressed.<sup>259</sup>

#### A. *Relevance Analysis of Internal Flight or Relocation Alternative*

Under the UNHCR's proposed holistic approach to refugee status determination, in which a claimant has established a well-founded fear of persecution for reasons of one of the enumerated grounds, the assessment of whether there is a possibility of relocation first requires a relevance analysis.<sup>260</sup> The concept of internal flight or relocation alternative is only relevant if relocation is practically, safely and legally accessible to the claimant.<sup>261</sup> In determining whether the possibility of relocation is relevant, the agent of persecution is pertinent.<sup>262</sup> The potential that, upon relocation, a claimant would be exposed to a risk of persecution or other serious harm is also part of the relevance analysis.<sup>263</sup>

250 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 3.

251 *Id.* para. 2; Marx, *supra* note 245, at 181.

252 Marx, *supra* note 245, at 180.

253 *Id.* The U.S. Board of Immigration Appeals has taken this position in several cases, including *Acosta*, 19 I & N Dec. 211. In *Acosta*, the Board of Immigration Appeals held that the requirement of a claimant's inability or unwillingness to return to a country implied that the claimant must establish that he or she has a well-founded fear of persecution country-wide. 19 I & N Dec. 211. See also GOODWIN-GILL and MCADAM, *supra* note 10, at 123.

254 Marx, *supra* note 245, at 180-81; UNHCR, *Guidelines No. 4*, *supra* note 245, para. 4.

255 Beittel, *supra* note 4, at 13. While the possibility of an internal flight or relocation alternative is most likely relevant to the refugee status determination of Mexican citizens fleeing drug-related violence, this concept cannot be used to deny consideration of these claims. UNHCR, *Guidelines No. 4*, *supra* note 245, para. 4.

256 WOUTERS, *supra* note 76, at 105.

257 Marx, *supra* note 245, at 200; WOUTERS, *supra* note 76, at 105.

258 See generally UNHCR, *Guidelines No. 4*, *supra* note 245. Although the UNHCR's guidelines are not binding on States Parties to the 1951 Convention, the UNHCR provides the foremost guidance on the interpretation of the 1951 Convention. It follows that the UNHCR's approach to the internal flight or relocation alternative is relevant to refugee status determination. As noted above, States Parties have developed their own tests and factors to be considered with regard to the internal flight or relocation alternative; however, there is no consensus among the Parties. Furthermore, the various tests that have been developed by State practice generally involve variations of the UNHCR's approach, most notably the reasonableness assessment. See *eg.* 8 C.F.R. § 208.13(b) (2010); *Thirunavukkarasu v. MEI*, [1993] 109 DLR (4th) 682, 687 (Can.); *R. v. Immigration Appeal Tribunal, Ex parte Jonah*, [1985] IMMAR7 (QBD, Nolan J.).

259 WOUTERS, *supra* note 76, at 105.

260 UNHCR, *Guidelines No. 4*, *supra* note 245, paras. 6 and 7.

261 *Id.* para. 7.

262 *Id.*

263 *Id.*

### 1. *Is the Area of Relocation Practically, Safely, and Legally Accessible?*

The internal flight or relocation alternative is relevant only if the claimant is exposed to a risk of persecution in a localized part of the country of origin and there are other locations within the country to which this risk does not extend.<sup>264</sup> The first issue to be addressed is whether an individual can gain access to an area perceived to be an alternative to seeking international protection.<sup>265</sup> An area is not an internal flight or relocation alternative if there are physical or other barriers, such as risks in travel or entry and legal barriers to travel, that cannot reasonably be overcome.<sup>266</sup> Removal of an individual to an area where there are substantial barriers to traveling to the location could render the effectiveness of the protection provided within the location illusory.<sup>267</sup> The accessibility prong of the internal flight or relocation analysis generally addresses both the personal situation of the claimant and the overall situation in the country of origin.<sup>268</sup>

In the context of Mexican citizens seeking refugee status, the perceived areas of possible relocation are areas where the drug-related violence is not highly concentrated, specifically, areas far from the U.S. – Mexico border.<sup>269</sup> While there may not be any apparent physical or legal barriers for Mexican citizens traveling to perceived areas of possible relocation, the widespread influence of drug trafficking organizations throughout Mexico is arguably a barrier to relocation. Although much of the drug-related violence in Mexico is centered in states near the U.S. – Mexico border, the geographic reach of drug trafficking organizations extends throughout Mexico.<sup>270</sup> It follows that the conflict wrought by these organizations could extend throughout the country. In fact, the areas of drug-related conflict appear to be expanding into new regions, including Mexico's southern border with Guatemala.<sup>271</sup> The widespread violence in Mexico, including fighting between drug trafficking organizations and between these organizations and the Mexican military, makes it less likely that individuals can relocate safely within the country. Furthermore, individuals seeking to relocate within Mexico will likely need to pass through areas where drug-related violence is occurring. However, the seriousness of the risk of persecution by relocating to a different part of Mexico will depend on the particular claimant's situation, including the available means of transportation.<sup>272</sup>

### 2. *Is the Agent of Persecution the State or a Non-State Agent?*

The type of agent responsible for the persecution or fear of persecution is imperative in determining whether there is a possibility of safe relocation within the country of origin.<sup>273</sup> Where fear of persecution emanates from a State agent, the analysis of internal flight or relocation alternative normally should not apply because this analysis arises only when there are areas in which the fear of being persecuted cannot materialize.<sup>274</sup> The concept of internal flight or relocation alternative should not be applied in such situations because it can be presumed that the State agent is permitted to act throughout the country.<sup>275</sup> It follows that where persecution is threatened by, for example, the police or military, there is a strong presumption against a finding of an internal flight or relocation alternative.<sup>276</sup>

In the context of refugee claims by Mexican citizens fleeing drug-related violence, the alleged agents of persecution include State-agents, such as the police and military.<sup>277</sup> With respect to persecution by Mexican authorities, including corrupt police officers and members of the military, the relevance of the internal flight or relocation alternative is uncertain. However, as

264 Marx, *supra* note 245, at 187.

265 *Id.* at 185. This “access prong” has a high consensus level among States and emphasizes that a relocation alternative must be realistic and practical. *Id.*

266 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 10; Marx, *supra* note 245, at 185. The “practically, safely and legally accessible” test must consider both physical and legal barriers. *Id.* Physical barriers include physical dangers, such as factional fighting and forms of harassment or exploitation. UNHCR, *Guidelines No. 4*, *supra* note 245, para. 10. Legal accessibility refers to the right to travel to, enter, and remain in the area of proposed relocation. *Id.* para. 12.

267 WOUTERS, *supra* note 76, at 106.

268 Marx, *supra* note 245, at 187.

269 Beittel, *supra* note 4, at 13.

270 *Id.* at 7, 14. Beittel provides an illustrative map documenting the areas of influence of Mexican drug trafficking organizations throughout Mexico. *Id.* at 7. As can be seen on the map, essentially all areas in Mexico are under some influence by one or more drug cartels. *Id.*

271 *Id.* at 11.

272 Marx, *supra* note 245, at 185. The reality is that many Mexicans fleeing the drug violence have escaped by walking across the border into the U.S. Ed Barnes, *Mexicans Facing Drug War Violence Could Seek Political Asylum in U.S.*, FOX News, Apr. 1, 2010, available at <http://www.foxnews.com/us/2010/04/01/mexicans-facing-drug-war-violence-seek-political-asylum/>. While the possibility of internal relocation may be feasible, it may not be realistic to expect such individuals to travel long distances to relocate in other areas within Mexico.

273 UNHCR, *Guidelines No. 4*, *supra* note 245, paras. 13-21.

274 *Id.* para. 13.

275 Marx, *supra* note 245, at 189. Furthermore, this concept should not be applied with respect to persecution by State authorities even where these authorities refrain from persecution in other areas of the country. *Id.* 187.

276 However, this is only a matter of principle and in practice does not preclude a finding that there is an internal flight or relocation alternative. Marx, *supra* note 245, at 189-90.

277 See *supra* notes 180-99 and accompanying text, discussing the agents of persecution in Mexico.

noted above, there is a presumption that these State agents are entitled to act throughout the country, which weighs against the feasibility of a safe internal relocation alternative.<sup>278</sup> Furthermore, according to the UNHCR, this presumption extends to situations where the feared persecution is condoned or tolerated by State agents.<sup>279</sup> This is important in the context of refugee status claims by Mexicans fleeing drug violence because corrupt government officials often tolerate criminal acts of drug trafficking organizations.<sup>280</sup> The UNHCR, however, recognizes that the possibility of internal relocation may be relevant if the State agent of persecution has no reach outside its localized region and the particular facts explain the government's failure to counter the localized persecution.<sup>281</sup> Hence, even in situations where the persecution feared by Mexican claimants emanates from State authority, the possibility of internal relocation may be relevant. The relevance of internal flight or relocation alternative is more probable with respect to allegations of persecution perpetrated by state and local Mexican police officers because these officers are not likely entitled to act outside their jurisdiction. Members of the Mexican military, as agents of the federal government, on the other hand, are likely entitled to act throughout Mexico, which could potentially render an internal relocation analysis irrelevant.

Since Mexican asylum-seekers also have a fear of persecution which emanates from non-State agents, namely members of drug trafficking organizations, an assessment of the relevance of the internal flight or relocation alternative with respect to non-State agents of persecution is necessary.<sup>282</sup> Where the feared persecution derives from a non-State agent, the analysis should focus on the persecutor's motivation, capacity to pursue the claimant in the proposed area of internal relocation, and the availability of protection by the State to the claimant in the proposed area.<sup>283</sup> Thus, there is a much greater probability that an internal flight or relocation alternative is relevant where the agent of the feared persecution is not affiliated with the State.<sup>284</sup> As discussed in Part V, there is evidence that the Mexican government is unable to protect its citizens from violence inflicted by drug trafficking organizations.<sup>285</sup> Additionally, state and local governments could arguably be considered unwilling to protect against such violence due to the pervasive corruption among government officials because these officials often tolerate violence that emanates from drug trafficking organizations.<sup>286</sup> The increasing drug-related violence in Mexico indicates that the Mexican government is unable to protect Mexican citizens from violence at the hands of the armed drug trafficking organizations.<sup>287</sup> This increasing violence, however, is concentrated in specific areas, which lends to the conclusion that even if the Mexican government is unable to protect citizens from drug trafficking organizations, this is only the case in certain locations.

### 3. *Is there a Risk of Being Persecuted or other Serious Harm Upon Relocation?*

When it comes to assessing whether the concept of internal flight or relocation alternative is relevant, the mere fact that the original agent of the feared persecution does not have a presence in the proposed area of relocation is not sufficient to establish that the claimant can relocate within his or her country.<sup>288</sup> There must be reason to believe that the agent of persecution's reach will not likely extend beyond the original localized area or at least will remain outside the area of internal relocation.<sup>289</sup> Under this assessment, the claimant must not only be safe from the feared persecution based on an enumerated ground in the proposed area of relocation, the claimant must also be safe from harm unrelated to the grounds enumerated in the 1951

278 See Marx, *supra* note 245, at 189-190.

279 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 13.

280 Beittel, *supra* note 4, at 9.

281 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 14.

282 See *supra* notes 180-88 and accompanying text, discussing non-State agents of persecution in Mexico.

283 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 15. The availability of protection by the State involves an assessment of the State's ability and willingness to protect the claimant from the persecution feared. *Id.*

284 For example, the U.S. Court of Appeals for the Eleventh Circuit has found that:

where the alleged persecutors are not affiliated with the government, it is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States, or at least to establish that such option is unavailable.

*Mazariegos v. Office of the U.S. Attorney General*, 241 F.3d 1320, 1327 (11th Cir. 2001).

285 See *supra* notes 173-99 and accompanying text.

286 See *supra* notes 189-94 and accompanying text. However, the fact that the government may tolerate persecution by non-State agents in one region does not necessarily mean that the authorities will tolerate similar persecution in other regions. This could be the case if many police officers in one region are corrupt, while police officers in a proposed region of internal relocation are not. State and local police forces in Mexico, however, are rife with corruption, which lends to the conclusion that similar tolerance may exist in other regions. Fainaru and Booth, *supra* note 46. Nonetheless, there is a much stronger argument that the Mexican government is unable, rather than unwilling, to protect against drug-related violence. This is especially true as a result of the federal government's recent crackdown on drug cartels. Beittel, *supra* note 4, at 2-3.

287 See *supra* notes 51-64 and accompanying text.

288 Marx, *supra* note 245, at 196; UNHCR, *Guidelines No. 4*, *supra* note 245, para. 18.

289 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 18.



With respect to persecution by drug-trafficking organizations in Mexico, the fact these organizations generally maintain influence and control within certain areas of the country favors the view that claimants must seek internal relocation prior to international protection.<sup>291</sup> However, due to the widespread corruption among Mexican government officials and the significant influence that drug trafficking organizations have throughout Mexico, a claimant may not be able to identify who is and is not collaborating with the agent of persecution.<sup>292</sup> Furthermore, the fact that a particular drug cartel may not be the predominant drug trafficking organization within certain areas of Mexico does not necessarily mean that they do not still have connections within these areas or the ability to infiltrate such areas. Moreover, drug cartels are known for reconfiguring by forming new alliances and engaging in turf wars to gain control over new territory within Mexico.<sup>293</sup> Therefore, there is no certain way to determine that a drug trafficking organization's geographic reach will not extend to the proposed area of relocation.<sup>294</sup> Additionally, this factor is important with respect to Mexican asylum-seekers because it relates to all types of serious harm that may be inflicted upon asylum-seekers. As discussed previously, it will be difficult for Mexican asylum-seekers to fit their refugee claims within one of the enumerated grounds of persecution.<sup>295</sup> The fact that this factor does not require this nexus between persecution and an enumerated ground could therefore be beneficial for asylum-seekers. While the asylum-seeker will still be required to establish this nexus in relation to the original persecution or fear of persecution, the same connection will not be required with regard to the proposed area of relocation.

### B. *The Reasonableness Test*

In addition to the requirement that there is no fear of persecution in the proposed area of relocation, the circumstances must be reasonable for the claimant to relocate to this area.<sup>296</sup> As stressed by the UNHCR, the analysis under the "reasonableness test" is not "based on what a 'reasonable person' person should be expected to do."<sup>297</sup> Rather, the analysis should focus on whether the internal flight or relocation alternative is reasonable given the claimant's personal circumstances and the conditions within the area of proposed relocation.<sup>298</sup> The UNHCR proposes that the reasonableness analysis address whether "the claimant, in the context of the country concerned, [can] lead a relatively normal life without facing undue hardship."<sup>299</sup> Under the UNHCR's view, the answer to this question must be based on an assessment of the claimant's personal situation, existence of past persecution, safety and security concerns, respect for human rights, and the prospect for economic survival in the proposed area of relocation.<sup>300</sup>

While the internal flight or relocation alternative is most likely relevant to Mexican asylum-seekers, particularly those who fear persecution by non-State agents, it may be difficult for these asylum-seekers to lead relatively normal lives in the proposed area of relocation without undue hardship. With regard to the personal circumstances of Mexican asylum-seekers, the examining authority should assess factors such as the age, sex, health, and family situation and relationships

290 Acceptance of this requirement is evident from State practice and has been endorsed in literature. Marx, *supra* note 245, at 196; UNHCR, *Guidelines No. 4*, *supra* note 245, para. 20. Additionally, if a claimant is returned to his or her country of origin, there must be certainty that the claimant will not be forced to return to the region of origin where the persecution or fear of persecution is located.

291 Beittel, *supra* note 4, at 7.

292 As one immigration attorney stated, "[t]here is no safe haven in Mexico; it's a fiction. The people in the country can't figure out who is and who isn't working for the dark side." Bensman, *supra* note 7.

293 Beittel, *supra* note 4, at 3-5. For example, the recent increase in violence suggests that there has been a realignment of control over drug trafficking routes. *Id.* at 3.

294 This issue may turn on whether the burden of proof for establishing the reasonableness of internal relocation lies with the asylum applicant or the authorities. 8 C.F.R. § 208.13(b)(3) (2010). Under U.S. regulations, if an asylum applicant has not established past persecution, then the burden is on him or her to establish that internal relocation would not be reasonable. *Id.* However, if the applicant has established past persecution or if the feared persecution is by a government, then the burden of proof lies with the authorities to establish "by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 208.13(b)(3)(i), (ii) (2010).

295 See *supra* notes 200-41 and accompanying text.

296 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 22. Many jurisdictions have adopted this "reasonableness test," which is also called an "undue hardship" or "meaningful protection" test. *Id.* For example, Canada has adopted the "undue hardship" test, which addresses whether it would be "unduly harsh to expect this person . . . to move to another less hostile part of the country." *Thirunavukkarasu v. MEI*, [1993] 109 D.L.R. (4th) 682, 687 (Can.). Although there is general agreement that the mere absence of a fear of being persecuted is not alone sufficient to establish that an internal flight or relocation alternative exists, there is little agreement on the amount of protection required by the proposed area of relocation. Marx, *supra* note 245, at 200.

297 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 23.

298 *Id.* The essential inquiry is whether, given all of the surrounding circumstances, it would have been reasonable to expect the claimant to relocate somewhere else within the country of origin. Marx, *supra* note 245, at 200.

299 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 23.

300 *Id.* para. 24.

of each individual claimant.<sup>301</sup> Social factors, such as a lack of family members or other close connections in the area of relocation may be particularly harsh for some claimants; in particular, this may affect their psychological well-being.<sup>302</sup> In some circumstances, claimants may actually have more family and social connections outside of Mexico, such as relatives in the U.S., than they do in the proposed area of relocation.<sup>303</sup> Additionally, psychological trauma from past persecution in Mexico may be relevant to assessing the reasonableness of internal relocation.<sup>304</sup> Return to the country where the persecution occurred could possibly cause further trauma for the claimant.<sup>305</sup> The claimant must also be safe and secure in the relocation area.<sup>306</sup> Therefore, if a proposed relocation site in Mexico is gripped with drug violence, this would not likely be a reasonable internal flight or relocation alternative.<sup>307</sup>

A proposed relocation site in Mexico must also be one where basic human rights standards are respected.<sup>308</sup> This, however, does not imply that any deprivation of any human right will be sufficient to deem the relocation site unreasonable.<sup>309</sup> Rather, the proposed relocation site should be assessed with a focus on whether rights that are fundamental to the individual, such that a deprivation of such rights would be sufficiently harmful, are protected.<sup>310</sup> Similarly, the socio-economic conditions in the proposed relocation area in Mexico are also relevant. The UNHCR proposes, “if the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative.”<sup>311</sup> However, a simple reduction in wages or standard of living may not be sufficient for a finding that the relocation is unreasonable.<sup>312</sup>

In conclusion, when considering whether the fear of persecution or other threats to life or security experienced by Mexican asylum-seekers could reasonably and effectively be avoided by relocating in another part of Mexico, the examining authority should give due weight to the personal circumstances of the claimant and conditions in Mexico. Given that much of the drug-related violence in Mexico has occurred in regions near the U.S. – Mexico border, the relevance of an internal flight or relocation alternative seems apparent. However, the drug-related conflict appears to be spreading to new territories. Furthermore, some Mexicans have and will continue to allege fear of persecution from State-agents, which makes the internal flight or relocation alternative less relevant. Additionally, even if an internal flight or relocation alternative is considered relevant, the reasonableness of the proposed relocation site must be adequately assessed. Whether relocation within Mexico is reasonable will ultimately depend on the claimant’s particular circumstances. Therefore, within the context of refugee status determination of Mexican asylum-seekers, the examining authority must not outright determine that an internal flight or relocation alternative is reasonable and provides effective protection simply because the current drug violence tends to be concentrated in specific regions.

301 *Id.* para. 25. Other factors that the UNHCR deems relevant include social vulnerabilities, ethnic, religious, and cultural considerations, language abilities, educational background, work opportunities, and past persecution and its effects on the claimant. *Id.* Similarly, the U.S. Code of Federal Regulations sets forth several factors to be considered when determining whether an internal flight or relocation alternative is reasonable. These factors include, “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; social and cultural constraints, such as age, gender, health, and social and familial ties.” 8 C.F.R. § 208.13(b)(3) (2010).

302 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 25.

303 For example, many Mexicans who have fled the drug violence have sought safety in the U.S. with their relatives. McKinley, *supra* note 3.

304 UNHCR, *Guidelines No. 4*, *supra* note 245, para. 26. In fact, in some jurisdictions the fact that a claimant has experienced past persecution alone is sufficient to avoid the internal relocation issue altogether. *Id.*

305 *Id.*

306 *Id.*

307 *Id.*

308 *Id.* para. 28.

309 *Id.* para. 26.

310 *Id.* para. 28.

311 *Id.* para. 29.

312 *Id.* Questions relating to economic considerations, such as access to employment, accommodation and social services, have given rise to controversy. Marx, *supra* note 245, at 200.

## VII. Complementary Protection: The Convention Against Torture as a Means of Protection for Mexicans Fleeing Drug-Related Violence

In 2005, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (hereinafter “Executive Committee”)<sup>313</sup> issued a Conclusion regarding complementary protection to the 1951 Convention.<sup>314</sup> The Conclusion “[a]knowledges that complementary forms of protection provided by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs.”<sup>315</sup> The Executive Committee further encourages States to provide complementary forms of protection to individuals who are in need of international protection but do not qualify for refugee status under the 1951 Convention.<sup>316</sup> One important treaty-based source of complementary protection under international human rights law is Article 3 of CAT, which prohibits the removal, or refoulement, of an individual to a State where substantial grounds exist for believing that he or she would be at risk of being subjected to torture.<sup>317</sup> Article 3 of CAT provides a potential alternative form of relief for Mexican asylum-seekers that do not satisfy the criteria under the refugee definition. In particular, CAT provides a potentially valuable alternative for individuals who are unable to establish the required nexus between the persecution feared and a protected ground and individuals who are ineligible for refugee status due to their past participation in criminal activities related to drug trafficking.

- 313 The Economic and Social Council, pursuant to a request by the United Nations General Assembly, created the Executive Committee as a governing body of the UNHCR. U.N. ECOSOC Res. 672 (XXV), Apr. 30, 1958; U.N. G.A. Res. 1166 (XII) (Nov. 26, 1957), para. 5. The Executive Committee has the authority to advise the High Commissioner in the exercise of his or her functions under the UNHCR Statute and on the suitability of providing international assistance to aid in solving specific refugee problems. G.A. Res. 1166 (XII) (Nov. 26, 1957), paras. 5(b), (c). The Executive Committee is also responsible for determining “the general policies under which the High Commissioner shall plan, develop and administer the programmes and projects required to help solve the [specific refugee] problems” and reviewing “the use of funds made available to the High Commissioner.” U.N. ECOSOC Res. 672 (XXV), *supra*, paras. 2(a), (b). With respect to the interpretation and application of the 1951 Convention, the Executive Committee adopts Conclusions on International Protection. WOUTERS, *supra* note 76, at 45. Although these Conclusions are not binding, they provide important soft-law guidance on interpreting and applying the 1951 Convention. *Id.* See also GOODWIN-GILL and MCADAM, *supra* note 10, at 296.
- 314 Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, Executive Committee Conclusion No. 103 (LVI) (2005).
- 315 *Id.* para. (h). However, the Executive Committee first calls upon the States Parties to interpret the refugee definition under the 1951 Convention and 1967 Protocol in a manner that provides protection under these instruments to all individuals that meet this criteria rather than resorting to a complementary form of protection. *Id.* para. (b).
- 316 *Id.* para. (i). However, the Conclusion fails to call upon the States Parties to treat beneficiaries of complementary forms of protection and refugees under the 1951 Convention equally. GOODWIN-GILL and MCADAM, *supra* note 10, at 296. It follows that the rights provided to refugees under the 1951 Convention do not necessarily apply to individuals granted other forms of complementary protection.
- 317 CAT, *supra* note 10, art. 3. As discussed at *supra* note 10, while this Article addresses only protection pursuant to CAT as a complementary form of international protection, there are several other potential mechanisms for protection of individuals who do not qualify for refugee status. In addition to the complementary forms of protection already discussed, temporary protection may also be a viable option for individuals seeking refuge outside their country of origin. Temporary protection is particularly relevant with respect to individuals fleeing drug-related violence in Mexico because it is often used as a form of relief when there is a mass influx of asylum-seekers fleeing generalized violence. MCADAM, *supra* note 10, at 3. However, according to the UNHCR, temporary protection provided in situations where there is a mass influx of asylum-seekers is not required if a State has the resources to process claims under the regular individual status determination procedures. GOODWIN-GILL and MCADAM, *supra* note 10, at 335. Based on the processing of individual asylum claims brought by Mexican asylum-seekers in the U.S. thus far, it does not appear that this situation has reached the level of a mass influx rendering individual status determination impracticable. Nonetheless, in addition to this mass influx response, it has been recognized by, among others, the High Commissioner for Refugees that the concept of temporary protection or refuge may be applied individually in situations where a person is fleeing generalized violence. *Id.* at 290. The concept of temporary protection rests on humanitarian grounds as a means for protecting individuals who may otherwise be ineligible for international protection. STEPHEN H. LEGOMSKY and CRISTINA M. RODRÍQUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1114 (5th ed. 2009). Although less beneficial than asylum, temporary protection has been described as “an important safety valve for the affected individuals.” *Id.* at 1121. Under U.S. law, temporary protected status (TPS) provides temporary immigration status for a minimum of six months and a maximum of eighteen months to eligible nationals of a State designated by the Secretary of Homeland Security. INA § 244(b)(2)(B); 8 C.F.R. § 244.2 (2010). The Secretary may designate a State or part of a State under certain circumstances, including where “[t]here is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state (or to that part of the state) would pose a serious threat to their personal safety.” INA § 244(b)(1)(A). The requirements for TPS eligibility include continuous presence in the U.S. since the effective designation date, admissibility as an immigrant, registration with U.S. Citizenship and Immigration Services (USCIS), continuous residence in the U.S. since a date set forth by the Secretary, and an absence of disqualification based on certain criminal conduct or other grounds. INA § 244(c)(2); LEGOMSKY and RODRÍQUEZ, *supra*, at 1117. Once an individual is granted TPS, he or she may not be removed from the U.S. and may work legally during the period of TPS. INA § 244(a)(1). The U.S. has granted TPS status to nationals of several States, including Angola, Burundi, Rwanda, Sierra Leone, Honduras, and Bosnia-Herzegovina. LEGOMSKY and RODRÍQUEZ, *supra*, at 1118. Additionally, the U.S. has granted a similar form of relief entitled “deferred enforced departure,” which is a presidential directive, to nationals of Liberia, Haiti and China. *Id.* See also USCIS, *Temporary Protected Status & Deferred Enforced Departure*, <http://www.uscis.gov/portal/site/uscis> (last visited June 23, 2010) [hereinafter USCIS]. While TPS may be relevant in the future to Mexican citizens seeking refuge in the U.S. after fleeing generalized drug-related violence, at this time Mexico is not a TPS designated country. USCIS, *supra*. Therefore, protection pursuant to TPS in the U.S. is not currently an option for Mexican citizens.

## A. Non-Refoulement Under the Convention Against Torture

At its conception, Article 3 of CAT was not conceived as an alternative means of protection for asylum-seekers that did not qualify for protection under the 1951 Convention.<sup>318</sup> However, the principle of non-refoulement contained in Article 3 of CAT provides a complementary form of protection for individuals who either do not qualify for refugee status or are excluded from such status for reasons such as past criminal activities.<sup>319</sup> The Committee Against Torture (hereinafter the “Committee”)<sup>320</sup> has repeatedly confirmed that Article 3 prohibits the removal of an individual to a State where he or she would be in danger of being subjected to torture, regardless of the individual’s conduct.<sup>321</sup> The non-refoulement provision in Article 3 of CAT provides an absolute right that permits no exceptions.<sup>322</sup> In contrast, the non-refoulement provision under Article 33 of the 1951 Convention permits a State Party to return “a refugee whom there are reasonable grounds for regarding as a danger to the security of the [host] country.”<sup>323</sup>

While the principle of non-refoulement in Article 3 of CAT guarantees absolute protection, unlike the protection provided by Article 33 of the 1951 Convention, the application of Article 3 is limited to acts that qualify as torture under the definition in Article 1 of CAT.<sup>324</sup> Article 1 of CAT defines “torture” as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>325</sup>

The meaning of torture and thus the prohibition of refoulement in Article 3 is constrained by three main requirements. First, only return to a place where there is a risk that an individual will be subjected to torture, rather than other forms of cruel, inhuman or degrading treatment or punishment, is prohibited.<sup>326</sup> Second, an act may only constitute torture if inflicted “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>327</sup> Essentially, only acts for which the authorities are in some way responsible, either because they acted or failed to act, fit within the definition of torture under Article 1.<sup>328</sup> This public requirement is a significant limitation on the protection provided by Article 3 with regard to acts carried out by non-State actors.<sup>329</sup> In such cases, the terms “consent” and “acquiescence” and the phrase “or other person acting in an official capacity” are particularly relevant.<sup>330</sup> Third, the definition of torture exempts pain or suffering arising out of lawful sanctions.<sup>331</sup>

318 GOODWIN-GILL and McADAM, *supra* note 10, at 301.

319 The Executive Committee’s 2005 Conclusion affirms that “relevant treaty obligations . . . prohibiting *refoulement* represent important protection tools to address the needs of persons who are outside their country of origin . . . but who may not fulfill the refugee definition under the 1951 Convention and/or its 1967 Protocol” and calls upon States to respect this fundamental principle. Executive Committee Conclusion No. 103 (LVI), *supra* note 314, para. (m).

320 The Committee Against Torture (the “Committee”) is a treaty-body under the United Nations charged with interpreting CAT at the international level. WOUTERS, *supra* note 76, at 429. The Committee monitors the implementation and enforcement of CAT by the States Parties. *Id.* An individual facing removal from a State Party to CAT that is contrary to Article 3 may bring a claim directly with the Committee. CAT, *supra* note 10, art. 22. However, this is only an option if the State Party has made a declaration pursuant to Article 22 of CAT, recognizing the competence of the Committee to receive and consider individual complaints. *Id.* In such cases, if the Committee finds a violation of Article 3, it will recommend that the State Party refrain from deporting the individual if it would be a breach of Article 3. WOUTERS, *supra* note 76, at 431. However, such recommendations are not legally binding on the State Party. *Id.* at 432.

321 GOODWIN-GILL and McADAM, *supra* note 10, at 301 & n.119. *See also* *Tapia Paez v. Sweden*, Apr. 28, 1997, Comm. No. 39/1996, U.N. Doc. CAT/C/18/D/39/1996, para. 14.5 (affirming that “[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention”).

322 Manfred Nowak, *Torture and Enforced Disappearance*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 151,160 (Catarina Krause and Martin Scheinin, eds., 2009).

323 1951 Convention, *supra* note 9, art. 33(2).

324 WOUTERS, *supra* note 76, at 302.

325 CAT, *supra* note 10, art. 1.

326 WOUTERS, *supra* note 76, at 438. The prohibition of *refoulement* contained in Article 3 exempts these other forms of treatment or punishment. *Id.* *See also* GOODWIN-GILL and McADAM, *supra* note 10, at 302.

327 CAT, *supra* note 10, art. 1. *See also* GOODWIN-GILL and McADAM, *supra* note 10, at 302; WOUTERS, *supra* note 76, at 445.

328 WOUTERS, *supra* note 76, at 445.

329 *Id.* In contrast, Article 33 of the 1951 Convention does not require such State involvement in prohibiting *refoulement*.

330 *Id.*

331 GOODWIN-GILL and McADAM, *supra* note 10, at 303.



The Committee has determined that the initial burden of proof for relief pursuant to Article 3 of CAT rests with the individual to set forth an arguable case.<sup>332</sup> The standard of proof under Article 3 requires that there be substantial grounds for believing that a person would be at risk of being subject to torture if sent to the proposed State of removal.<sup>333</sup> The Committee has interpreted substantial grounds to mean a “foreseeable, real and personal risk” of torture.<sup>334</sup> Such risk must go “beyond mere theory or suspicion” or “mere possibility of torture.”<sup>335</sup> The individual essentially has the burden of establishing that substantial grounds exist for believing that torture is practiced in the proposed country of removal and that the individual is personally at risk of being subjected to torture if removed.<sup>336</sup> Furthermore, as expressed in Article 3(2),<sup>337</sup> the existence of “a consistent pattern of gross, flagrant or mass violations of human rights” in the State concerned should be considered if applicable.

Although there are several limitations on the non-refoulement principle in Article 3 and the standard of proof requires a high threshold, this provision may provide a complementary protection mechanism for asylum-seekers. In particular, Article 3 provides alternative relief for those who are unable to demonstrate the requisite connection between persecution—in this case torture—and one of the five enumerated grounds and those who are excluded from refugee status under the 1951 Convention.<sup>338</sup> Given that many Mexican asylum-seekers fleeing drug-related violence to the U.S. face the potentially insurmountable obstacle of establishing the necessary relationship between persecution and one of the five enumerated grounds, protection pursuant to CAT is a worthwhile option to explore.

#### B. *Framework for Protection of Mexicans Fleeing Drug-Related Violence Pursuant to the Convention Against Torture in the United States*

The U.S., as a State Party to CAT, is prohibited under Article 3 from returning an individual to Mexico if substantial grounds exist for believing that he or she is at risk of being subjected to torture.<sup>339</sup> As a possible alternative to asylum and withholding of removal, CAT provides two specific advantages to Mexicans fleeing drug-related violence.<sup>340</sup> One advantage is that individuals that have participated in certain criminal activities, such as drug trafficking, are not excluded from relief.<sup>341</sup> Another benefit of protection under CAT is that it does not require applicants to establish that the harm feared is on account of one of the five enumerated grounds. As discussed in Part V, Mexican asylum-seekers fleeing drug-related violence face significant challenges in basing their claims on one of the five enumerated grounds, which is required for both asylum and withholding of removal. It follows that CAT provides a potentially more successful option than asylum or withholding of removal for some Mexicans seeking relief from drug-related violence.

However, there are also significant difficulties in establishing a claim under CAT.<sup>342</sup> Under U.S. law, an applicant for withholding of removal under CAT has the burden of establishing that it is “more likely than not” that he or she would be tortured if removed to the proposed country of removal.<sup>343</sup> Therefore, the burden of proof under CAT is higher than

332 WOUTERS, *supra* note 76, at 484. See *eg. A.S. v. Sweden*, Feb. 15, 2001, Comm. No. 149/1999, U.N. Doc. CAT/C/25/D/149/1999, para. 8.6; U.N. Committee Against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, Nov. 21, 1997, U.N. Doc. A/53/44, annex IX.

333 GOODWIN-GILL and McADAM, *supra* note 10, at 304.

334 *Id.* at 304 & n.141 (citing several decisions by the Committee Against Torture).

335 *Id.* at 304; *E.A. v. Switzerland*, Nov. 10, 1997, Comm. No. 28/1995, U.N. Doc. CAT/C/19/D/28/1995, para. 11.3.

336 Nowak, *supra* note 322, at 160.

337 CAT, *supra* note 10, art. 3(2).

338 GOODWIN-GILL and McADAM, *supra* note 10, at 303.

339 United Nations Treaty Collection, Ch. IV: Human Rights, No. 9: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdsg_no=IV-9&chapter=4&lang=en).

340 As with withholding of removal under U.S. law, protection under CAT prohibits only the removal of the individual to a State where he or she is more likely than not to be tortured. 8 C.F.R. § 1208.16 (2010). Therefore, protection pursuant to CAT does not grant any permanent resident status in the U.S. Furthermore, U.S. law does not prohibit the removal of an individual entitled to protection under CAT to a third country where the risk of torture does not exist. 8 C.F.R. § 1208.16(f) (2010).

341 Mathew J. Lister, *Gang-related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. R. 827, 850-51 (2008).

342 *Id.*

343 8 C.F.R. § 208.16(c)(2) (2010). According to U.S. regulations, in determining whether it is more likely than not that the person will be tortured upon removal, all relevant evidence should be considered, including past torture inflicted on the individual, the possibility of internal relocation within the country to an area where he or she will not likely be tortured, and evidence of “gross, flagrant or mass violations of human rights within the country of removal.” *Id.* If an immigration judge determines that an applicant for withholding of removal under CAT is more likely than not to be tortured in the country of removal, the individual is entitled to protection under CAT. 8 C.F.R. § 1208.16(c)(4) (2010). An applicant entitled to protection under CAT shall be granted withholding of removal. *Id.* However, if an applicant is subject to mandatory denial of withholding of removal under U.S. law then the removal shall be deferred rather than withheld. *Id.*

that required for asylum claims, wherein a well-founded fear of persecution requires a “reasonable possibility” of suffering persecution.<sup>344</sup> Additionally, protection under CAT has a restrictive public requirement, which requires some State involvement or responsibility.<sup>345</sup> As with applications for asylum and withholding of removal in the U.S., when evaluating whether an individual is entitled to protection under CAT courts will consider whether internal relocation to an area where there is not a likelihood that he or she will be subjected to torture is possible.<sup>346</sup> Mexican citizens could potentially claim protection under CAT based on the likelihood that they will be subjected to torture upon return to Mexico by State and non-State agents, including members of the Mexican military, police officers, and members of drug trafficking organizations. Although applicants from Mexico seeking protection under CAT must establish that it is more likely than not that they will be subjected to acts that rise to the level of torture, the primary obstacle for such applicants will be establishing the public requirement, or involvement of public officials, in such acts.<sup>347</sup>

### 1. *Allegations of Torture by Mexican Authorities*

The alternative of protection pursuant to CAT for Mexicans fleeing drug-related violence in Mexico has become increasingly relevant in light of recent reports exposing allegations of torture by the Mexican military and Mexican police officers.<sup>348</sup> In order for a public official’s infliction of pain or suffering to fall within the definition of torture, it is not necessary that the official be carrying out the official policy of the government.<sup>349</sup> However, U.S. courts have interpreted the phrase “acting in an official capacity” to require that the official must be acting “under color of law.”<sup>350</sup> Under this standard, there must be a connection between the official’s public position and the harmful conduct.<sup>351</sup> It follows that a successful claim pursuant to CAT requires the applicant to establish that any risk of torture by members of the Mexican military or Mexican police officers would be carried out under the color of law.

According to the U.S. Department of State 2009 Country Report on Human Rights Practices in Mexico, there have been numerous reports of torture by Mexican soldiers.<sup>352</sup> For example, in March 2008, soldiers in Baja California “detained and tortured 25 Tijuana municipal police, using electric shocks, beatings, and asphyxiation to force the police to make self-incriminating statements that were used to charge them with crimes.”<sup>353</sup> Two other reports of torture by soldiers seeking information occurred during a raid of a small village in the state of Guerrero.<sup>354</sup> The two victims of the reported torture are a fourteen year old and a young disabled man.<sup>355</sup> Several other incidents of torture by soldiers have been reported throughout the country since President Calderón deployed the military in the fight against Mexican drug trafficking organizations.<sup>356</sup> Additionally, according to reports, no soldiers have been convicted of these acts of torture.<sup>357</sup>

Claims by Mexicans alleging that they run a risk of being subjected to torture upon return to Mexico by members of the

344 See 8 C.F.R. § 208.16(c)(2) (2010) compared with § 208.13(b)(2) (2010). In the case of *I.N.S. v. Cardoza-Fonseca*, the U.S. Supreme Court described this lower threshold for establishing a well-founded fear of persecution as requiring no minimum percentage of probability that the individual would be persecuted. 480 U.S. at 431. The Court further noted that a well-founded fear of persecution could be established “even if there is only a slight, though discernable, chance of persecution.” *Id.*

345 CAT, *supra* note 10, art. 1; 8 C.F.R. § 208.18(a)(1) (2010).

346 8 C.F.R. § 208.16(c)(2) (2010). See *supra* Part VI for a discussion of the international flight and relocation alternative for Mexican citizens fleeing drug-related violence.

347 Due to the widespread and extremely cruel drug-related violence occurring in Mexico carried out by State agents and drug trafficking organizations, many Mexican applicants will likely be able to successfully establish that they will likely be subjected to acts that constitute torture if removed to Mexico. The complex issue is that the definition of torture requires that there be some government involvement. Therefore, Part VII focuses on satisfying the public requirement under CAT.

348 See *eg.* MEXICO COUNTRY REPORT, *supra* note 235; José Miguel Vivanco, *Time to Speak up on Military Abuse in Mexico*, Human Rights Watch, May 17, 2010, available at <http://www.hrw.org/en/news/2010/05/17/time-speak-military-abuse-mexico>; and *Uniform Impunity*, *supra* note 4; Steve Fainaru and William Booth, *Mexico Accused of Torture in Drug War*, WASH. POST, July 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/08/AR2009070804197.html>.

349 *Ramirez-Peyro*, 574 F.3d at 898 (quoting the original decision by the immigration judge in this case).

350 *Id.* (citing *In re Y-L*, 231 I & N Dec. 270, 285 (BIA 2002)). A public official “acts under color of law when he misuses power possessed by virtue of . . . law and made possible only because he was clothed with the authority of . . . law.” *Id.* at 900.

351 *Id.* at 898.

352 See MEXICO COUNTRY REPORT, *supra* note 235.

353 *Id.*

354 *Id.*; Fainaru and Booth, *supra* note 348.

355 MEXICO COUNTRY REPORT, *supra* note 235. These victims were allegedly “blindfolded, beaten, given electric shocks, partially suffocated with a plastic bag, and threatened with castration by soldiers.” *Id.*

356 *Id.* For example, there have been reports of torture by soldiers in Guerrero, Chihuahua, Michoacán and other areas throughout Mexico. *Id.*

357 According to a report by Human Rights Watch, the U.S. Department of State has confirmed continuing torture in Mexico but is ‘not aware that any official has ever been convicted of torture.’ Vivanco, *supra* note 348. Additionally, investigations of alleged torture inflicted by Mexican soldiers have taken place within military courts, rather than civilian courts, which raises concerns about independence and accountability. *Id.*

Mexican military have a potentially successful claim for protection under Article 3 of CAT. In such cases, past torture inflicted on the individual and the increasingly prevalent reports of torture inflicted by the Mexican military provide support for claims of protection under CAT. Claims based on a danger of being subjected to torture by the military upon return to Mexico will likely have a greater chance of success than claims based on a risk of torture inflicted by non-State actors.<sup>358</sup> However, the applicant must still establish that military officials would be acting under color of law with regard to a risk of torture. In most circumstances involving a danger of torture inflicted by the military, this standard for the public requirement of the definition of torture is likely satisfied.

In addition to allegations of torture perpetrated by the Mexican military, there have been reports of torture inflicted by Mexican police officers.<sup>359</sup> Some of these reported acts of torture have directly involved actions by police officers, while others, as discussed below, have indirectly involved officers through their consent or acquiescence to violence by non-State agents.<sup>360</sup> The widespread corruption among Mexican police officers, including their connections with drug trafficking organizations, has resulted in police officers carrying out crimes on behalf of drug trafficking organizations in Mexico.<sup>361</sup> In such cases, the infliction of pain or suffering is at the hands of police officers, as public officials, which is the most direct form of State involvement because the public official is actually committing the act.<sup>362</sup> The applicant, however, must still establish that an officer is acting in his or her official capacity, or under color of law.

With regard to police officers, considerations such as whether the officers are on duty and in uniform, the motivations behind their conduct, and whether they are able to access a victim, or potential victim, due to their public position are important.<sup>363</sup> While the “official capacity” inquiry will depend on the particular facts of each case, where the actions of corrupt Mexican police officers are directly involved, it appears likely that the required connection between their public position and their harmful conduct will be fulfilled. Drug trafficking organizations seek the cooperation of Mexican police officers because of their public position.<sup>364</sup> When police officers are carrying out violence on behalf of drug cartels they are generally still acting in official capacity because they use their authority to benefit the cartels.<sup>365</sup> Therefore, Mexican citizens who are able to establish that it is more likely than not that they will run the risk of being tortured by Mexican police officers if removed to Mexico have a potentially successful claim under CAT.

## 2. *Non-State Actors and the “Consent or Acquiescence” Requirement*

In situations where the alleged likelihood of torture would be perpetrated by non-State agents, namely drug trafficking organizations, the public requirement is more difficult to establish.<sup>366</sup> In such cases, the applicant must establish that the non-State agents acted with the consent or acquiescence<sup>367</sup> of a public official or other person acting in an official capacity.<sup>368</sup> Based on the pervasive corruption among Mexican police officers and their close ties to drug trafficking organizations, the “consent or acquiescence” requirement can be met even where the public official is not directly involved.<sup>369</sup> Since non-State agents have perpetrated much of the drug-related violence in Mexico, including allegations of torture, the consent or acquiescence of Mexican public officials to such violence will be imperative for many claims by Mexicans under CAT. U.S. regulations define acquiescence within the meaning of the definition of torture as “requir[ing] that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility

358 The fact that reportedly none of the soldiers responsible for the alleged acts of torture in Mexico have been convicted further supports the argument that there are substantial grounds for believing that the individual will be in danger of being subjected to torture since these agents of torture have not been held accountable.

359 MEXICO COUNTRY REPORT, *supra* note 235.

360 *See id.* For example, in what has been referred to as the Atenco Operation, a confrontation occurred between local vendors and state and federal police, which resulted in the killing of two individuals and detention of more than forty-seven women, many of whom were allegedly raped by police officers. *Id.* According to the U.S. Department of State, none of the more than 2,000 police officers who participated in the operation were convicted. *Id.*

361 *See Ramirez-Peyro*, 574 F.3d at 898.

362 As opposed to instigating, consenting, or acquiescing to acts that constitute torture. WOUTERS, *supra* note 76, at 445-46.

363 *Ramirez-Peyro*, 574 F.3d at 901.

364 Beittel, *supra* note 4, at 9.

365 *Id.*

366 WOUTERS, *supra* note 76, at 445.

367 Another potential level of involvement of Mexican public officials when they are not personally carrying out the torture is instigation. Instigation means “to bring about, to incite or to encourage, to induce or to solicit, to help or support.” WOUTERS, *supra* note 76, at 446. However, with respect to corrupt Mexican police officers, the more likely levels of involvement in torture perpetrated by drug trafficking organizations are consent or acquiescence.

368 *Id.* at 445.

369 For example, the police force in Nuevo Laredo have reportedly kidnapped Gulf cartel competitors and turned them over to Los Zetas who have reportedly tortured them for information about their drug trafficking operations. Cook, *supra* note 11, at 9.

to prevent such activity.”<sup>370</sup> Additionally, U.S. courts have interpreted “acquiescence” to mean that an applicant must show “willful blindness” on the part of the government agent toward the torture by a third party.<sup>371</sup> In a recent case, the U.S. Board of Immigration Appeals confirmed that if a government official consents or acquiesces to torture by a drug trafficking organization, the official would not only be following a personal pursuit, he would also be breaching his or her obligation to intervene.<sup>372</sup> The essential role of police officers is to prevent harm, especially serious harm such as torture.<sup>373</sup> Therefore, an officer’s willful failure to act to prevent harm implies that such acquiescence will occur within his or her official capacity.<sup>374</sup>

The claim that Mexican drug trafficking organizations have effectively taken control over local government institutions through corruption is a potentially successful argument for satisfying the public requirement of the definition of torture under CAT.<sup>375</sup> The fact that state and local Mexican police forces are rife with corruption, despite the federal government’s efforts to weed out such corruption, provides support for Mexican claims under CAT. Although it is possible to claim protection under CAT based on a danger of being subjected to torture by drug trafficking organizations, the success of such claims will be very fact intensive. Even in cases where there is a clear danger of being subjected to acts that may constitute torture, the public requirement is a difficult hurdle to overcome. CAT was intended to provide protection only where government authorities are somehow involved. Therefore, Mexican applicants that are able to connect their alleged risk of torture upon return to Mexico to actions directly involving corrupt police officers or other public officials will have an advantage over claims based on indirect involvement.

Overall, considering the difficulties that Mexican asylum-seekers will likely face in seeking protection under the 1951 Convention, CAT may be a valuable alternative to asylum and withholding of removal. CAT, however, presents its own set of difficulties for Mexicans fleeing drug-related violence, including a higher burden of proof and a public requirement. Furthermore, as with claims for refugee status, claims under CAT may be denied if there is a possibility of internal relocation to an area where it is not likely that the individual will be subjected to torture.<sup>376</sup> It follows that where the danger of torture is localized, protection under CAT may be barred. As discussed in Part VI, whether internal relocation is reasonable will depend on, among other factors, the geographic reach of the agents of persecution, or in the case of CAT, the agents of torture.<sup>377</sup> The existence of an internal relocation alternative also presumes that there is an area within the proposed country of removal where the State is willing and able to provide protection to the applicant.<sup>378</sup> Complementary protection pursuant to CAT will be of most value to Mexican applicants who are unable to establish the required connection between the feared persecution and a protected ground and those who are excluded from refugee protection due to past criminal activity.

## VIII. Conclusion

The 1951 Convention and 1967 Protocol were intended to provide protection to a limited number of individuals who meet the definition of a refugee. The restriction of refugee status to individuals who are able to demonstrate the required nexus between their well-founded fear of persecution and one of the five enumerated grounds is a significant and possibly insurmountable obstacle for Mexican asylum-seekers fleeing drug-related violence. However, members of certain sectors of society, namely journalists and police officers, in Mexico that have been specifically targeted by drug-related violence perpetrated by State and non-State agents have potentially successful claims for refugee status on account of either their political opinions or membership in a particular social group. Nevertheless, due to the contentious issue of whether drug-related violence may serve as a basis for refugee status, complementary protection under CAT may be a worthwhile alternative for Mexican citizens seeking international protection. With regard to Mexican asylum-seekers, the issue of internal flight

370 8 C.F.R. § 1208.16(a)(7) (2010).

371 See *Ramirez-Peyro*, 574 F.3d at 898; *Mouawad v. Gonzalez*, 485 F.3d 405, 413 (8th Cir. 2007); *Zheng v. Ashcroft*, 332 F.3d 1186, 1188-89 (9th Cir. 2003). Circuit courts have accepted this broader “willful blindness” interpretation of acquiescence as opposed to the Board of Immigration Appeals’ narrower “willful acceptance” approach. Fanesi, *supra* note 202, at 322-23.

372 *In re Ramirez-Peyro* (BIA Mar. 18, 2010), available at <http://www.centerforinvestigativereporting.org/files/Lalo%20BIA%20decision%203-18-2010.pdf> (the Board of Immigration Appeals found that a Mexican citizen would more likely than not be subjected to torture by Mexican law enforcement officers and/or drug trafficking organizations and remanded the decision to the immigration judge).

373 *Ramirez-Peyro*, 574 F.3d at 905.

374 *Id.* The court in *Ramirez-Peyro* further noted that “[t]he officials who watch or engage in torture not under color of law and fail to act to punish the perpetrators are not intervening, in part, because to do so would require acknowledgement of extensive corruption in the police force.” *Id.*

375 For example, one U.S. immigration attorney reportedly obtained protection under CAT for his Mexican client by arguing that through corruption, drug cartels had taken control over the local government in Matamoros, Mexico. Bensman, *supra* note 7.

376 8 C.F.R. § 208.16(c)(2) (2010).

377 Although the internal flight or relocation analysis provided by UNHCR does not specifically address CAT, the general concepts of safety and reasonableness of this analysis are relevant to the possibility of internal relocation under CAT.

378 WOUTERS, *supra* note 76, at 493-94.



or relocation alternative is relevant and could potentially bar relief pursuant to the 1951 Convention and CAT because the drug-related violence in Mexico is primarily concentrated within certain areas of the country. Therefore, Mexican citizens who have fled the drug-related violence in their home country to seek asylum, withholding of removal and relief pursuant to CAT in the U.S. will face substantial difficulties meeting their burden of proof. Claims for refugee status based on emerging forms of persecution, such as drug-related violence, and applications for protection under CAT require new and creative approaches to satisfying the requirements for each form of relief. Additionally, it may be necessary for both Mexican citizens seeking refuge in the U.S. and the U.S. government itself to explore complementary mechanisms of protection under international human rights law and pursuant to humanitarian grounds to protect individuals fleeing the ongoing endemic drug-related violence in Mexico.<sup>379</sup> ■

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379 *See supra* notes 10 and 317 for a discussion on additional mechanisms of international protection, namely protection pursuant to CRC and ICCPR, as well as, temporary protection under U.S. law.