

# MARKED FOR DEATH: THE MARAS OF CENTRAL AMERICA AND THOSE WHO FLEE THEIR WRATH

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## PART I. INTRODUCTION

Guatemala City. San Salvador. The small town of Nebaj, population 16,000.<sup>1</sup> These three cities and towns share at least one common characteristic: a proliferation of gang violence. The problem of gang violence has reached epidemic proportions in Central America. Gangs, like Mara 18 and MS-13, operate with impunity throughout urban areas and rural areas alike. National governments are unable to stem the tide of gang violence. Local governmental officials are often unwilling to arrest the gangsters in their midst. In essence, the gangs, or *maras*, operate as the de facto government within their zones of control. Yet, despite this ongoing reign of terror, the majority of Central Americans resist the false allure of the gangs and refuse to become gang members. Unfortunately, the sad truth is that the *maras* rarely take no for an answer. To publicly oppose the gangs, through refusal to join them or open confrontation, is to risk death, not only for oneself, but also for one's loved ones.

Like Hamas, Islamic Jihad, the IRA, Shining Path, and the Ku Klux Klan, the *maras* perpetuate their power through fear. The *maras* persecute their opponents, who include anyone who resists their commands. If the average person believed he or she could resist the *maras* without consequence, the *maras*' stranglehold on power would cease. Perhaps, eventually, the governments of Central America will develop an effective strategy for combating the *maras*.<sup>2</sup> However, that day is not today, nor is it likely to be any time in

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\* J.D., Georgetown University Law Center, 2006; B.A., Bowdoin College, 2002. Many of the ideas contained in this note were a result of my participation in a litigation-based clinical program at Georgetown, the Center for Applied Legal Studies. I am indebted to my case-team partner, Claudia Slavin, and our faculty advisor, Professor Jaya Ramji-Nogales, for their knowledge and support. The opinions expressed and any failings contained herein are, of course, my own.

1. Lainie Reisman, Pan American Health Organization, Opening Remarks at the Voices from the Field Conference on Gangs: Local Initiatives and New Research on Central American Youth Gang Violence (Feb. 23, 2005) ("Gangs are now flourishing in tiny Central American towns like Nebaj, Guatemala, estimated population of 16,000 and which until only a few years ago was only accessible via a rather tortuous dirt road.")

2. There are some signs of improvement. However, comprehensive programs that offer youths an alternative to gang life are still years away from widespread implementation. See, e.g., *Guatemala Departs From Draconian Regional Policy on Gangs*, NOTICEN: CENTRAL AMERICAN AND CARIBBEAN AFFAIRS, June 30, 2005, available at 2005 WLNR 10414564 ("The [Guatemalan] government has

the near future. Meanwhile, a large number of people in Central America continue to live in fear of gang persecution.<sup>3</sup>

For asylum purposes, the United States government has no desire to open an immigration floodgate.<sup>4</sup> Fact-finders often view gang-based asylum claims with a skeptical eye, as if such claims exist outside the permissible legal framework.<sup>5</sup> Sadly, innocent people are caught in the middle.<sup>6</sup> As such, the ongoing crisis requires a reassessment of U.S. immigration policy with respect to people who, rather than risk persecution at the hands of the *maras*, flee their homes for the United States.<sup>7</sup>

The broad goals of this note are twofold: (1) to demonstrate that the recognition of gang based asylum claims will not open the immigration floodgates; and (2) to present strategies for overcoming judicial skepticism of these claims. Accordingly, Part II provides background information on the scope of gang violence throughout Central America. This section highlights the differences between common crime, which plagues many rural and urban areas of the United States, and the enclaves of terror Mara 18 and MS-13

now endorsed the views of . . . APREDE . . . [and this] 'is part of an integrated focus that, through nine policies of prevention will allow [the government and civic groups], in a coordinated manner, to attack the causes that bring young Guatemalans of both sexes to choose the street as a way of life.'" (citation omitted)). Yet the professed intention to control gangs and the reality on the ground are two different matters entirely. See *infra* note 3.

3. *Criminal Gangs in the Americas: Out of the Underworld*, THE ECONOMIST, Jan. 7, 2006, at 23, 26 ("A series of tough new laws passed over the last few years has stiffened penalties even for belonging to a gang . . . and police have adopted a get-tough policy . . . [but] gang violence is unlikely to wane in the near future. Police resources are stretched or non-existent. Rehabilitation programmes are tiny and . . . the small pilot programmes have at best a 30% success rate. Jails are stuffed to almost twice their normal capacity in El Salvador. . .").

4. See, e.g., *Romero-Rodriguez v. U.S. Att'y Gen.*, 131 F. App'x. 203, 204 (11th Cir. 2005). In *Romero-Rodriguez*, the Eleventh Circuit upheld the Immigration Judge's (IJ) denial of asylum to the applicants, two young brothers from Honduras who feared persecution at the hands of gang members. The applicants had refused to join the gang on account of their "religious and conscientious upbringing." The IJ found the applicants failed to demonstrate a well-founded fear of persecution on account of one of the five enumerated grounds for asylum. Moreover, the Eleventh Circuit's decision provides some insight into the implicit rationale of the IJ—i.e., the fear of opening an immigration floodgate. This fear is evident when the IJ notes his concern that one brother "also came [to the United States] to support his wife" and the other brother to support his newborn daughter. Neither of the brothers came "only to avoid [the] pressure of joining a gang." In other words, the IJ feared a deluge of asylum claims from individuals who professed to fear gangs, but who, in reality, merely wanted to take advantage of better economic opportunities in the United States.

5. Compare *Veliz-Estrada v. Gonzales*, 137 F. App'x. 958 (9th Cir. 2005) with *Petitioner's Opening Brief* at 4-6, *Veliz-Estrada v. Gonzales*, No. 04-72955 (9th Cir. Feb. 4, 2005), 2005 WL 985985. The Ninth Circuit concluded that "substantial evidence supports the IJ's denial of asylum because petitioner failed to establish past persecution or a well-founded fear on account of an enumerated ground," notwithstanding that petitioner refused outright to join or financially support the gang, and, in response, gang members attacked him on several occasions.

6. See, e.g., *Youth Murdered*, SIGLO XXI, May 2, 2004 ("Sumale Lago, 22, was killed yesterday. . . . A police informant says that Sumale refused to join a group of gang members and instead attended church. He returned from worship and was [a] victim of an ambush. . .").

7. *Gang Violence Blamed for Head Left on Guatemala Bus*, REUTERS, Jan. 24, 2004; Marion Lloyd, *Guatemala Activists Seek Justice as Women Die*, BOSTON GLOBE (Guatemala), at A1, June 14, 2004 (describing how 1,183 women were killed in between January 2002 and June 2004, possibly due to street gangs); Julio Lara, *Living in Gang Territory: Violence Turns into an Everyday Event in Zones 7 and 18*, PRENSA LIBRE (Guatemala), July 19, 2004.

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operate throughout Central America. Part III discusses current asylum law as it relates to gang-based claims. Sadly, there is little binding and favorable precedent in this area, so analogical reasoning is an important component of the applicant's case. Moreover, this section examines potential litigation strategies with respect to political, religious, and familial grounds for asylum, as well as relief under the Convention Against Torture. Lastly, Part IV summarizes the main ideas of this note, and concludes that immigration judges must be given the discretion to award asylum, without fear of summary reversal, to applicants who meet the requisite standards for refugee classification.

## PART II. THE EPIDEMIC OF GANG VIOLENCE

The *maras* are ruthless, international gangs, who perpetuate their power through fear, intimidation, rape, and murder. Their numbers are increasing. Individual gang chapters, or cells, often coordinate resources and activities across porous borders. Many national governments lack coherent plans to battle the gangs. Too often the strategy is to detain individuals with tattoos, a common gang identifier, without addressing the lack of educational and employment opportunities that drive many youth into the waiting arms of the *maras*. Equally problematic, the prosecution of gang-related criminal activities is almost non-existent due to a lack of financial resources and legal personnel (e.g., judges and prosecutors). Local governmental officials (e.g., police forces) are often unwilling to crack down on the gang members within their midst. Police forces are outmanned and outgunned. Widespread corruption within the government enables the *maras* to operate with impunity. As such, using the country of Guatemala as a case-study, this section examines the scope of the gang crisis in Central America and the threat posed to individuals who resist the false allure of the *maras*.

### A. *The Numbers*

The sheer number of active gang members illustrates the vast scope of the gang crisis. For example, in Guatemala alone, there are an estimated 434 gang cells, made up of at least 80,000 gang members.<sup>8</sup> Guatemala suffers from one of the world's highest levels of violent crime, with a homicide rate of around thirty-six per 100,000.<sup>9</sup> Indeed, the gangs are like a cancer, spreading throughout rural and urban areas. As one State Department report

8. *Digest: Guatemala*, SUN-SENTINEL, Sept. 8, 2003, at 14A. Of course, the exact number of gang members is unknown. Some sources place the number as high as 125,000 in Guatemala alone, while other sources estimate there are between 70,000 to 100,000 gang members in all of Central America. See, e.g., *Guatemala Departs From Draconian Regional Policy on Gangs*, NOTICEN: CENTRAL AMERICAN AND CARIBBEAN AFFAIRS, June 30, 2005, available at 2005 WLNR 10414564; but see, e.g., Antonio Betancourt, *Guatemala: Villagers Lynch 2 Gang Suspects*, N.Y. TIMES, June 15, 2005, at A11.

9. *Gang Violence Blamed for Head Left on Guatemala Bus*, REUTERS, Jan. 25, 2005.

noted, "Gangs are a growing concern in Guatemala City as well as in rural Guatemala. Gang members are often well armed with sophisticated weaponry and they sometimes use massive amounts of force."<sup>10</sup> In fact, the geographical spread of gangs, coupled with their sheer numerical growth, enables them to have de facto control over the areas in which they operate.<sup>11</sup> This control is so absolute that civilians risk their lives whenever they assist authorities in the identification of gang members. As one resident of Guatemala put it, "[i]f we report [the gang members], they will kill us because they know us."<sup>12</sup> In one particularly gang-ridden section of Guatemala City, there are 18,000 houses, of which it is estimated 1,021 are gang safe houses.<sup>13</sup>

### B. Local and Transnational Operations

Evidence suggests that individual cells communicate with each other to coordinate criminal activities (e.g., drug dealing, conducting hits, etc.). In addition, the barriers to intrastate and transnational coordination of activities are decreasing with the proliferation of communications technologies throughout Central America. Assuming such trends continue, those who oppose the gangs (and their loved ones) literally have nowhere to run and hide. In geographically small countries like El Salvador – no larger than West Virginia, or Guatemala – the size of Virginia, it is inconceivable that an individual or an entire family could escape the *maras* through simple relocation and begin a new life without fear of retribution.<sup>14</sup>

The *maras* have a limited transnational command-and-control structure. Most experts agree that Mara 18 and MS-13 lack a single supreme leader, the functional equivalent of an Osama bin Laden.<sup>15</sup> However, this does not prevent intra-national or transnational cooperation. Mara 18 and MS-13 cells are linked throughout Central America and Mexico. Some experts even suggest that the Mexican mafia operating out of Tijuana and Monterrey direct much of the transnational activity of the Central American gangs.<sup>16</sup> Other sources document the spread of Mara 18 and MS-13 from their traditional

10. U.S. State Department, *Guatemala Consular Information Sheet*, Mar. 21, 2005 available, at <http://lists.state.gov/SCRIPTS/WA-USIAINFO.EXE?A2=ind0503d&L=dostravel&D=1&O=D&P=546> (last visited March 26, 2006).

11. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass'n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author).

12. *Surrounded by Violence: Half a Million Neighbors in Zones 6, 7, 12, 18, 21, Between Gangs and Drugs*, PRENSA LIBRE (Guatemala), Feb. 21, 2005.

13. *Id.*

14. Telephone interview and e-mail correspondence with Max Gimbel, Fmr. Dir. of Research, Guatemalan Human Rights Commission (GHRC) in Washington, D.C. (Mar. and Apr. 2005) (on file with author).

15. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass'n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author).

16. *Id.*

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23. *Id.*

24. *Id.*

25. *Id.*

powerbases of El Salvador and Guatemala to the southern states of Mexico.<sup>17</sup> Gang cells, or cliques, use technology to their advantage to increase their influence over larger areas of their relatively small countries. The spread of cellular phone technology makes intrastate and transnational communication easier. The internet also provides an effective tool for individual gang members to communicate with one another. Mara 18 even operates a website.<sup>18</sup> The practical impact of such communication and gang coordination is to deprive the applicant of safe relocation options.<sup>19</sup>

### C. Gang Structure

Local neighborhood cliques comprise the backbone of a *mara's* organizational structure.<sup>20</sup> These individual cliques operate with different degrees of sophistication.<sup>21</sup> However, most cliques exhibit at least a rudimentary command-and-control structure. Much like a terrorist cell, each clique has a boss or leader.<sup>22</sup> This leader rules the clique with absolute authority.<sup>23</sup> Beneath him are the foot soldiers. The leader's directives are followed lest the foot soldiers themselves risk retribution on account of their recalcitrance.<sup>24</sup> Each individual clique maintains the right to operate autonomously from other cliques within the same *mara*. However, the leaders of individual cliques often communicate with one another to further intrastate criminal enterprises, hunt down enemies, and rally support for ongoing turf wars with members of rival gangs.<sup>25</sup> Much like a terrorist cell, law enforcement can take down a clique or arrest its leader without destroying the overall ability of the gang to function. In other words, neutralize a cell and another will soon materialize to take its place.

### D. National Governments Unable to Protect the Public

Although there are some signs that Central American governments, at least on the national level, recognize the need for a comprehensive strategy (as

17. *Mexico: Savage Gang[s] Arrive From the South*, Inter Press News Service (IPS), Mar. 11, 2005.

18. *Criminal Gangs in the Americas*, *supra* note 3, at 26 ("Mara 18 maintains a website accessible at [www.xv3gang.com](http://www.xv3gang.com); Salvatrucha's website has been offline recently.")

19. Indeed, the Honduran Minister of Security reports that business records obtained from Mara 18 gang members demonstrate the relative sophistication and inter-connectedness of different cliques. The business records contained detailed statements relating to the cost and transportation of ammunition and various inter-clique communications via the internet. Rupert Widdicombe & Duncan Campbell, *Poor Neighbours Fall Prey to US Gang Culture*, THE GUARDIAN, May 27, 2003, available at <http://www.guardian.co.uk/international/story/0,30604,963951,00.html>.

20. See, e.g., *Criminal Gangs in the Americas*, *supra* note 3, at 23, 24.

21. *Criminal Gangs in the Americas*, *supra* note 3, at 23, 24.

22. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass'n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author).

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opposed to ineffective police dragnets) to combat the *maras*, current anti-gang efforts are still woefully inadequate to solve the problem.<sup>26</sup> Guatemala provides a good example of the inability and ineffectiveness of the government to stop the spread of gang violence. Many gang members have sought refuge there because of recent police dragnets in countries like El Salvador and Honduras, and, therefore, Guatemala's gang crisis has become more acute in the past several years.<sup>27</sup> Yet, endemic corruption, insufficient funding for law enforcement, and inadequate training for judicial officers combine to render impossible the dispensation of justice.<sup>28</sup>

Corruption is a problem throughout the Guatemalan judicial branch. Government officials acknowledge the pervasiveness of this problem. Examples range from prosecutors charging the public for services that should be free, to the enactment of resolutions freeing individuals convicted of crimes.<sup>29</sup> This corruption undermines the public's trust in the very institutions charged with protecting the people from the *maras*. People will not risk their lives to assist the prosecution of gang members if there is no assurance that the gang members will not be back out on the street to exact revenge in a matter of days.<sup>30</sup>

Equally problematic, the Guatemalan government's funding for the judiciary, the National Civilian Police (hereinafter "PNC"), and social programs is inadequate.<sup>31</sup> Put simply, Guatemala lacks sufficient numbers of prosecutors, judges, national police officers, and social workers. For example, due to significant budget shortfalls and inadequate resources, the PNC Academy is close to collapse.<sup>32</sup> In addition, the actual number of police officers is perhaps 21,000, a number widely recognized as meeting only half of the country's security needs.<sup>33</sup> Former PNC Director Erwin Sperrisen remarked, "there ought to be at least 35,000 police officers . . . there are no incentives or pay raises . . . [and] it is frustrating because in one year we captured 50,000

26. See, e.g., *Criminal Gangs in the Americas*, *supra* note 3, at 23, 26.

27. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass'n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author).

28. See, e.g., *In OJ, Corruption is "At Every Level,"* SIGLO XXI, May 4, 2004.

29. *Id.*

30. Claudia Mendez Villaseñor, *Surrounded by Violence: Half a Million Neighbors in Zones 6, 7, 12, 13, 14, Between Gangs and Drugs*, PRENSA LIBRE, Feb. 21, 2005. ("In these places, the Public Ministry does up to 43 searches a day . . . and police make about 60 captures a month. . . . These actions, however, are not very effective due to the lack of accusations, and those that are captured get out free. 'If we report them, they kill us because they know us,' affirmed Rogelio Cruz, resident of Zone 12.")

31. In many Central American countries, there is a national police force and a more localized police force, somewhat analogous to the split between Federal Marshals and municipal police forces in the United States.

32. Telephone interview and written correspondence with Max Gimbel, Fmr. Dir. of Research, Guatemala Human Rights Commission (GHRC) in Washington, D.C. (Mar. and Apr. 2005) (on file with author).

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Notwithstanding the spread of gang violence, the Guatemalan judicial system is overworked and inefficient, which limits the ability of the courts to protect citizens from retribution at the hands of the *maras*. The Public Prosecutor's Office has coverage in only certain parts of the country, with almost no representation in places from which more than eighty percent of complaints are received.<sup>35</sup> According to the U.S. State Department, "the [Guatemalan] Constitution provides for an independent judiciary; however, the judicial system often failed to provide fair trials due to inefficiency, corruption, insufficient personnel and funds, and intimidation of judges, prosecutors, and witnesses."<sup>36</sup> Furthermore, judges, prosecutors, and witnesses continually receive threats from gangs.<sup>37</sup> People are too intimidated to do their jobs and civic duty, and thus only three percent of approximately 250,000 complaints filed annually with the Public Ministry are ever prosecuted.<sup>38</sup> Moreover, a leadership vacuum exists within many of the key crime-fighting government institutions. In the past five years, Guatemala has had nine different PNC directors and seven different Interior Ministers.<sup>39</sup> The absence of consistent leadership exacerbates the problems of under-funding and inadequate training for many public servants. It is no wonder the *maras* operate with near impunity in Guatemala.

Lastly, public officials have failed to develop rehabilitation programs and implement judicial reforms. For instance, Guatemala lacks a credible witness protection and relocation program, even though fear of retribution is an important disincentive that keeps people from testifying against gang members.<sup>40</sup> Educational opportunities for young people are scant. In addition, even if a youth desires to avoid or leave gang life, there are too few occupational alternatives to choose from.<sup>41</sup> Social service programs are also almost nonexistent. Thus, at-risk youths, the very individuals who are the

34. Enrique Perez, *Erwin Sperissen: It Is Frustrating*, PRENSA LIBRE (Guatemala), Feb. 14, 2005.

35. Telephone interview and written correspondence with Max Gimbel, Fmr. Dir. of Research, Guatemala Human Rights Commission (GHRC) in Washington, D.C. (Mar. and Apr. 2005) (on file with author).

36. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES - 2004: GUATEMALA (2004) [hereinafter U.S. Dep't of State Report, Guatemala - 2004].

37. INTER-AM. C.H.R., FIFTH REPORT ON THE SITUATION OF HUMAN RIGHTS IN GUATEMALA, Ch. IV, OEA/Ser.L/V/II.111, doc. 21 rev. (2001), available at <http://www.cidh.org/countryrep/GuateO1eng/chap.4.htm>.

38. U.S. Dep't of State Report, Guatemala - 2004, *supra* note 36, § e.

39. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass'n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author).

40. *Id.* See also *Out of the Underworld*, *supra* note 3, at 24 ("The relatively new anti-gang laws in El Salvador and Honduras do not include versions of America's anti-racketeering laws, which allow suspects to be charged with conspiracy to commit a criminal act, rather than the act itself.")

41. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass'n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author).

target of gang recruitment efforts, possess few educational or employment opportunities as alternatives to gang membership. Put simply, going to college or getting a job as a means to escape the gangs are simply not options for most individuals.

#### E. Local Officials Unwilling to Protect the Public

An asylum applicant must be prepared to demonstrate that, in addition to the ineffective response of the national government, government officials are unwilling to protect the public from gang violence and retribution.<sup>42</sup> This is a difficult task. The challenge is to demonstrate that the local authorities do not, and will not, protect innocent citizens from gangs, and therefore, if the applicant went to the police for help, the threat to the applicant, and quite possibly his or her family, would increase. Furthermore, unless the applicant demonstrates this unwillingness on a countrywide basis, he counters the internal relocation argument, which is often cited as a reason for not granting asylum.<sup>43</sup> In any event, evidence supports the contention that in many areas of Central America, the authorities are at best corrupt, and at worst, mere extensions of the gangs.<sup>44</sup> Again, because of the recent surge in gang violence, Guatemala is illustrative of the unwillingness of local officials to protect the civilian population.

The authorities are unwilling to control gangs because of the systemic corruption within their own ranks. Police, as well as political and military officials, are involved in drug trafficking and other organized crimes. Gangs do not fear a police crackdown and subsequent prosecution – and people do not trust government officials to protect them.<sup>45</sup> Corruption reaches the highest ranks of government. For example, one of the five key mafias in Guatemala was led by retired General Francisco Ortega Menaldo, the former Guatemalan Chief of Intelligence.<sup>46</sup> Likewise, corruption pervades all levels of the judicial system.<sup>47</sup> Often, courts charge for services that should be free,

42. *INS v. Elias-Zacarias*, 502 U.S. 478, 481-83 (1992); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996); *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

43. See, e.g., *Lopez-Zamora v. Gonzales*, 151 F. App'x 544 (9th Cir. 2005) (upholding denial of asylum where substantial evidence supports the IJ's finding that gang members who attacked the applicant were not associated with the government and that applicant did not report the attack to police, which undercuts the conclusion that the government is unwilling or unable to control the private actor's attempts at persecution); but see *infra* note 59.

44. Ginger Thompson, *World Briefing Americas: Guatemala: U.S. Arrests Top Drug Officer on Drug Charges*, N.Y. TIMES, Nov. 17, 2005, at A12 (United States Drug Enforcement Administration reports arrest of Adan Castillo, Guatemala's chief drug enforcement investigator, and two of his aides, "on charges of conspiring to smuggle tens of thousands of pounds of United States-bound cocaine through Guatemala."); *Mexico to Ax Corrupted Members of Elite Force*, REUTERS, Dec. 24, 2005, available at <http://msnbc.msn.com/id/10597765/> ("Mexico is trying to purge 800 corruption-tainted federal agents from an elite force modeled on the FBI but infiltrated by drug gangs.").

45. Tim Johnson, *Guatemalan Seeks Global Help to Lower Crime in Weary Land*, MIAMI HERALD, Feb. 9, 2003.

46. *Id.*

47. *In OJ, Corruption Reaches 'All Levels'*, *supra* note 28.

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Similarly, police collaboration with drug traffickers and gang members is rampant.<sup>49</sup> Police have been known to personally participate in kidnapping, homicide and rape, and to accept bribes for turning a blind eye to criminal activity.<sup>50</sup> According to a Guatemalan non-governmental organization, police officers have even rented out weapons to gangs for 300 Quetzals (about U.S. \$40 per night).<sup>51</sup> The gang members commit violent assaults and assassinations with these weapons, and then return the arms to the authorities in the middle of the night.<sup>52</sup>

The lack of accountability is another serious problem that illustrates the unwillingness of government officials to protect the populace from targeted gang violence.<sup>53</sup> The PNC often transfers corrupt police to different parts of the country, rather than disciplining them for their transgressions.<sup>54</sup> According to the United Nations' Verification Mission in Guatemala (MINUGUA), in 2003, approximately 2,300 agents were accused of criminal behavior.<sup>55</sup> The vast majority of cases were never investigated or were summarily disposed of by authorities.<sup>56</sup> Many Guatemalans are afraid to report crimes, fearing that police will tell the gang members who “pointed the finger” at them.<sup>57</sup> Because of the high levels of corruption and lack of accountability, public confidence in the law enforcement system is at a nadir.<sup>58</sup>

#### F. *The Absence of Hope*

Imagine if, in the United States, there were no jobs in vast swaths of the

48. *Id.* See also Inter-Am. C.H.R., *supra* note 37, section e (“One infamous example was the Second Court of First Instance of Guatemala, which was known for some time as ‘the biotipo’ because that was where the quetzals flew in exchange for anomalous measures in cases.”).

49. *Guatemala’s Berger Admits Some Police Linked to Organized Crime*, EFE NEWS SERVICE, June 26, 2004.

50. Telephone interview and written correspondence with Emilio Goubaud, Executive Dir., Ass’n for Crime Prevention (APREDE) in Guatemala City, Guatemala (Mar. and Apr. 2005) (on file with author); Telephone interview and written correspondence with Max Gimbel, Fmr. Dir. of Research, Guatemala Human Rights Commission (GHRC) in Washington, D.C. (Mar. and Apr. 2005) (on file with author).

51. Telephone interview and written correspondence with a Central American gang expert (identity withheld) (2005) (on file with author).

52. *Id.*

53. See, e.g., U.S. Dep’t of State Report, Guatemala – 2004, *supra* note 36. (“Police corruption [is] a problem, and there were credible allegations of involvement by individual police officers in criminal activity, including rapes, killings and kidnappings.”).

54. U.S. Dep’t of State Report, Guatemala – 2004, *supra* note 36.

55. *Corruption: High Levels of Corruption in the PNC*, CBRIGUA, Feb. 4, 2004.

56. *Id.*

57. See Julio Lara, *Living in Gang Territory: Violence Turns into an Everyday Event in Zones 7 and 18*, PRENSA LIBRE, July 19, 2004; See also Claudia Mendez Villasenor, *Surrounded by Violence: Half a Million Residents of Zones 6, 7, 12, 18 and 21, Between Gangs and Drug Rings*, PRENSA LIBRE, Feb. 21, 2005.

58. See INTER-AMERICAN C.H.R. FIFTH REPORT ON THE SITUATION OF HUMAN RIGHTS IN GUATEMALA, at Ch. IV, OEA/Ser.L/V/II.111, doc. 21 rev. (2001). available at <http://www.cidh.org/countryrep/Guatemalaeng/chap4.htm>.

country, no educational opportunities, gang members roamed the streets with guns and knives in hand, gang members murdered individuals for their refusal to join the gangs, and gang members targeted the families of those who resisted their recruitment efforts (or spoke out against violence). Imagine further, a national government without the resources to prosecute or fund a crackdown on the violence (or provide alternatives to gang-life), in which local police work with the gangs to commit crimes, and where relocation is not an option because the gangs exist everywhere. This grim picture is the reality in many areas of Central America.

Although one should not minimize the problem of crime within the United States, the aforementioned grim realities demonstrate the objective difference between gang violence in Central America and common crime in the United States. At least within the United States there is hope – hope that law enforcement will arrest and prosecute gang members, hope for educational opportunities as a means to escape gang violence, hope of internal relocation.<sup>59</sup> In Central America, this hope is largely absent. This is the prism through which gang-based asylum cases must be viewed.

### PART III. STRATEGIES FOR GANG-BASED ASYLUM CLAIMS<sup>60</sup>

The Immigration and Nationality Act (hereinafter “INA”) authorizes the Attorney General to confer asylum on any refugee. A refugee is defined as a person “who is unable to return or unwilling to return to . . . [his or her

59. Even if internal relocation enables the applicant to escape his persecutors, there are still other factors that impact the analysis of whether internal relocation is a reasonable alternative to asylum. Compare 8 C.F.R. § 208.13(b)(3) (2006) (“[A]djudicators should consider . . . whether the applicant . . . would face other serious harm in the place of suggested relocation . . . [the] administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.”), and *Da Silva v. Ashcroft*, 394 F.3d 1, 7-8 (1st Cir. 2005) (“Even if the putative persecutor is a local official or other non-state actor, an alien need not show that he will be unsafe anywhere in the country in order to avoid automatic disqualification from withholding of removal . . . The touchstone is whether, under all the circumstances of a particular case, internal relocation is a reasonable solution.”), with C.I.A., *Guatemala*, in *WORLD FACTBOOK*, available at <http://www.odci.gov/cia/publications/factbook/geos/gt.html> (approximately seventy-five percent of Guatemalans live below the poverty line; Guatemala’s GDP per capita is \$4,300). In light of these legal standards and facts, it is fair to question whether internal relocation is possible for an individual who survives on as little as \$11.78 per day. It might be unreasonable to expect a young man to relocate to another region, where he would lack the close-knit familial and social relationships that enable him to survive, or for a teenage mother from an urban area to resettle in an agricultural-based village.

60. Immigration courts are the trial courts of the asylum system. Decisions may be appealed to the Board of Immigration Appeals (BIA), the rulings of which are binding on trial-level immigration courts throughout the United States. BIA decisions may be appealed to the U.S. Court of Appeals. If a federal circuit court reverses the BIA on appeal, however, any new standard set by that court is binding only in that circuit. Thus, the potential exists for circuits to develop divergent interpretations of the legal standards governing asylum law. For example, the Ninth Circuit might articulate a broader view of membership in a particular social group than the Fourth Circuit. Consequently, asylum applicants in the Ninth Circuit would benefit from the broader classification, while those in the Fourth Circuit would not. As such, the discussion of various legal standards within this note is neither exhaustive nor definitive. The applicant or his representative must research the case-law of the applicable circuit to determine the best framework under which to bring a gang-based asylum claim.

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61. 8 U.S.C. § 1502(a)(1)(A).  
62. *See*, e.g., *INS v. St. Cyr*, 533 U.S. 28, 35 (2001).  
63. *See*, e.g., *INS v. Janicek*, 391 U.S. 318, 322 (1968).  
64. *INS v. Cardoza-Fonseca*, 480 U.S. 529, 540 (1987).  
65. *Ma v. Ashcroft*, 394 F.3d 1, 7-8 (1st Cir. 2005).  
66. The “nationality” of the applicant is not the determining factor in the gang-based asylum claim.

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native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>61</sup> In short, to qualify for asylum, an applicant must demonstrate: (1) a well-founded fear of persecution that is (2) on account of one of the five enumerated statutory grounds and (3) by an organization that the government is unable or unwilling to control.<sup>62</sup> A well-founded fear of future persecution contains a subjective and an objective component; the applicant must show that his fear is genuinely held, and that a reasonable person in like circumstances would fear persecution.<sup>63</sup> The U.S. Supreme Court has reasoned that one might have a well-founded fear of persecution when the likelihood of persecution is ten percent or more.<sup>64</sup> In addition, the applicant could establish his well-founded fear of persecution through the objective fact of past persecution alone.<sup>65</sup>

At first glance, this framework seems to call for a relatively straightforward analysis. Fitting the individual into one of the five categories for asylum and demonstrating that the fear of persecution is real will result in granting of asylum for that applicant. However, sadly, in reality, the application process is not that easy. Therefore, this section analyzes case-law as it relates to gang-based asylum claims and discusses possible litigation strategies.

#### A. *The Enumerated Statutory Grounds for Asylum*

The applicant must demonstrate that he fits into one of the five recognized categories and that this classification is the basis for his asylum claim. This might not be too difficult if, for example, the applicant heads an anti-government opposition movement, and political opinion is a basis for the asylum claim. The applicant can demonstrate his or her political beliefs with relative ease (e.g., press clippings, witness testimony). However, if an applicant's claim is based on his refusal to join gangs such as Mara 18 or MS-13, such action does not easily fit into one of the five enumerated grounds for asylum. As such, the applicant might argue that his refusal to join the gangs (or desire to leave them) arises out of a political opinion or a religious conviction.<sup>66</sup> In addition, for family members threatened because of their kin's opposition to gang membership, the logical path for an asylum

61. 8 U.S.C. § 1158 (b)(1) (2006); 8 U.S.C. § 1101(a)(42)(A) (2006).

62. See, e.g., Elias-Zacarias, 502 U.S. 478, 481 (1992).

63. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 444-45 (BIA 1987); see also *Yong Hao Chen v. INS*, 195 F.3d 198, 201-02 (4th Cir. 1999).

64. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

65. *Matter of Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989). In *Chen*, the BIA reasoned that past persecution was a potential basis for asylum in two separate scenarios: (1) where past persecution was on account of a statutorily protected ground, the government must rebut the presumption of a well-founded fear of future persecution; and (2) where there was past persecution, but a fundamental change of circumstances in the country of origin rendered the fear of future persecution moot, then the immigration judge might still grant relief on humanitarian grounds.

66. The subsequent discussion does not examine possible grounds for asylum with respect to "nationality" or "race." Central American gangs, at least Mara 18 or MS-13, do not seem to persecute

claim might be to argue for membership in a particular social group (i.e., the nuclear family of those who oppose gangs for political or religious reasons). Yet, for better or worse, the immigration courts have been reluctant to extend the "membership in a particular social group" category and, for that matter, the "political opinion" and "religion" categories, to include gang-based asylum claims.<sup>67</sup>

### 1. Political Opinion

The success of a political opinion claim rests on the applicant's ability to persuade the Immigration Judge (IJ) that his anti-gang convictions are political in nature, and that these opinions are the source of his well-founded fear of persecution.<sup>68</sup> In other words, the applicant must demonstrate that the persecutor's actions are motivated by the applicant's political opinions.<sup>69</sup> There are several potential pitfalls to such a claim, but this subsection will address each of these problems in systematic order.

First, and perhaps most problematic, is the absence of favorable case-law to support political opinion claims in the gang-based context. True, favorable case-law exists at the IJ level, but favorable treatment of such claims at the Bureau of Immigration Appeals (BIA) or the U.S. Courts of Appeals level is non-existent. Therefore, given the lack of favorable and binding precedent, the argument that anti-gang beliefs constitute a political opinion might be successful only before sympathetic judges. The provision of corroborative evidence is the best defense against a skeptical fact-finder in the absence of favorable precedent.

Second, the applicant must convince the IJ that the applicant's anti-crime opinions are political in nature. This might be a difficult concept for some IJs

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their victims on the basis of either of these two classifications. However, this does not necessarily mean that persecution on these grounds does not exist.

67. For example, the Fourth Circuit did not recognize that "family" constitutes a cognizable "particular social group" until September 2004. Yet, even this belated recognition of the prototypical social group is in doubt. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004), rehearing en banc granted, opinion vacated pending rehearing (Jan. 13, 2005), review withdrawn pursuant to settlement (July 26, 2005). Given its complex procedural history and subsequent settlement agreement, the *Lopez* decision is unlikely to have any value as precedent. However, the decision provides an insight into the thought process – in terms of gang-based asylum claims – of one of the more conservative circuit courts in the United States. As such, this note references the *Lopez* decision for illustrative and discussion purposes, but not as an example of binding precedent.

68. See *Nnachi-Anydiegwu v. Gonzales*, 134 F. App'x. 171, 173 (9th Cir. 2005) (The Ninth Circuit appears to construe anti-gang beliefs as a political opinion: "The BIA concluded that although Nnachi-Anydiegwu was credible, her claims for asylum failed because she did not demonstrate persecution . . . on account of her . . . anti-gang political opinion . . . The BIA's finding . . . is supported by substantial evidence . . . Although Nnachi-Anydiegwu's persecutor knew that she was Christian and that she was opposed to gang violence, there is no evidence that he threatened her, beat her up . . . 'because of' those grounds."); see also *Matter of D-V-*, slip op. at 13 (San Antonio Immigr. Ct. Sept. 9, 2004) (unpublished opinion).

69. See *Rivas-Martinez v. INS*, 997 F.2d 1143, 1148 (5th Cir. 1993); see also *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (BIA 1990) (finding that respondent's testimony established a link between his political beliefs and threatened harm).

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to accept for a simple reason: aside from criminals themselves, who favors or supports crime? If IJs were to extend the political opinion classification to include anti-crime attitudes, then nearly everyone would qualify.<sup>70</sup> Once again, the immigration floodgate phenomenon factors into the equation. Still, such an argument is not without hope of success, especially before a sympathetic IJ. The trick is to convince the IJ that in the applicant's country of origin, opposition to crime (and, by extension, to gangs) is a political opinion. As one Immigration Judge recently found,

[o]pinions and views concerning crime are ultimately political . . . How to control it, how to prevent it, how to punish it, and even what it is, all are ultimately debated, defined and, one hopes . . . resolved in the political arena. Refusing to associate, even in the face of injury or death, with an organization whose culture and lifestyle is integrally involved in the business of crime is the ultimate expression of a political opinion.<sup>71</sup>

In other words, the applicant must show that to oppose crime in his country of origin is to risk serious injury or even death: that is, persecution. Furthermore, the applicant must show that what Americans would call "crime" is so epidemic in the country of origin that a figurative, if not literal, war exists in that country between those who oppose crime and those who support it.

Third, the applicant should be prepared to provide the IJ with evidence of the outward manifestations of his anti-gang political opinions. Did the applicant lead public protests against gang violence before he fled the country? Did the applicant work for an NGO that provides refuge for ex-gang members? Did the gangs target friends or colleagues of the applicant who shared his political beliefs? Does the applicant possess independent corroborative evidence of these events and/or actions, such as newspaper clippings, eyewitness testimony, photographs or medical reports? Such outward manifestations are fact specific and unique to each case. Yet, this evidence provides the IJ with a stronger foundation to issue a favorable opinion than does a simple statement of the applicant, such as "I oppose gangs and crime in all its forms."

## 2. Religion

Perhaps a more promising classification for purposes of gang-based asylum claims is religion. Under this framework, the applicant provides evidence of (1) his membership in a religious group; (2) the strength of his

70. See, e.g., *Romero-Rodriguez v. U.S. Att'y Gen.*, 131 F. App'x 203, 204-206 (11th Cir. 2005) (upholding denial of asylum where applicants based persecution claim on attempted recruitment by a gang involved exclusively in criminal activities, applicants had not been harmed, and timing of the applicants' entry into the United States raised questions as to their motives).

71. *Matter of D-V-*, slip op. at 13.

religious beliefs; and (3) that his religious beliefs are incompatible with the gang lifestyle. The problem with this argument, as in the case of the previous argument, is the lack of favorable precedent in the context of gang-based asylum claims. In other words, Immigration Judges cannot issue a grant of asylum for an applicant without fear of reversal.

Yet, on a more general level, persecution on account of religion is a well established basis for asylum.<sup>72</sup> Moreover, the Supreme Court has interpreted the phrase "conviction based upon religious training or belief" as "all sincere religious beliefs which are based upon a power of being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."<sup>73</sup> The Court views the broad concept of religious belief as a central component of personal liberty and dignity: "Putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty."<sup>74</sup> The lack of binding case-law does not necessarily doom gang-based asylum claims under a religious classification. The applicant must demonstrate the connection between his refusal to join (or leave) the gang, his religious convictions, and his fear of persecution. The issue is not so much to fit the applicant into a religious classification, but rather to satisfy the nexus requirement.<sup>75</sup>

### 3. Membership in a Social Group

An applicant may be eligible for asylum if he is a member of a particular social group.<sup>76</sup> The circuit courts have developed a three-part test to determine whether an applicant is entitled to asylum based on his membership in a particular social group. The applicant must: (1) identify the existence of a "particular social group" recognizable under the statute; (2) establish membership in that group; and (3) show that his persecution is based on that membership.<sup>77</sup> Members of a particular social group "share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties."<sup>78</sup> Moreover, the common characteristic that defines the group "must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."<sup>79</sup>

Interestingly, it could be easier for an applicant who refuses membership in

72. 8 U.S.C. § 1158(b)(1)(B)(i) (2006); 8 U.S.C. § 1101(a)(42)(A) (2006).

73. *United States v. Seeger*, 380 U.S. 163, 176 (1965).

74. *United States v. Macintosh*, 283 U.S. 605, 634 (1931). In *Macintosh*, Chief Justice Hughes also noted that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." *Id.* at 633-634.

75. See *infra* Part III.B for an analysis of the nexus requirement and religion.

76. 8 U.S.C. § 1158(b)(1)(B)(i) (2006); 8 U.S.C. § 1101(a)(42)(A) (2006).

77. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

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

79. *Id.*