

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

Ralph E. Guderian of the GMT Law Firm LLC in Chicago joined the Section Council last year. His detailed article, "Most of the people from Central America entering and seeking asylum in the United States will not be successful" is included in this issue of *The Globe*.

The International and Immigration Law Section Council is not the only section whose interests touch on immigration concerns and international issues. Included in this issue are: "Canadian court deems Uber arbitration clause invalid" by Reagan Quynn that first appeared in the

April 2019 issue of *In the Alternative*; "Tips from an international family lawyer" by David N. Schaffer from the May 2019 issue of *Family Law*; and "The Germanic system of justice: Learning about an approach focused on human dignity" by Elizabeth Clarke from the April, 2019 issue of *Child Law*.

As always, thank you to our authors. ■

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Most of the people from Central America entering and seeking asylum in the United States will not be successful

BY RALPH E. GUDERIAN

Introduction. My research shows that the ultimate granting of asylum in the United States for people currently fleeing from the Central American countries of Honduras, Nicaragua, Guatemala, El Salvador and Costa Rica appears to be the exception rather than the norm. Of

course each case needs to be analyzed under its own particular facts. These countries suffer with high rates of poverty, inequality, violent crimes, gangs and illegal drugs. And the asylum statute is not a general hardship statute, nor is it a remedy for generalized crime and violence in a

country. Only particular specified human rights violations—those relating to race, religion, nationality, membership in a particular social group or political opinion are covered.

Also, these countries over the years

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have undergone a partial change from dictatorship toward democracy, from violence toward the preservation of human rights. This being the case most of the Central American people currently crossing the United States/Mexican border into the United States to seek asylum will either, in several years due to the backlog in the immigration court, be returned to Central America or remain illegally in the United States. It appears that some mechanism needs to be implemented to screen the validity of a person's asylum claim—fear of persecution on returning—before the person crosses over the border that is if he or she is caught.

Streets paved with gold. Forty seven thousand children from Guatemala, El Salvador and Honduras came over the Mexican border in 2014 by way of coyotes (people hired to bring them across the border—they profit in human smuggling). They came over under the mistaken belief that the “Dream Act” would allow children if unaccompanied by an adult to remain in the United States legally. This mistaken belief was fostered by coyotes.

The belief that the streets in the United States are paved with gold still prevails along with other reasons for coming to the United States. Arrests of families crossing the U.S. –Mexican border illegally in the past several months hit a record. From October through February border agents arrested 136,150 people traveling in families at the southern border. These figures exceeded the record for a 12 month period—107,212 people were arrested during the federal fiscal year that ended in September 2018.

Most of the migrant families came from Central American countries. They typically don't try to evade capture after crossing the border and instead surrender to border agents to seek asylum. There is a 30 day limit on jailing children, after which they are released into the United States with their parents while their claims are

adjudicated. With the current backlog of more than 829,000 cases in immigration court, a ruling could take years.

Poverty rates high—absolute privilege, absolute poverty. Poverty rates have risen since the early 1980s in Central America. In the 2000s, the level of poverty in Honduras was extremely high and it was very high in Nicaragua, Guatemala and El Salvador, however it was low in Costa Rica.

This high level of poverty was due in part to a policy of absolute privilege, absolute poverty. In all of the preceding five countries the distance between the incomes of the richest 10 percent and that of the poorest 10 percent is enormous reaching 51 to 1 in Guatemala. In El Salvador the rich often live in mansions with fifteen-foot walls in the wealthiest neighborhoods shutting out their country's poverty, and maintaining their status of wealth and privilege.

Additionally, as will be explained later, such persistent poverty exists in many of the countries in part because of the strict adherence to neo liberal economic policies.

Violent crime rates high—gangs and drugs. Also in all of these five countries violent crime is rapid. Crimes involving physical harm from homicide to armed robbery occur. El Salvador is the most violent country in the hemisphere. Its murder rate per capita is extremely high. Much of the crime is conducted by organized crime syndicates resulting from the demand for illegal drugs. This demand comes from the United States, Europe and also within Latin America. Billion dollar profits for the drug-traffickers make the frequent lethal risks involved from cartel infighting and anti-drug interdiction operations worthwhile.

The “War on Drugs” which has stressed drug supply side reduction has not solved this drug problem. Also addressing the demand side of the supply-demand equation—improved law enforcement measures, drug education, meaningful

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treatment programs and decriminalization has not solved the problem. Thus it appears that this drug problem will continue at least until international demand of the cocaine- heroin vice diminishes or becomes outmoded or no longer considered in fashion by the consuming public.

Gangs also conduct much of the crime. Youth gangs (known as “maras”) emerged in the 1980s among the children of Central Americans who had migrated to Los Angeles. In the 1990s, some of these youths began to return to Central America. They took the gangs with them to El Salvador, Guatemala and Honduras in particular. Estimates of total gang membership in Central America ranged from 70,000 to 300,000 in 2006. Though most were small neighborhood outfits, some turned to serious crimes, including extortion and drug dealing and drug trafficking.

Violence and an increase in the amount of territory controlled by gangs affect people’s human rights--right to life, physical integrity, education and free movement.

In 2012 in El Salvador the Catholic Church brokered a truce between the Mara Salvatrucha and Barrio 18 gangs which resulted in reducing the death toll by 50%. However kidnappings and extortion remained epidemic.

In El Salvador, Honduras and Guatemala most people struggle to survive under the merciless watch of criminal gangs that control what people do and can’t do, what they can talk about and even where they can walk. Everyday decisions like on which road to walk or whether to attend school, can be a life or death decision. Children are often confined to their homes out of terror impinging upon their ability to enjoy their right to freedom of movement, to education and to recreation and play.

They force bus drivers and shop owners, sex workers (prostitutes) and anyone else to pay hefty fees for the “privilege” of not being killed. Extortion is the blood money that fuels the violence. It is the financial lifeblood of gangs.

In Honduras you can’t walk around freely. At any point there can be a shootout where young people are killed by gang members. In El Salvador each neighborhood is controlled by a criminal gang—“mara”. (note—this

is also true today in Chicago) One way they control the population is through extortion—hefty “taxes” that individuals and businesses are forced to pay. Missing a payment can mean a death sentence.

Some of the deaths in these five countries are the result of domestic violence or of robberies. Allot of the killings seemed to have a sexual motive. They kill them because they are women and because they are poor. Much of the crime involves the poor robbing and/or killing the poor.

They also kill because they think they can get away with it. This is the result, as will be explained further later, of criminal impunity—exemption from punishment—by the government.

In nearly every country in the region, a lethal combination of inequality, poverty, urban migration and unemployment has been fueling skyrocketing rates of crime.

Land of beauty. It should also be noted that Central America appears as a land of beauty. Majestic peaks and deep valleys characterize upland Guatemala. Richly diverse rain forests make Costa Rica a destination of ecotourism. The tropical waters of the Caribbean coasts of Honduras and Nicaragua attract visitors. They export basically bananas and coffee. And Spanish is the predominant language.

Dictatorship toward democracy. Communism collapsed and democracy emerged in Eastern Europe at the beginning of the 1990s. There was also a slow inexorable shift in Central America away from authoritarianism in the countries where it was occurring toward constitutionally elected civilian governments. The pendulum between dictatorship and democracy had stopped. Central American countries were becoming more democratic--not just in regard to voting but also toward the preservation of human rights, justice and basic freedoms.

However, Honduras, Nicaragua, Guatemala, El Salvador and Costa Rica faced some formidable obstacles before they could become democratic like in the United States and to a varying extent they still face such obstacles today. They must struggle, as pointed out earlier, against poverty, inequality and an external threat to the rule of law in the form of drug trade.

Most of Central America was conquered and colonized through violence. This violence was based on power not laws. It was political and/or military. It was planned, deliberate, carried out by organized groups of society against members of other groups. It was used to make a point. It was committed by the institutions entrusted with the protection of its citizens. And it was justified by large numbers of people. Military regimes, dictatorships and democracies were set up with swings between them. Such military regimes would often intimidate, imprison, maim, and kill.

Conditions had existed in Central America for Guerrilla revolutionary movements. There was (1) sustained peasant support; (2) maintenance of sufficient military strength to endure army attacks and to maintain a more general offensive; and (3) stripping the incumbent government of all legitimacy and replacing it with their movement.

In Nicaragua the Sandinistas had revoked the civil liberties of the Nicaraguan people, depriving them of any legal right to speak , to publish, to assemble or to worship freely, independent newspapers had been shut down. There was no longer any independent labor movement nor any right to strike.

Wars and genocide had occurred. Human rights violations ranging from an individual’s freedom of movement to the right to life had occurred. Some such human rights are: the right to life, freedom of thoughts, conscience, and religion; freedom from torture and cruel, inhuman, or degrading treatment or punishment; freedom from forced medical or scientific experimentation; freedom from slavery and servitude; the principle of equality before law; and the principle that criminal laws cannot be applied retroactively.

In the 1990s a conservative government was elected in Nicaragua and comprehensive peace settlements and democratization took place in El Salvador and Guatemala. Although they avoided armed struggle, Honduras and Costa Rica were strongly battered by events taking place in neighboring countries.

Market led globalization. Market –led globalization was also occurring in Central America in the 1990s. The international marketplace was focused on. Globalization

is a process that involves (1) increased human mobility and interaction, (2) creation of a single integrated market, and (3) development of common norms and values.

Neoliberal economic policies. Central American countries' transitions to democracy and market-led globalization, was accompanied by changes in economic policy as well. The dominant economic model of the time, the so-called Washington Consensus, demanded strict adherence to neoliberal economic policies.

Such policies include cuts in government bureaucracy and social services, privatization of former government enterprises, the redirection of credit away from the peasantry into large private export activities and a variety of other socially regressive policies designed to stimulate exports.

The opening up of the economy to foreign trade and businesses often leaves local producers unable to compete against global producers and forces them out of business. With emphasis placed on exports, farmlands are often converted from supplying local needs to growing "cash crops" for export. Consequently, economies that were once self-sufficient in feeding their populations start importing food items and unemployment and poverty increase.

Such neoliberal economic policies were also implemented to earn foreign exchange and ultimately service the region's enormous foreign debt. Competing for investments, governments try to make their countries more attractive to investors by cutting down the "cost of labor". Reducing the cost of labor means lowering wages, benefits, and a whole range of labor standards. Willing to sacrifice labor rights, governments discourage or even actively prevent unionization. Declining wages force poor families to take their children out of school and put them to work often in dangerous and unhealthy conditions.

The social violence of peace replaced the political violence of war. Neoliberalism had a significant impact on the region. Increasing disparities in wealth led to rising disenchantment among the new democracies in the region and in Costa Rica as well. The social violence of peace replaced the political violence of war, contributing to increased

levels of insecurity and disillusionment in the democratic process. As the twenty-first century wears on, Latin Americans of the last generation have experienced little or no improvement in their per capita income and that abject poverty raging at more than 40 percent remains a serious problem for many.

Inequity has increased, as the "rich get richer and the poor get poorer". For this reason polls indicate that over half of the region's peoples have taken on a cynical view of democratic government claiming that they would support an authoritarian or any other similarly-styled government, provided that it would resolve the endemic economic problems of the day.

Democracies do generally outperform dictatorships in regard to social progress, but not so much with regard to economic growth, employment and poverty reductions.

Also, it should be noted that the race to the bottom strategy of reducing the cost of labor, so as to also more effectively compete in the international marketplace, did not foresee the larger participation in the world market of India and China, whose labor costs are much lower than those prevailing in Latin America.

Poverty, inequality and drug trade. Today all five of these countries are still struggling against poverty, inequality and an external threat to the rule of law in the form of drug trade. None of these democracies have achieved anything close to United States democracy.

Honduras. Today Honduras president Juan Orlando Hernandez is neoliberal. Honduras failed to consolidate democracy. The neoliberal model greatly restricted Honduras' ability to respond to the profound socioeconomic crisis plaguing the country-- extreme poverty—one half of the population lives in poverty, migration to the United States in search of work, crime is rampant and "social cleansing" occurs by state police and private security forces. They failed to recognize the changing nature of crime—street gang threats were increasingly displaced by organized crime related to drug trafficking.

Nicaragua. Nicaraguan president Daniel Ortega Saavedra is non neoliberal. He is anti-democratic, runs the country by decree

as an autocrat resulting in a repressive and corrupt dictatorship. The downsizing of government, cut-backs in social services, privatization of state enterprises, the credit emphasis on agro-export rather than peasant production of domestic foodstuffs, and so on, combined to exacerbate the misery of ordinary people in Nicaragua. Unemployment, underemployment, crime rates, drug addiction, domestic violence, and homelessness (especially among children) soars and persistent poverty exists.

Guatemala. Guatemalan president Jimmy Morales is neoliberal. Guatemala remains a violent society that still has far to travel before winning a meaningful peace. Much remains to be done to stabilize the political system which is severely corrupt—fifty people were killed in pre-election violence in one election, curtail social violence, and improve the lot of the very numerous poor—more than one half the population lives below the poverty line. Little has been done to address the rights of Guatemala's large indigenous (from other countries) population and marginalization and systematic racism persists. Rising crime rates associated with the drug trade and organized crime networks occurs. Human rights abuses and intimidation of human rights workers persists.

El Salvador. El Salvador's president Sanchez Ceren is non neoliberal. Neoliberal policies in El Salvador had yielded little socioeconomic progress. The human rights climate remained somewhat troubled and evidence persisted of potential for violent political repression. Mano dura (iron fist) policies failed to reduce crime. Violent crime, corruption, impunity and political polarization threatened to derail El Salvador's peace. The politicization of key institutions, such as the judiciary and the electoral tribunal, hampered further democratic consolidation. The economy had grown dependent on remittances (money sent in from people in the United States) which were being reduced. There was growing budget deficits and declines in exports and jobs. And nearly half of Salvadorans live below the poverty line.

Costa Rico. Costa Rico's president Alvarado Quesada is non neoliberal. The

state reduced its promotion of equality—enhancing economic policies and human development. Such policies and their effects had once distinguished Costa Rica from its Central American neighbors and for decades validated the country's exceptional myth. Not only had this economic transformation begun to affect citizens' well-being—urban middle class became poor, social spending dropped, but it had surprisingly rapid effects on a once stable political party system. There was tension between those who wished to continue the neoliberal model and those who wished to preserve Costa Rica's welfare state. It is an increasingly polarized society. Twenty four percent of the population is below the poverty line.

Governmental corruption.

Governmental corruption can lead directly to human rights violations. And corruption exists in all five countries with the least being in Costa Rica. There also exists shortcomings of the police—numbers inadequate, training inadequate and salaries low. Thus crimes are often neither reported nor properly investigated. There is also poor performance in the criminal justice system. All of which can also lead directly to human rights violations.

Criminal impunity. Criminal impunity—exemption from punishment by the government—is also rapid in these five countries—Honduras, Nicaragua, Guatemala, El Salvador and Costa Rica. Thus people commit crimes and violate human rights because they think that they can get away with it. Telling the whole truth and nothing but the truth and holding former repressors accountable is easier said than done, particularly when former violators and their supporters remain powerful political actors. Only days after the United Nations sponsored truth commission in El Salvador released its report condemning dozens of military and civilian human rights violators and urging they be held accountable, the El Salvadoran government passed a sweeping general amnesty law. Thus the continued high level of violent crimes in El Salvador, from gang related violence to kidnapping rings, is inextricably linked to consistent patterns of impunity for former violators.

Inadequately trained and corrupt

border authorities. Additionally inadequately trained border authorities can lead to human rights violations. Screening for possible asylum claims is inadequate for both United States and Mexican governments. In the United States the use of expedited removal procedures by border authorities without adequate training and guidance can lead to what is, in effect, summary deportation of people who may have protective claims. In Mexico, Central Americans are routinely deported without being properly informed of their right to seek international protection.

Also there is an overall attitude by the Department of Homeland Security (DHS) officers, along the United States-Mexican border, that asylum seekers should not be given the due process required under federal and international law. Instances have been reported of border patrol agents physically preventing asylum seekers from crossing into United States territory to claim fear of return, as well as reports that border patrol agents coerce asylum seekers into recanting their expressions of fear by threatening to separate them from their children. Also, as will be explained later, government officials dismiss outright asylum claims involving domestic violence, persecution by gangs, and harm based on particular social groups generally.

Physical environment hazards. Also physical environment hazards can lead to human rights violations. Central America's physical environment is subject to hazards such as volcanic eruption, earthquakes, Atlantic hurricanes, Pacific typhoons as well as winter storms and wildfires. Such hazards clear the way for human rights violations.

Amnesty International reports of human rights violations. Amnesty International reported on the five countries current human rights violations by the governments in addition to gangs. In El Salvador security forces (soldiers and officers) beat a 16 year old boy to confess to participation in a shootout and being a lookout for gangs, in what seems to be a desperate attempt to show that officials are trying to tackle the shocking levels of violent crime in the country. They paraded him handcuffed and barefoot in front of a television crew that was covering a shootout

from earlier in the day.

The boy said soldiers poured bottles of water into his mouth and nose, put his head in a puddle, stuffed sand into his mouth, jumped on his stomach, then kicked, punched and threatened to kill him unless he confessed.

In 2015 there were rocketing levels of discrimination and gender based abuse, intimidation and violence against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people not just by gangs but also from law enforcement officers and security forces in El Salvador, Guatemala and Honduras.

In El Salvador police officers hit a 32 year old transgender woman. They hit her with their guns and told her she had a month to leave.

In Honduras you can't walk around freely. At any point there can be a shootout where young people are killed by gang members or soldiers who are often colluding with gangs. In El Salvador security forces have been given enhanced powers—war on gangs—however, evidence has emerged of increasing human rights violations committed by police and military members including extrajudicial executions in two separate massacres.

A 2013 study of unaccompanied and separated children from Central America shows that 48% experienced or have been threatened with serious harm by organized armed criminal actors and state actors within the community. There was also lack of sufficient protection by the state.

In Honduras a 13 year old boy and his 7 year old brother were killed by local gang members. The 13 year old and his friend had been badly beaten before being shot to death in "clandestine houses" used by the gangs called "casa locas". The 7 year old's decomposed body was found wrapped in a mattress. The boys' mother testified against at least five men who were arrested for the murders and was put into a witness protection program.

The mother and two other children then fled Honduras to Mexico and had to return to Honduras to the same neighborhood since the mother had lost the papers proving the family's legal status as refugees in Mexico.

Two weeks later one of the two sons received anonymous text messages threatening to kill the whole family if they did not leave the neighborhood within nine days. They left and were granted refugee status in Mexico.

In San Salvador a 14 year old girl and a friend were warned by several local gang members not to return to school which was in a territory controlled by a rival gang. In April 2016 the 14 year old girl and her friend decided to go to school anyway and were forced into a car by the same local gang members and held captive in a house for 4 days. During that time the girls were given no food but were forced to consume cocaine and ecstasy and to drop off drugs for sale in certain neighborhoods.

The girls escaped and left home to go live with relatives in different parts of the country and never returned home. The 14 year old has not returned to school or spoken with her friends. She spends most of her time inside because she is afraid of seeing the gang members who abducted her. She is now starting to take some classes and hopes to return to school and eventually become a doctor.

In El Salvador, in February 2016, gang members stopped a car in which a 19 year old girl had been given a lift back from school where she had been studying architecture. One of the boys in the car was forced out and they were instructed to drive off. They heard gun shots and later told that the boy had been shot dead. That same night the 19 year old girl received calls from an unidentified person who ordered her not to tell anyone what had happened and that she had 24 hours to leave the neighborhood or she would be killed.

She fled and has been living with different relatives in El Salvador ever since. She has not been able to return to her studies in architecture, has cut off contact with most of her friends, and barely leaves the house.

In 2016, a lady age 30 testified against the gang members who had abducted and killed her brother, while he was working collecting fares on the buses known as “rapiditos”, in May 2014, in Honduras. She was put in a protected witness program however she began being harassed in the street—people were hissing “snitch” when she passed by and threatened to kill her. One night, in May

2016, unidentified men threw a firebomb at her house in the middle of the night.

She left the country, because they would kill her if she stayed, to seek asylum in the United States. However she decided after spending almost all of her money in bribes in Guatemala to cut her losses and to seek asylum in Mexico.

In Honduras in 2013 a girl age 15 reported to school authorities that two girls in her class were bullying her. The girls took their revenge by having their boyfriends who were gang members rape her on school property. She fled to live with relatives then returned to her neighborhood. However one of the attackers continued to harass her. She left to seek asylum in Mexico. Because it would take 2 months before a decision could be made she returned to Honduras. She has not been able to return to school.

Fleeing to the United States. Thus in answering the question of why people now flee from these five countries—Honduras, Nicaragua, Guatemala, El Salvador and Costa Rica—to the United States, human rights violations by both Governments and private actors is one reason. As mentioned previously another reason for flight is the belief that the streets in the United States are paved with gold. They also flee because of economic factors—poverty, lack of employment opportunity, low salaries, separated families, natural disasters, droughts and lack of educational opportunities. Also they flee because of insecurity and violence—threats, crimes, extortion, danger, fear of gang members and recruitment by gang members.

While the lure of the “American dream” may still be alive, basic survival needs are leading citizens of these five countries to seek refuge wherever they can find it.

Asylum applications skyrise. Asylum applications by nationals of Guatemala, Honduras and El Salvador have increased almost 6 times from 2010 to 2015. Levels not seen since the regions’ armed conflicts. And where there exists human rights violations there may be grounds for asylum in the United States.

Asylum law. To be granted asylum in the United States, a person must demonstrate that he or she is a “refugee”, that he or she is not barred from asylum for any of the

reasons listed in our immigration laws, and that the decision-maker should grant asylum as a matter of discretion.

A “refugee” is any person who is outside his or her country of nationality (or, if stateless, outside the country of last habitual residence) and is unable or unwilling to return to that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.

Thus United States asylum law applies to those who have a well-founded fear of persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion”. Fleeing because of generalized crime and violence in their country do not easily fit into these categories. Nevertheless, at times United States immigration judges have interpreted this law so as to grant asylum to Central American migrants who can demonstrate “a well-founded fear of persecution” within the standards described above, or who qualify for protections under the United Nations Convention Against Torture.

Social group persecution. It has been argued that a particular social group can be defined by the member’s vulnerability to harm of gang violence. Due to the way that Central American gangs operate, in many cases women and children are targeted by these criminal groups precisely because they are women and children, which United States courts have repeatedly interpreted as their being persecuted due to “membership in a particular social group”.

Children and young adults are particularly vulnerable to death threats, as local gangs often try to forcibly recruit them, extort them, or in the case of girls, pressure them into relationships with gang members. Women and underage youths are attractive recruits for gangs because they can draw less attention from authorities when carrying out tasks such as smuggling drugs and weapons, or collecting extortion payments.

Others may face persecution from gangs on account of their sexuality or gender, their religion, their resistance to gang activity, (e.g., refusing to pay extortion fees), or because one of their family members has ties to a gang. All of these can form grounds for

an asylum petition, as applicants are not fleeing “generalized” crime and violence in their home country.

Also, oftentimes, as pointed out earlier, in addition to gangs’ law enforcement officers and security forces or other governmental institutions are often the perpetrators.

It should be noted that in June 2018, the United States Attorney General issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) which expresses uncertainty in recognizing persecution by non-government actors. The Attorney General has deep skepticism of any form of persecution by a private actor—domestic violence—gang violence—as a valid basis for asylum. Private criminals are motivated more often by greed or vendettas than by an intent to overcome the protected characteristic of the victim. Despite the “vile” abuses that are suffered by victims “the asylum statute is not a general hardship statute” nor is it some omnibus catch-all for solving every heart-rendering situation.

The Attorney General’s decision did not establish a blanket rule foreclosing any domestic violence or gang violence-based asylum claim as does the Immigration and Customs Enforcement (ICE) and United States Citizenship and Immigration Services (USCIS) policy memoranda. In such policy memoranda ICE and USCIS incorrectly states that “[i]n general, in light of the [Matter of A-B-] standards, claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence and gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.”

Therefore counsel should assert and argue that any social groups advanced must be analyzed on an individual case-by-case basis. Indeed the policy memoranda instructed their respective officers to “look at each proposed group on a case-by-case basis and under the facts presented in a given case”. Additionally, domestic violence and gang-based claims may raise valid claims on account of other grounds, such as political opinion, religion, race or nationality. It is important to put forth

multiple relevant social groups and/or statutorily protected bases.

It should be noted that in December a Washington D C judge blocked policies, such as those in the Matter of A-B-, that made it more difficult to seek asylum because they were victims of domestic or gang violence.

Conclusion. In conclusion, as the preceding shows, human rights violations are occurring and there is a great and real potential for further occurrences in these five Central American countries—Honduras, Nicaragua, Guatemala, El Salvador and Costa Rica. None of these countries has achieved anything close to the United States democracy. And where there exist human rights violations there may be grounds for asylum in the United States. ■

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REFERENCE LIST

- Amnesty International, *Home Sweet Home? Honduras, Guatemala and El Salvador’s Role in a Deepening Refugee Crisis*, London, United Kingdom: Amnesty International, 2016.
- Black, Jan Knippers (Edited By), *Latin America its problems and its promise, a multidisciplinary introduction* (Fifth Edition), Part Six: Mexico and Central America—Central America: from Revolution to *Low-Intensity Democracies*, Thomas W. Walker and Christine J. Wade, Boulder Colorado: Westview Press, 2011.
- Blouet, Brian W. and Blouet, Olwyn M., *Latin America and the Caribbean, a systematical Regional Survey*, (Fourth Edition Update), Chapter 9, Central America, Peter Rees, Hoboken, New Jersey: John Wiley & Sons, Inc., 2005.
- Booth, John A. and Wade, Christine J. and Walker, Thomas W., *Understanding Central America, Global Forces, Rebellion, and Change* (Fifth Edition), Boulder, Colorado: Westview Press (2010)
- Buckman, Robert T. *Latin America*, The World Today Series 2014-2015 (48th Edition), Lanham, Maryland: Stryker-Post Publication, 2014.
- Dent, David W., *Historical Dictionary of*

U.S.-Latin American Relations, Westport, Connecticut: 2005.

- Eckstein, Susan (Edited By), *Power and Popular Protest, Latin American Social Movements*, Berkeley, California: University of California Press, 2001.
- Hershberg, Eric, and Rosen, Fred (Edited By), *Latin America After Neoliberalism Turning the Tide in the 21st Century?*, Chapter 6 Latin America: Persistent Inequality and Recent Transformations, Luis Reygadas, Chapter 7 Table to Eat On: The Meaning an Measurement of Poverty in Latin America, Araceli Damian and Julio Boltvinik, Chapter 8 Crime and Citizen Security in Latin America, Mark Ungar, Chapter 9 The Politics of Memory, the Language of Human Rights, Katherine Hite, New York, New York: The New Press, 2006.
- Human rights first, *Asylum*, <https://www.humanrightsfirst.org/asylum/asylum-law-and-procedure>
- Immigrant Legal Resource Center (ilrc), *Matter of A-B-Considerations*, October 2018, ilrc@ilrc.org or www.ilrc.org
- Kabasarat, Zehra F., *Contemporary World Issues, Human Rights Worldwide, A Reference Handbook*, Santa Barbara, California: ABC-CLIO, Inc., 2006.
- Menzel, Sewall, *Dictators Drugs and Revolution, Cold War Campaigning in Latin America, 1965-1989*, Bloomington, Indiana: Author House (2006).
- Reid, Michael, *Forgotten Continent, The Bible for Latin America’s Soul*, New Haven, Connecticut: Yale University Press, 2007.
- Rosenberg, Tina, *Children of Cain, Violence and the violent in Latin America*, New York, New York: Penguin Books, 1991.
- The Telegraph, *Jimmy Morales: Guatemala’s clown who went on to become president*, March 14, 2019.
- The Wall Street Journal, *Arrests of Families At Border Hit High*, Alicia A .Caldwell and Louise Radnofsky, March 6, 2019, Vol. CCLXXIII No. 53.
- The Wall Street Journal, *Policy of Returning Asylum Seekers To Mexico Blocked*, Brent Kendall and Louise Radnofsky, April 9, 2019, Vol . CCLXXIII No. 82.
- TICO Times, *Carlos Alvarado Quesada*, April 1, 2018
- 8 U.S. Code Section 1158, *Asylum*.
- Wagner, James W. and Kirby, Kate Curran (Co-Editors), Kate Curran Kirby (Principal Author & Researcher), Mars Eghigian, Jr. and Joseph Petrenko (Co-Authors), *The Gang Book, A detailed overview of street gangs in the Chicago metropolitan area*, Chicago Crime Commission, Illinois: Chicago Crime Commission, 2006.

Canadian court deems Uber arbitration clause invalid

BY REAGAN QUYNN

In early January, the Ontario appeals court declared the arbitration clause for Uber drivers invalid. The appeals court not only cited the clause a violation of the Arbitration Act but also deemed the clause itself unreasonable. The decision came out of a lawsuit filed by an Uber driver seeking to declare Uber drivers are employees of Uber.

The arbitration clause in question required any disputes involving Uber

drivers be resolved through arbitration. The violation involved the elimination of Uber driver rights when making complaints. Under the clause, drivers would not have the option to file a complaint with the Ministry of Labour thus eliminating the right to an investigation by the Employment Standards Office.

Additionally, the court not only deemed the required administrative and filing-

related costs of arbitration, which totaled around \$14,500, unfair, but found that Uber intentionally chose the specified Arbitration Clause to favor itself. Comparatively, in the United States, a Ninth Circuit Court of Appeals decided Uber can require arbitration, although arbitration is no longer required for sexual assault and sexual harassment claims. ■

Tips from an international family lawyer

BY DAVID N. SCHAFFER

In the past 15 years, my practice has grown to being devoted to about one-third devoted to international family law matters. This includes Hague proceedings and non-Hague international proceedings, registration of foreign decrees, domestic litigants who they or the other parent want to take their minor child(ren) out of the country for part of their parenting time, etc. I have never met in person some of my clients, who reside all over the world, including India, Sweden, the Netherlands, Tanzania, Saudi Arabia, The Russian Federation, and Iraq, as well as active military personnel. I am on the United States Department of State's referral list for Hague proceedings. My intent for this article is to share some of the insights, protocols, and lessons, if you will, I have learned from the international component of my practice. They are in no particular order, but taken as a whole, I hope they prove helpful.

Don't dabble: While I do provide tips for getting into this genre of family law, they come with this caveat: Don't dabble in

international family law. The stakes are too high for international clients, including the very real possibility that a parent may never see their child(ren) again or face great risk traveling to see their child(dren) in the other country.

Be prompt: If the stereotype for Americans is to be "fashionably late," foreign clients are just the opposite. Whether it is for a meeting at my office, a Skype conference, or telephone conference, international clients are consistently prompt and on time.

Keep your financial records in order: While this is common sense, it is especially essential when dealing with an overseas clientele who will be wiring you significant retainers from overseas, coupled with a chain of international emails. You can safely assume that you are on the government's radar screen, as well you should be, especially when dealing with clients from the Middle East, for example. As such, it is also a given that more than just you and your client will be privy to the contents of your international telephone calls, text

messages, and emails. Proceed accordingly.

Be especially sensitive to keeping your clients informed: They have entrusted a matter to someone who could be 8,000 miles away and have sent sums of money in the form of a retainer to someone whom they have never personally met. I have a policy for all clients of not charging for a brief email or quick status phone call. I will list it on their statement, but mark it "no-charge." I never want a client, especially a client who may be on the other side of the earth, to worry that the "time-clock" will always be ticking whenever they call. If you are tied up with another case, let your clients know this in a quick email, text, or telephone call.

Know what your telephone carrier charges for international calls: Not doing your homework could result in one receiving an insanely high phone bill - emphasis on "insane." Some carriers offer an international calling plan that, for an additional monthly charge, provides lower international rates. This could literally mean the difference between \$10 a minute and 15

cents a minute. Turns out, I get the best rate using my cellphone carrier's international plan. Also remember that if your client initiates the call, generally there is no charge to you. Finally, be sensitive to the fact that an international telephone call is not part of yours or your client's unlimited calling plans, especially if the calls are made to somewhere outside of North America. As with any part of a practice, do your homework and it can save you a lot of unnecessary expense.

I use DHL for overnight international document transmittal: I do not get paid by DHL for this endorsement. If I am overseas sending documents back to the States or asking for original documents from an overseas client, I use DHL. They were referred to me by an International Banker who swears by them. They will also be happy to open an account for you so if and when the time comes to use their services, you will be ready – and get a discount while you are at it.

Know the time zones of your clients: My iPhone will tell me the time in every city that I enter. I input every city that I currently have a client in. I recommend no particular application.

International Academy of Family Lawyers (“IAFL”): The IAFL enables Fellows practicing international family law to obtain legal assistance of the highest caliber in another country. Fellows, non-IAFL lawyers and members of the public alike are able to search the IAFL website for the most highly regarded international family law practitioners in the countries represented. Co-counsel with an IAFL member in the other country involved. There are currently 45 countries represented in this database and IAFL has over 620 Fellows. The Academy's website is iafl.com. Disclaimer: I am proud to say that I am a Fellow of the IAML.

Sources of law: For Hague proceedings, there are two main entities that I use as an invaluable source of resources and up-to-date information, as well as a starting point for more research. The first is the United States Department of State. For international custody practitioners, there is an International Parental Child Abduction webpage that provides detailed instructions

and tips for filing a Hague Application. Even if a case involves a non-Hague signatory country, this is still a good place to start. The second source, which is equally helpful, is the National Center for Missing and Exploited Children. Any practitioner having even the slightest inclination to practice family law should immediately download a copy of the Center's manual titled *Litigating International Child Abduction Cases Under the Hague Convention* for their reference library.

Volunteer to get more international experience: The United States Department of State has a Hague attorney referral list. Sign on willing to take a *pro bono* Hague petition. The Department of State will help you along the way with resources and, if needed, provide you with a mentor attorney to assist you. The American Bar Association's “Operation Standby,” of which I also am listed, maintains a list of attorneys willing to assist people in the active military with their divorce and custody issues at either a reduced fee or *pro bono*. There is nothing more satisfying than assisting a soldier on active duty with their issues. My paralegal will tell you it is not unusual for our office to get calls from Iraq or Afghanistan, from a soldier needing help with his or her family law matter. It has always been my experience that the soldiers who call me are some of the most polite, respectful, and appreciative clients I have had the privilege of representing.

Beware of strangers from the Far East bearing gifts: Having an international online presence, I will get a brief email inquiring if I can handle post-judgment collection of a case that was settled somewhere in Asia, including Australia. The most common email source seems to be from “NAME@iprimus.com.au.” Often times the Big Steel Company will send a request from a gmail account. Or a woman has a six or seven figure support judgment that just needs to be settled locally. While fortunately I have never taken the bait, I have learned how the scam works. The “client” offers to send a “certified check” with a very large retainer as well as an extra five figure amount. In return, the “client” only asks that once the “official certified” check is deposited in the attorney's clients'

funds account, the attorney wire back the extra funds. Then, a few weeks later, the attorney gets an NSF notice from their bank: the “certified check” was a fake, and the funds wired back to the “client” cannot be retrieved. To add to the misery, the attorney's client's funds account is overdrawn to cover the wired funds and checks start bouncing from that account. If something sounds too good to be true, it usually is.

Please consider me a resource: Should you have any additional questions, get stuck on a case, or head my advice about not just “dabbling in this area of family law” please do not hesitate to call me for assistance. As a lawyer, I have a special interest in making sure the next generation of lawyers learns the right way to do things. I also always prefer working with a lawyer who knows what he or she is doing, or is willing to ask the right questions. ■

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1. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, done at The Hague, The Netherlands.
 2. <http://travel.state.gov/content/childabduction/english/from/hague-app.html>.
 3. <http://www.missingkids.com>.
 4. <http://www.missingkids.com/publications/PDF3a>.

The Germanic system of justice: Learning about an approach focused on human dignity

BY ELIZABETH CLARKE

Children deprived of liberty remain an invisible and forgotten group in society notwithstanding the increasing evidence of these children being in fact victims of further human rights violations. - UN Global Study on Children Deprived of Liberty

Earlier this year, the Juvenile Justice Initiative led an educational mission to Germany to study the country's approach to justice for older adolescents. This mission was, in two words, transformative and educational.

In Germany, if you are under the age of 14 you are considered a "child" and cannot be prosecuted criminally. If you are between the ages of 14 and 18, you are considered a "juvenile", can only be prosecuted in youth court and can only be given a juvenile sentence. Juvenile sentences, even for very serious crimes, average no longer than ten years. And between the ages of 18 and 21, you are considered an "adolescent", can only be prosecuted in youth court but then issued either a juvenile or adult sentence. However even for adolescents that are found responsible for a serious offense, the vast majority (over 90 percent) are given a juvenile sentence.

By contrast, Illinois does not have a lower age of criminal responsibility.

These Germanic classifications have been in place for decades, in fact, older adolescents have been given juvenile sentences since the 1950's. It is part of their overall approach to justice that is based on the principle of human dignity—and it remains in effect because the numbers reflect that the approach works. Specifically, Germany has dramatically lower incarceration rates than the U.S., and a strong and effective network of

reentry programming with an emphasis on employment.

To quote the "Basic Law of the Federal Republic of Germany," *human Dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.*

To crystallize this point, just outside the center of Berlin's is a sign for the Brandenburg University of Applied Police Sciences, located (of all places) on the grounds of the former Schutzstaffel (SS) SS camp adjacent to the Sachsenhausen Concentration Camp Memorial. As the sign notes, "the prime educational objective is commitment to the primary principle of the basic law—that human dignity is inviolable. As part of their studies, students learn about the history of what happened here and the crimes committed by the police under the Nazi regime."

This sign resonates a powerful statement—that the Germanic commitment to human dignity is reinforced inside and outside prisons, with justice system leaders, academics and civil society. That dovetailed into the most transformative lesson we learned on this trip, which was the positive impact of basing a justice system on the principle that all state authority must respect and protect human dignity. ■