

FREE SPEECH CRISIS IN LATIN AMERICA: MAKING USE OF THE INTER-AMERICAN AND U.S. ASYLUM LAW SYSTEMS FOR THE PROTECTION OF THE RIGHTS OF JOURNALISTS, MEDIA OWNERS, AND WHISTLEBLOWERS

BY SANDRA GROSSMAN & RACHEL ZOGLIN

Freedom of expression is a universal human right, deeply enshrined in established international human rights instruments like the Universal Declaration of Human Rights and the American Convention of Human Rights.¹ This right includes the “freedom to hold opinions without interference” and the freedom to “seek, receive and impart information and ideas through any media and regardless of frontiers.”² Citizens’ ability to openly criticize their governments and leaders is essential for the development and maintenance of democratic institutions and cultures. Unfortunately, authoritarian regimes around the world routinely violate this right by imposing repressive laws limiting free expression and permitting rampant impunity for human rights abuses committed against persons exercising these rights. Journalists and whistleblowers fall victim to government-sponsored attacks, including unjustified criminal prosecution, harassment, threats of violence, or even death for expressing or reporting on an alternative political opinion or for exposing government misconduct.

Ecuador, for example, is one of the last remaining countries in the Western Hemisphere to criminalize expressions offensive to public officials by means of what are known in the region as “*desacato*” laws. In March of 2011, Ecuadorean President Rafael Correa brought criminal charges under one of these laws against Mr. Emilio Palacio, a journalist (and former Grossman Law, LLC client), and the directors and major shareholders of El Universo newspaper in Ecuador. President Correa asserted that an article published by Mr. Palacio caused damage to his honor and prestige. In a series of highly irregular and

politically influenced judicial decisions, Mr. Palacio and the owners of El Universo were sentenced to a three-year prison term and to \$40 million in damages, a disproportionate sanction that calls into question the independence and impartiality of the judiciary in Ecuador. Though President Correa eventually issued a “pardon” to Mr. Palacio, the damage is done. The conviction against Mr. Palacio stands as a constant reminder to Mr. Palacio and other journalists to watch their words or face massive civil and criminal penalties.³

Unfortunately, Mr. Palacio’s case is just one example of a situation repeated all too often across the Western Hemisphere. Journalists and whistleblowers face a perilous environment in Latin America in particular – where regimes restrict freedom of expression and freedom of thought. In Venezuela, for example, the head of state continues to defame and denounce critical journalists and media owners, as well as use state machinery to criminalize and sanction free speech. As was the case with Mr. Palacio, an individual’s only option is often to seek refuge outside his

³ The Inter-American Commission of Human Rights publicly denounced the sentence, stating:

The existence and application of laws that criminalize expressions offensive to public officials, or *desacato* laws, in all of their forms, are contrary to inter-American standards in the area of freedom of expression. The Inter-American Commission on Human Rights, based on the American Convention on Human Rights, established more than a decade ago that the use of the criminal law to sanction expressions about public officials violates article 13 of the American Convention, which protects freedom of expression.

¹ Universal Declaration of Human Rights, G.A. Res. 217A, art. 19, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter “Universal Declaration of Human Rights”]; Organization of American States, American Convention on Human Rights, art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter “American Convention”].

² Universal Declaration of Human Rights, art. 19.

Press Release R104/11, Organization of American States, Office of the Special Rapporteur Expresses Concern Regarding Confirmation of Conviction Against Journalist, Directors and Media Outlet in Ecuador (Sept. 21, 2011), available at http://www.oas.org/en/iachr/expression/show_article.asp?artID=870&IID=1 (last visited Mar. 31, 2014).

or her own country. How can U.S.-based human rights advocates and immigration attorneys best represent their clients who find themselves in this precarious situation? What legal tools can these advocates use for best protecting the interests of their clients?

This article describes the Inter-American and United States asylum law systems for the protection of the rights of journalists and media owners. We provide examples of former clients who have obtained asylum in the United States based on their experience in the critical media. We provide immigration attorneys and human rights advocates with an overview of the legal resources and arguments at their disposal. With the support of knowledgeable advocates journalists may have the chance to continue their battle for free speech within the United States, even if this right is denied to them in their own countries.

Repression in Latin America and the Inter-American System for the Protection of Freedom of Expression

According to Article 19 of the Universal Declaration of Human Rights, all people have the inalienable human right to enjoy "freedom of opinion and expression," including "freedom to hold opinions without interference" and to share such opinions "through any media and regardless of frontiers."⁴ In the Americas, the Organization of American States (OAS) established legal mechanisms to provide "the greatest scope and the broadest guarantees of protection to the right of freedom of thought and expression."⁵ The American Convention on Human Rights, adopted in 1969 in San Jose, Costa Rica, establishes freedom of thought and communication as basic human rights, and encourages the free flow of information and ideas.⁶ Article 13 specifically notes that "the right to freedom of thought and expression" includes the sharing of information and ideas "of all kinds . . . [whether shared] orally, in writing, in print, in the form of art, or through any other medium."⁷

Although every country in the Americas has ratified the Convention,⁸ over the past two decades, many countries have enacted laws abrogating these basic human rights, including "*leyes de mordaza*" (also known as "gag laws") and "*desacato*" laws (criminal defamation laws). Some governments in Latin America have attempted to silence political opposition and expression by obtaining complete control over the media, including print, broadcast, and Internet outlets. In Venezuela, for example, former President Chavez's regime systematically shut down nearly every source of independent news in the country and waged war against Globovisión, the country's last independent and critical news station. His actions forced Globovisión's founders, Nelson Mezerhane and Guillermo Zuloaga (both Grossman Law, LLC clients), to seek refuge in the United States.⁹ In Ecuador, President Correa has engaged in widespread repression of the media and passed some of the most restrictive laws in the hemisphere, including a new communications law which demands that journalists cover government events and provide "accurate and balanced" information or face civil or criminal penalties.

Like state-sponsored persecution of journalists, impunity for crimes committed against journalists remains a serious problem around the globe, and especially in Latin America. Between 1992 and 2013, 672 journalists were victims of the "ultimate form of censorship" – murder.¹⁰ Only 12% of perpetrators were held accountable, at least in part, for these crimes.¹¹ The

⁸ On September 10, 2012, the Bolivarian Republic of Venezuela announced its decision to denounce the American Convention on Human Rights. The decision relieves the country of its obligations under the American Convention. Venezuela's decision was widely condemned as weakening the inter-American system for the protection of human rights. See, e.g., Press Release E-338/13, Organization of American States, OAS Secretary General Regrets Venezuela's Withdrawal from the American Convention on Human Rights (Sept. 11, 2013) available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-338/13 (last visited Mar. 31, 2014).

⁹ See, e.g., Jackson Diehl, *Obama's Policy on Venezuela Leaves Chavez Victims Paying the Price*, Washington Post, Oct. 30, 2011, available at http://articles.washingtonpost.com/2011-10-30/opinions/35280264_1_hugo-chavez-globovision-venezuelans; Press Release, Inter-American Press Association, IAPA Warns of Venezuela's Chavez Carrying out Threat to Globovisión, Dec. 9, 2010, available at <http://www.sipiapa.org/en/iapa-warns-of-venezuela-s-chavez-carrying-out-threat-to-globovision/>.

¹⁰ See Committee to Protect Journalists, available at <http://cpj.org/killed/murdered.php> (last visited Mar. 3, 2014).

¹¹ *Id.*

⁴ Universal Declaration of Human Rights, art. 19.

⁵ See Office of the Special Rapporteur for Freedom of Expression, Inter American Commission of Human Rights, The Inter-American Legal Framework regarding the Right to Freedom of Expression 1 (Dec. 30, 2009), available at <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf> (last visited Mar. 31, 2014).

⁶ American Convention, art. 13, § 1.

⁷ *Id.*

United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the Inter-American Commission on Human Rights (the "Commission") have published reports on and issued decisions condemning human rights abuses in these cases.¹²

Unfortunately, many have attacked and questioned the authority of these bodies, especially the Special Rapporteur for Freedom of Expression (a part of the Commission), whose standing as the most powerful watchdog for freedom of expression issues in the Americas has arguably been weakened by years of attack and interference.¹³ In an unprecedented move, in 2012, the Government of Venezuela announced its intention to withdraw from the Convention.¹⁴ Chavez defended his actions by calling the Commission's public decisions against Venezuela offensive to "the dignity of the whole Venezuelan people."¹⁵ Although Venezuela's attempt to evade responsibility for its human rights abuses has drawn criticism from the international community, little has changed.¹⁶ Journalists

¹² See, e.g., *Barrios Family v. Venezuela*, Series C No. 237 (I/A Court H.R., Merits, reparations and costs judgment of Nov. 24, 2011); *López Mendoza v. Venezuela*, Series C No. 233 (Merits, reparations, and costs judgment of Sept. 1, 2011); *Matter of Certain Venezuelan Prisons* (Provisional measures regarding Venezuela, order of July 6, 2011); *Apitz Barbera v. Venezuela*, Series C No. 182 (Preliminary objection, merits, reparations, and costs judgment of Aug. 5, 2008); *Matter of "Globovisión" Television Station*, (Provisional measures re Venezuela, order of Jan. 29, 2008).

¹³ *El Ejecutivo denuncia que Catalina Botero viola estatuto de CIDH*, *El Telegrafo*, Dec. 12, 2011, available at http://www.telegrafo.com.ec/index.php?option=com_zoo&task=item&item_id=23440&Itemid=2; Sandra Hernandez, *At OAS meeting, an attack on freedom of expression*, *L.A. Times*, June 5, 2012, available at <http://articles.latimes.com/2012/jun/05/news/la-ol-oas-human-rights-20120605>.

¹⁴ Press Release, Int'l Justice Resource Center, *Venezuela Denounces American Convention on Human Rights as IACHR Faces Reform*, Sept. 19, 2012, available at <http://www.ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/>.

¹⁵ Alejandra Hernandez, *Chavez: Venezuela will leave the IACHR Court 'out of dignity'*, *El Universal*, July 25, 2012, available at <http://www.eluniversal.com/nacional-y-politica/120725/chavez-venezuela-will-leave-the-iachr-court-out-of-dignity>.

¹⁶ *US: Venezuela's exit from IACHR is a regrettable message for democracy*, *El Universal*, July 15, 2012, available at <http://www.eluniversal.com/nacional-y-politica/120725/us-venezuelas-exit-from-iachr-is-a-regrettable-message-for-democracy>; Press Release 117/12, Organization of American States, *IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights*, Sept. 12, 2012, available at http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp.

and whistleblowers remain in extremely precarious circumstances, and may need to flee their countries at a moment's notice. Nevertheless, the American Convention and the Commission stand as powerful instruments, to be used by advocates for establishing the violation of international norms regarding the protection of journalists.

United States Immigration Law: Applying for Asylum in the United States as a Journalist or Media Owner

The United States immigration system may offer protection for individuals who are unable to exercise their right to freedom of expression and are forced to flee their countries after experiencing serious harm that rises to the level of persecution. To qualify for asylum, an individual must establish that he or she is a "refugee" within the meaning of the Immigration and Nationality Act (INA), meaning that he or she is unable or unwilling to return to his or her country of nationality, or country of last habitual residence, due to past persecution or a well-founded fear of future persecution on account one of the five "protected grounds": race, religion, nationality, political opinion, or membership in a particular social group.¹⁷ Most journalists are likely to file an asylum application based on persecution they suffered either on account of their political opinion, or on account of their membership in the particular social group of journalists.

a. Prosecution as Persecution

Establishing eligibility for asylum requires an applicant to show that he or she has been persecuted in his or her home country. Courts define "persecution" as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive,"¹⁸ and in a way that is "condemned by civil governments."¹⁹ Persecution must be more than mere harassment or threats,²⁰ because

¹⁷ INA § 208, 8 U.S.C. § 1158; see also United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

¹⁸ *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

¹⁹ *Matter of Laipenicks*, 18 I. & N. Dec. 433, 456-57 (BIA 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir.1985).

²⁰ See *Li v. Att'y Gen.*, 400 F.3d 157, 164-68 (3d Cir. 2005) (holding that "unfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution"); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998) (recognizing that persecution need not be physical harm, but must be more than mere harassment).

discrimination, without more, does not constitute persecution.²¹ It need not include physical harm or suffering, "but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life."²² Illegitimate prosecution may in some instances constitute persecution.

Increasingly, authoritarian regimes are using biased judiciaries to criminalize and sanction journalists for their speech. According to the U.S. State Department's 2012 Country Report, the Venezuelan judiciary, for example, selectively harassed, intimidated, imprisoned, and prosecuted political, union, business, and civil society leaders critical of government policies or actions.²³ In addition to normalized persecutory prosecutions, no procedures exist for individuals or organizations to seek civil remedies for human rights violations.²⁴ In the context of a judiciary subjugated to the will of the executive, asylum applicants may successfully argue that they are persecuted and will be denied due process in their countries.

As was the case with Ecuadorean journalist Emilio Palacio, if an asylum applicant is charged with bogus or trumped-up criminal charges and he or she can demonstrate that the persecutor is acting with an unlawful motive, he or she may be able to establish persecution.²⁵ Criminal prosecution may amount to persecution where punishment is arbitrary or excessive, because it may suggest that the motive, in part, may be on account of one of the five enumerated grounds.²⁶ But an applicant cannot apply for asylum merely to escape liability for violating laws of general application that are "fairly administered."²⁷ Lawyers and advocates who can demonstrate both a pattern of prosecutorial and judicial harassment against their clients, as well

as a politically influenced judiciary, may successfully demonstrate that their clients are persecuted and not legitimately prosecuted.

In the case of Nelson Mezerhane, former founder and part owner of Globovision, the Venezuelan Government used its control over the judiciary to institute a permanent campaign of judicial harassment against him. In 2005, Mr. Mezerhane was accused of masterminding the car bomb killing of a federal prosecutor, Mr. Danilo Anderson.²⁸ After willingly presenting himself to a tribunal pursuant to an order of arrest, Mr. Mezerhane was held in pre-trial detention for forty-five days.²⁹ During this time, Mr. Mezerhane's attorneys presented voluminous substantive evidence of the false nature of the government's charges, which resulted in Mr. Mezerhane's eventual release under conditions. Importantly, but not until years after Mr. Mezerhane had already served his time in jail, the U.S. State Department confirmed, "[i]n November [of 2010], a former trial witness and Anderson's relatives separately alleged that former senior government officials had tampered with the investigation and witnesses."³⁰ The State Department report constituted further evidence in Mr. Mezerhane's asylum proceedings that the criminal charges brought against him constituted persecution and not legitimate prosecution.

Following the Danilo Anderson scandal, there was little that the Venezuelan government did not accuse Mr. Mezerhane of, including purchasing fighter planes, attempting a coup, and a host of environmental and financial crimes.³¹ The Executive used the court system as a vehicle to persecute Mr. Mezerhane. In December of 2010, in a telling final move, the Venezuelan government formally liquidated Mr. Mezerhane's holding company,

²¹ See, e.g., *Borovsky v. Holder*, 612 F.3d 917, 921 (7th Cir. 2010).

²² *Matter of Laipenieks*, 18 I. & N. Dec. 433, 456-57 (BIA 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir.1985).

²³ U.S. Dep't of State, *Venezuela Country Reports on Human Rights Practices – 2012*, at 1, 30 (Mar. 2002), available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dldid=204486#wrapper> (last visited Jun. 21, 2013).

²⁴ *Id.* at 16.

²⁵ See, e.g., *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996).

²⁶ See, e.g., *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000) (although a police officer's initial stop had legitimate law enforcement basis, subsequent beatings on account of religion constituted persecution).

²⁷ See, e.g., *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004); *Chang v. INS*, 119 F.3d 1055, 1060 (3d Cir. 1997).

²⁸ *Four People Accused of Masterminding the Murder of Public Prosecutor Danilo Anderson*, *El Universal*, Nov. 12, 2005, available at http://www.eluniversal.com/2005/11/12/en_pol_art_12A631057 (last visited Mar. 3, 2014).

²⁹ Sandra A. Grossman, *Reward for the Oppressor – Injustice for the Oppressed?*, *Huffington Post*, May 10, 2012, available at http://www.huffingtonpost.com/sandra-maria/eladio-aponte-aponte_b_1506342.html (last visited Mar. 3, 2014).

³⁰ U.S. Dep't of State, *Venezuela Country Reports on Human Rights Practices – 2010*, at 19 (2010), available at <http://www.state.gov/documents/organization/160483.pdf> (last visited Mar. 3, 2014) [hereinafter *DOS 2010 Rep.*].

³¹ Human Rights Watch, *Tightening the Grip: Concentration and Abuse of Power in Chavez's Venezuela* 67 (July 2012), available at <http://www.hrw.org/sites/default/files/reports/venezuela0712webwcover.pdf>.

Sindicato Avila, a 20% owner of Globovisión, under the pretext of a larger operation against Mr. Mezerhane's bank, Banco Federal.³²

The U.S. government granted Mr. Mezerhane asylum in clear recognition that the numerous charges against him constituted nothing more than a campaign of judicial terrorism, meant to further the government's strategy of eliminating free media in Venezuela. If a journalist/whistleblower or media owner is deprived of a fair trial, or punishment is imposed without a judicial process, he may well meet the persecution requirement to qualify for asylum.³³

b. Asylum Based on Political Opinion

Many journalists who seek asylum in the United States have reported on politics, politicians, or government corruption in their home countries. An asylum applicant in this position may meet the requirements for asylum based on persecution on account of political opinion, or perceived or imputed political opinion. Persecution on account of one's political opinion is a well-established basis for seeking asylum in the United States.³⁴ When an individual is persecuted for exposing schemes of government corruption, such persecution can serve as a basis for asylum on account of one's political opinion.³⁵ Whistleblowing can also be considered an expression of one's political opinion for the purposes of a claim to asylum.³⁶

³² As confirmed by the U.S. State Department, on July 20, 2010, the President of Venezuela stated on a nationally televised broadcast that by seizing Mezerhane's shares, the government could own up to 25.8% of Globovisión and have the right to name someone to its executive board, suggesting several pro-government television journalists as candidates. See DOS 2010 Rep., *supra* note 30.

³³ See *Bellido v. Ashcroft*, 367 F.3d 840, 845 (8th Cir. 2004).

³⁴ See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

³⁵ See *Sagaydak v. Gonzales*, 405 F.3d 1035, 1042 (9th Cir. 2005) ("Retaliation for investigating or publicizing corruption by political figures is by its very nature a political act."); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir. 1999) (petitioner was persecuted on account of his political opinion because his prosecutorial investigation into acts of political corruption "was, by its very nature, political").

³⁶ See, e.g., *Zhu v. Mukasey*, 537 F.3d 1034, 1044 (9th Cir. 2008) (filing a complaint against a factory manager, who was also a government official, for raping an employee is a political act when interpreted as an act of opposition to the government). *But see* *Musabelliu v. Gonzales*, 442 F.3d 991, 995 (7th Cir. 2006) (whistleblowing can be a form of political opinion, for "[s]omeone who campaigns against the government and urges the voters to throw the rascals out is engaged in political speech [or] someone who writes an op-ed piece or otherwise urges the people to rid themselves of corrupt officials[,] but not someone who privately discloses corruption as part of his official duties).

Some judges have rejected journalists' asylum applications based on political opinion where: (1) the injury suffered was retaliatory and did not rise to the level of "persecution"; or (2) the reporting merely shed light on an isolated, aberrational incident of corruption, rather than a scheme or system of government corruption.³⁷ While "purely personal retribution"³⁸ or "personal vengeance"³⁹ does not constitute "persecution" for asylum purposes, "personal retaliation against a *vocal political opponent*" suggests that the retaliation is politically motivated and thus may establish that a journalist deserves asylum.⁴⁰ In the case of Ecuadorean journalist Emilio Palacio, the arbitrary and excessive punishment ordered by the Ecuadorean courts, in conjunction with declarations and injunctions from the Commission, helped to establish that the criminal charges against Mr. Palacio were politically motivated and excessive.⁴¹ The U.S. government granted Palacio asylum in August 2012.

c. Asylum Based on Membership in a Particular Social Group

As an alternative, asylum applicants may also argue that they are persecuted because they belong to a particular social group of journalists and media owners who are critical of their governments. Though the concept of being a "member of a particular social group" is unsettled, it generally refers to persons who hold a "common, immutable characteristic," including an "innate" characteristic "such as sex, color, kinship ties, or in some other circumstances . . . a shared past experience such as a former military leadership or land ownership."⁴² Whether journalists constitute a particular social group has yet to be definitively established,

³⁷ *Hasan v. Ashcroft*, 380 F.3d 1114, 1120 (9th Cir. 2004) (citing *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000)).

³⁸ *Hasan*, 380 F.3d at 1120.

³⁹ *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008).

⁴⁰ *Hasan*, 380 F.3d at 1120 (quoting *Grava*, 205 F.3d at 1181).

⁴¹ See also United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ¶ 86, HCR/IP/4/Eng/REV.1 (Jan. 1992) (stating that adjudicators should examine the nature of the act committed, the nature of the prosecution, and its motives in determining whether a political offender is a refugee) (available on lexis.com and in volume 10 of Charles Gordon et al., *Immigration Law and Procedure*).

⁴² *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985).

and most successful journalist asylum claimants won by showing persecution on account of political opinion.⁴³ Some courts have determined that journalists who have not engaged in political expression do not constitute a social group for asylum purposes.⁴⁴

However, where journalists are targeted because of their profession, advocates can and should argue that their clients should satisfy the "particular social group" definition. Courts have established that other employment categories, such as unionists and government employees, may satisfy the "particular social group" definition, because they cannot change their shared past experience, or because their involvement in the profession is fundamental to their individual identities.⁴⁵ Similarly, those persons advocating for exercising their right to freedom of expression by engaging in the practice of journalism and related fields may argue that this is a part of their identity that they cannot change and should not be required to change.

In the case of former *Globovisión* owner, Nelson Mezerhane, in addition to the political opinion argument,

⁴³ See, e.g., *Hayrapetyan v. Mukasey*, 534 F.3d 1330 (10th Cir. 2008); *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004).

⁴⁴ See, e.g., *Dubal v. Mukasey*, 2007 U.S. App. LEXIS 29068, at *7 (6th Cir. Dec. 12, 2007) ("[J]ournalists do[] not constitute a protected group for asylum purposes because 'the 'concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.'" (citations omitted); *Quintero v. Gonzales*, 2006 U.S. App. LEXIS 16880, at *5 (9th Cir. June 30, 2006) (declining to decide whether Colombian journalists constitute a particular social group, and denying asylum applicant's petition for review on other grounds); *Bortnikov v. INS*, 2003 U.S. App. LEXIS 6448, at *4 (9th Cir. Apr. 3, 2003) ("Russian journalists are too large and diverse a collection of individuals to qualify as a 'particular social group.'"). *But see* Julian Aguilar, *Mexican Journalist Wins Asylum in Texas*, *Texas Tribune*, Sept. 1, 2011, available at <http://www.texastribune.org/immigration-in-texas/immigration/mexican-journalist-wins-asylum-texas> (Mexican reporter was granted asylum "based on him being targeted [both by the Mexican government and by cartels] for being a journalist" who reported on cartels and prison corruption).

⁴⁵ See, e.g., *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988) (finding relevant to petitioner's asylum claim evidence that he was on a death list for being a unionist); *Aguilera-Costa v. INA*, 914 F.2d 1375 (9th Cir. 1980) (granting asylum to an applicant who was persecuted in part due to his membership in a particular social group of government employees); *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (holding that one's status as a former Salvadoran policeman is an immutable characteristic, and could constitute persecution on account of political opinion or membership in a particular social group). *But see* *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (holding that tattooed former gang members are not a cognizable social group).

we proffered the alternative legal theory that he also belonged to a social group of independent media owners who were critical of the Venezuelan government. More than simply engaging in a profession or performing work for remuneration, he performed an essential role in Venezuelan society, providing the general population with information, ideas, and diverse perspectives. His work, and the work of others like him, like the owners of the *El Universe* newspaper in Ecuador, for example, involves their internationally recognized human right to freedom of expression. Lawyers must impress upon judges considering asylum claims based on a "particular social group" theory that freedom of expression is a fundamental human right. Journalists – whether they speak about politics or not – invoke the fundamental human right to free speech, which they "should not be required to change" to avoid persecution. The "particular social group" of journalists should be recognized as a legally cognizable social group for asylum purposes.⁴⁶ The social-group theory can and should provide a viable alternative to political-opinion cases in journalist asylum claims.

d. Other Requirements

Generally, one must apply for asylum within one year of his or her most recent entry to the United States.⁴⁷ This requirement may be waived if circumstances have changed since the applicant's entry and now warrant the pursuit of asylum status.⁴⁸ In the case of a journalist, for example, while he or she may have first entered the United States without any real fear

⁴⁶ Cf. *Donchev v. Mukasey*, 553 F.3d 1206, 1222-23 (9th Cir. 2009) (Fletcher, J., dissenting) (arguing that the petitioner's "friendships with, support, and defense of the Roma [are] fundamental to his individual identity and conscience[,] and he should not be required to change" them); *Matter of A-M-E-*, 24 I. & N. Dec. 69, 74-75 (BIA 2007) (considering one's wealth a characteristic that one should not be required to change to escape persecution); *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996) (granting asylum to a young woman fleeing forced female genital mutilation and holding that "having intact genitalia" is a characteristic "so fundamental to the individual identity of a young woman that she should not be required to change it.").

⁴⁷ INA § 208(a)(2)(B), (D), (4)(i).

⁴⁸ See 8 C.F.R. § 208.4(a)(4) (changed circumstances that may excuse the one-year filing requirement include "circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to (A) changes in conditions in the applicant's country of nationality or . . . (B) changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in the applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk").

of persecution in his or her home country, if circumstances change, even years later, that person may in some instances still qualify for asylum or other forms of relief from removal if he or she can show that he or she will be persecuted in his or her home country.

An applicant is barred from asylum if he or she: (1) participated in the persecution of others; (2) has been convicted of a particularly serious crime in the United States; (3) is suspected of having committed a serious, nonpolitical crime outside the United States; (4) is suspected of being a danger to U.S. security; or (5) was firmly resettled in another country before coming to the United States.⁴⁹

Conclusion

Advocates may successfully use the U.S. asylum laws, in conjunction with established norms on the protection of freedom of expression offered in the Inter-American system, to obtain refuge and protection for journalists, media owners, and whistleblowers in the United States. Nevertheless, the process is not easy and attorneys must prepare their clients for a difficult road ahead, one where they may have to face the reality of continuing their work and profession from a country that is not their own. Of his experience with the U.S. asylum process, Ecuadorean journalist Emilio Palacio wrote:

El asilo es una de las experiencias más duras. Hay que vivirlo para saber lo que significa. Lo más doloroso no es el sufrimiento personal, sino el que experimentan nuestros seres queridos. Lo más difícil es adaptarte a lo desconocido: un país diferente, costumbres distintas, leyes que ignoramos. Aprender a vivir el día a día, de nuevo, desde el principio, se convierte en una dura lección, que se paga con dinero y tiempo perdidos innecesariamente. Afortunadamente, en Estados Unidos el sistema está organizado en torno a reglamentos y protocolos muy precisos. Una vez que los conoces, comienzas a ver luz al final del túnel.

Asylum is one of the hardest experiences. You have to experience it to know what it means. The most painful thing is not personal suffering, but [the suffering] experienced by our loved ones. The hardest thing is to adapt to the unknown: a different country, different customs, laws we know not of. Learning to live day to day, again, from the beginning, it

becomes a hard lesson, paid with money and time lost unnecessarily. Fortunately, in the United States the system is organized around very specific regulations and protocols. Once you know, you start to see light at the end of the tunnel.⁵⁰

Despite the practical and legal challenges, a well-crafted legal theory and an understanding of the political and legal framework in the Americas will make all the difference for a persecuted individual exercising his right to freedom of expression.

Sandra A. Grossman is the founder and managing partner of Grossman Law, LLC, a full-service immigration law firm in Rockville, Maryland. **Rachel Zoghlin** is an associate attorney at Grossman Law, LLC.

REMINDER:

The correct citation form for the BIB is Author, Title, 19 Bender's Immigr. Bull. 389 (Apr. 15, 2014).

SERVICE QUESTIONS?

If you have any questions about the status of your subscription, please contact your Matthew Bender representative, or call our Customer Service line at:

1-800-833-9844

(e-mail: customer.support@lexisnexis.com)

⁴⁹ INA § 208(a)(2), (b)(2).

⁵⁰ Statement on file with Grossman Law, LLC.

