

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 16,000.¹ 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*.² However, that day is not today, nor is it likely to be any time in

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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.³

For asylum purposes, the United States government has no desire to open an immigration floodgate.⁴ Fact-finders often view gang-based asylum claims with a skeptical eye, as if such claims exist outside the permissible legal framework.⁵ Sadly, innocent people are caught in the middle.⁶ 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.⁷

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.

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.⁸ Guatemala suffers from one of the world's highest levels of violent crime, with a homicide rate of around thirty-six per 100,000.⁹ 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."¹⁰ 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.¹¹ 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."¹² 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.¹³

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.¹⁴

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.¹⁵ 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.¹⁶ 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.*

powerbases of El Salvador and Guatemala to the southern states of Mexico.¹⁷

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.¹⁸ The practical impact of such communication and gang coordination is to deprive the applicant of safe relocation options.¹⁹

C. *Gang Structure*

Local neighborhood cliques comprise the backbone of a *mara's* organizational structure.²⁰ These individual cliques operate with different degrees of sophistication.²¹ However, most cliques exhibit at least a rudimentary command-and-control structure. Much like a terrorist cell, each clique has a boss or leader.²² This leader rules the clique with absolute authority.²³ Beneath him are the foot soldiers. The leader's directives are followed lest the foot soldiers themselves risk retribution on account of their recalcitrance.²⁴ 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.²⁵ 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; 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).

23. *Id.*

24. *Id.*

25. *Id.*

opposed to ineffective police dragnets) to combat the *maras*, current anti-gang efforts are still woefully inadequate to solve the problem.²⁶ 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.²⁷ Yet, endemic corruption, insufficient funding for law enforcement, and inadequate training for judicial officers combine to render impossible the dispensation of justice.²⁸

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.²⁹ 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.³⁰

Equally problematic, the Guatemalan government's funding for the judiciary, the National Civilian Police (hereinafter "PNC"), and social programs is inadequate.³¹ 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.³² 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.³³ 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, 18, 12, 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).

33. *Id.*

persons . . . but there were only 48 firm sentences; it is ridiculous.”³⁴

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.³⁵ 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.”³⁶ Furthermore, judges, prosecutors, and witnesses continually receive threats from gangs.³⁷ 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.³⁸ 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.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ Likewise, corruption pervades all levels of the judicial system.⁴⁷ 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.

release individuals who should be in jail, and demand payment in exchange for testimony.⁴⁸

Similarly, police collaboration with drug traffickers and gang members is rampant.⁴⁹ Police have been known to personally participate in kidnapping, homicide and rape, and to accept bribes for turning a blind eye to criminal activity.⁵⁰ 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).⁵¹ 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.⁵²

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

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*, CERIGUA, 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/Guate01eng/chap.4.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.⁵⁹ 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 CLAIMS⁶⁰

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.

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.”⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴ In addition, the applicant could establish his well-founded fear of persecution through the objective fact of past persecution alone.⁶⁵

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.⁶⁶ 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, 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.⁶⁷

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.⁶⁸ In other words, the applicant must demonstrate that the persecutor’s actions are motivated by the applicant’s political opinions.⁶⁹ 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

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).

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.⁷⁰ 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.⁷¹

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.⁷² 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.”⁷³ 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.”⁷⁴ 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.⁷⁵

3. *Membership in a Social Group*

An applicant may be eligible for asylum if he is a member of a particular social group.⁷⁶ 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.⁷⁷ 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.”⁷⁸ 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.”⁷⁹

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.*

a gang (or desires to leave) to base his claim on religion or political opinion than on membership in a social group. Courts are likely to reject the recognition of broad and potentially amorphous social groups like “all young, urban males who have been targeted by the gangs in Guatemala.”⁸⁰ The more particularized the social group with respect to the individual applicant, the more likely the IJ will be to accept the categorization as legitimate. Again, such distinctions would assuage the IJs’ floodgates fear. The applicant might establish himself as a member of a particular social group whose members “have been actively recruited by gangs, but who have refused to join because they oppose the gangs.”⁸¹ In the approving words of one Immigration Judge,

[T]he respondent has demonstrated why the MS gang targeted him for persecution. The respondent was not harassed by the gang members because he is young, or because he is male or because he comes from the lower economic class of Honduras . . . It was not until the MS gang actively sought him out for membership that he began to be persecuted. The respondent has testified that he does not agree with the gang member style of life and that he expressed his views many times to different gang members. . . . [H]is anti-gang sentiments are an immutable characteristic . . . that he . . . should not be required to change.⁸²

Sadly, there are few cases that take such an expansive view of membership in a particular social group with respect to gang-based asylum claims. Most, if not all, favorable decisions are at the IJ level and usually involve unreported opinions.⁸³ Unless an applicant brings a case before a sympathetic Immigration Judge, therefore, the applicant should attempt to analogize his membership in the particular social group (e.g., young males who have been recruited by the gangs but refuse to join them) to other less controversial, accepted

80. *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276, 285-286 (BIA 1985), *aff'd*, *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). In *Sanchez*, the BIA found that the proffered social group “comprised and composed of young, urban, working class males who have not served in the military or otherwise affirmatively demonstrated their support for the Government of El Salvador” did not constitute a social group. *Matter of Sanchez and Escobar*, 19 I. & N. Dec. at 286. The BIA stated that “the above characteristics singularly or in the aggregate do not form the basis of a realistic likelihood of persecution.” *Id.* at 286.

81. See *Matter of D-V-*, slip op. at 9-10 (San Antonio Immigr. Ct., Sept. 9, 2004) (unpublished opinion).

82. *Id.* at 10-11 (citation omitted).

83. Commercial databases, like Westlaw and Lexis-Nexis, only report immigration decisions from the BIA level and up. However, not all BIA decisions are made public. In addition, the hundreds, if not thousands, of decisions at the IJ level are not made public. Generally, asylum proceedings are conducted in private to preserve the anonymity of the applicant. Such action is necessary to protect the identities of vulnerable applicants and vulnerable witnesses. Consequently, favorable decisions must spread through word of mouth, e-mail, and facsimile. Moreover, the dissemination of favorable results is possible only if the IJ issues a written opinion, and, regardless, such opinions are not binding on other courts.

social groupings.⁸⁴

Most courts agree that the nuclear family is a prototypical social group, so family members threatened because of their kin's refusal to join (or desire to leave) a particular gang could invoke this classification without reference to another, potentially more controversial, social grouping.⁸⁵ Presumably, an asylum applicant can demonstrate that he or she is part of a family, which constitutes membership in a particular social group. Yet, the classification of family as a social group is narrow in scope (i.e., its recognition poses little threat of opening the immigration floodgate) because friends or extended family members fall outside the scope of "family." Also, family members with little connection to an individual who refuses to join a gang have little to fear from gang members for the simple reason that their attenuated relationship shields them from identification. Nevertheless, courts would be hard pressed to conclude that the nuclear families of individuals who refuse to join the gangs do not share a common, immutable characteristic as required for them to form a "particular social group."⁸⁶

The close family members of an individual who resists the gangs are often in as much danger as the individual himself.⁸⁷ Unfortunately, gang members target the spouses, children, and close relatives of recalcitrant recruits in order to send a message that dissent is not tolerated.⁸⁸ In other words, the refusal to become a gang member has deadly consequences not only for the recalcitrant recruit, but also for his or her nuclear family (e.g., spouse, significant other, children). The nuclear families of individuals who resist gang recruitment efforts are part of a particular social group. The gangs often make no distinction between the actual recruit and their families for purposes of persecution. As such, the nuclear family of an individual who refuses to join the gang is well positioned to take advantage of this avenue for asylum.

Yet, fitting into one of the five enumerated grounds for asylum is only half of the battle. The applicant must also demonstrate that his well-founded fear of persecution exists *because* of his religious or political beliefs, his racial identity or national origin, or his membership in a particular social group.

84. Cf. *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (BIA 1996) (reasoning that gender, youth, membership in a particular tribe, and opposition to the practice of FGM are all immutable characteristics, and, therefore, the possession of such traits constitutes membership in a particular social group). An applicant might analogize his resistance to the gang's recruitment efforts to a rejection of FGM "practice;" in both circumstances the opposition of the asylum applicant is to a "practice."

85. See *Fatin*, 12 F.3d at 1239-40 (affirming kinship ties under *Acosta* as a characteristic of a particular social group); see also *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can be, in fact, no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.").

86. See, e.g., *Lwin*, 144 F.3d at 510-13.

87. Telephone interview and written correspondence with Leonel Dubon, Program Dir., Casa Alianza – Guatemala (Mar. and Apr. 2005) (on file with author).

88. 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).

This is the infamous “nexus requirement.”⁸⁹ The following subsection discusses the impact of this requirement on gang-based asylum cases in greater detail.

B. *The Nexus Requirement and Well-Founded Fear of Persecution*

The nexus requirement forces the applicant to demonstrate the connection between his well-founded fear of persecution and his alleged ground for asylum.⁹⁰ To take a simple example, it is not enough for the applicant to demonstrate that he is a Coptic Christian living in Egypt and that several Muslims attacked him. Rather, the applicant must show that Muslims attacked him *because* he was Christian. In a world where persecutors rarely state, “I am attacking you because of your religious [Christian] faith,” such an evidentiary hurdle can be difficult to overcome.⁹¹ As one might imagine, the problem of the nexus becomes even more acute in gang-based asylum claims, for, if gang violence is merely treated as random “crime,” then how, short of the persecutor volunteering a statement, can the applicant ever prove he was persecuted on account of one of the five enumerated grounds? The applicant’s well-founded fear of persecution must be objectively and subjectively reasonable,⁹² although he need not show conclusively why persecution might occur.⁹³ Nevertheless, the more specific and particularized the information the applicant provides, the more persuasive his argument that his well-founded fear of persecution is on account of one of the five enumerated grounds. This subsection discusses potential strategies for meeting the nexus requirement in light of the aforementioned legal framework.

1. *Political Opinion*

To establish a nexus between political opinion and fear of persecution, the applicant must “demonstrate through some evidence, either direct or circumstantial, that the persecutors know of [his] political opinion and . . . likely

89. See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 236-39 (4th Cir. 2004). The rehearing en banc and subsequent settlement agreement vacated the holdings of this case, but *Lopez-Soto* highlights the potential problem of causation for those applicants who refuse to become gang members. The problem of causation is most evident when the applicant argues that his well-founded fear of persecution is on account of his membership in a particular social group (e.g., the family).

90. 8 U.S.C. § 1158 (b)(1) (2006); 8 U.S.C. § 1101(a)(42) (2006); see, e.g., *Matter of Mogharrabi* 19 I. & N. Dec. 439, 441 (B1A1987).

91. The evidentiary burden is difficult to overcome because the applicant most likely fled his country of origin in a hurry to avoid persecution. He might not have been able to collect or smuggle information out of the country to corroborate his well-founded fear of persecution. In addition, once in the United States, the applicant might be cut off from sympathetic brethren who still reside in the country of origin. Without access to his social networks, the applicant might have no means to obtain crucial information to corroborate his asylum claim.

92. *Hassan v. Ashcroft*, 388 F.3d 661, 666 (8th Cir. 2004).

93. See *id.*, at 666; see also *Yong Hao Chen v. INS*, 195 F.3d 198, 201-02 (4th Cir. 1999).

will persecute [him] because of it.”⁹⁴ A general desire to flee crime or random gang violence will not suffice.⁹⁵ Instead, the applicant must demonstrate that his well-founded fear of persecution is because of his refusal to join the gang (his refusal being the manifestation of his anti-gang beliefs), and the dire consequences of such actions visited on him as a result. Such an argument counters the axiom that asylum is not available for every victim of civil strife, but only to those who are persecuted for particular reasons.⁹⁶ The recognition of anti-crime beliefs as a political opinion likely depends on the conduct of the applicant and the response of the gang members. In other words, conduct links the applicant’s well-founded fear of persecution with his political opinion. Ideally, gang members would approach the applicant and declare their intention to persecute because of his opposition to gang violence, crime, etc. In reality, asylum applicants are not so fortunate. As such, success depends on the applicant’s ability to secure evidence establishing this nexus.

The applicant must provide the judge with evidence (1) of his anti-gang beliefs; and (2) that gang members knew of these beliefs. If the applicant establishes the connection between these two factual circumstances, this opens the door for an inference that persecution is on account of a political opinion. Therefore, as with all asylum claims, the testimony of the applicant is essential. First, he must give credible testimony of his anti-gang convictions. Second, the applicant should provide evidence that he made known his anti-gang opinions to gang members, and, furthermore, that gang members did not threaten him until he voiced his opposition to the gang lifestyle.⁹⁷ Third, the applicant should present independent evidence to corroborate his anti-gang political opinions. For example, participation in rallies against gang membership (corroborated by photographic evidence or eyewitness testimony), followed by threats or acts of violence against the applicant, could establish a connection between the political opinion and a fear of future persecution. Lastly, as with all grounds for asylum, it is helpful to provide evidence of individuals similarly situated to the applicant who made known their anti-gang political opinions to gang members and were subsequently

94. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 351 (5th Cir. 2002) (citing *Rivas-Martinez v. INS*, 997 F.2d 1143, 1143 (5th Cir. 1993)). Again, the applicant and his attorney must be aware that each circuit could have a slightly different interpretation of what constitutes persecution on account of political opinion (or any of the other statutorily enumerated grounds for asylum). Absent a Supreme Court decision, the U.S. Courts of Appeals have the power to bind Immigration Judges and BIA panels, but only within their respective jurisdictions.

95. See *Matter of D-V-*, slip op. at 12-14 (San Antonio Immigration Court, Sept. 9, 2004) (unpublished opinion).

96. *Ali v. Ashcroft*, 366 F.3d 407, 410 (6th Cir. 2004) (“We are convinced that . . . Ali did not suffer persecution, but was instead involved in civil unrest between competing political factions.”); *Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987) (“Thus, we can infer that Congress did not intend to confer eligibility for asylum on all persons who suffer from civil disturbances.”); *Matter of Acosta*, 19 I. & N. Dec. 211, 211-12 (BIA 1985). (“The term persecution . . . does not encompass the harm that arises out of civil . . . strife in the country.”)

97. See, e.g., *Matter of D-V-*, slip op. at 14 (San Antonio Immigration Court, Sept. 9, 2004) (unpublished opinion).

targeted for retribution.

Of course, this is not an exhaustive examination of the potential means by which the applicant might establish his anti-gang beliefs as the basis for his persecution. Rather, no matter what evidence the applicant presents before the fact-finder, the key is for him to demonstrate that but for his political opposition to the gangs, he would not be in danger of persecution. Moreover, from a legal standpoint, the refusal of an applicant to join a gang because of anti-gang political beliefs is materially indistinguishable from instances in which an individual refuses membership in a guerrilla movement or death squad. Various courts have recognized the rejection of recruitment efforts in the context of guerilla movements or death squads as grounds for an asylum claim based on political opinion.⁹⁸ Therefore, if an individual's refusal to become a guerrilla fighter or member of a death squad is an expression of a political opinion, then the applicant's refusal to join a transnational criminal gang must be given similar recognition. As in the case of a guerrilla movement or a death squad, the refusal to become a gang member constitutes the manifestation of a political opinion; the clear inference is that subsequent persecution is because of this belief.⁹⁹

2. Religion

Assuming the applicant elects to pursue an asylum claim on account of his religious beliefs, the thrust of his argument is threefold: (1) establish that gang members knew the applicant's religious convictions were a basis for his refusal to join; (2) provide evidence that gang members persecute individuals who refuse to join them because of their religious convictions; and (3) demonstrate there is a reasonable possibility gang members will persecute the applicant because of his religious beliefs.

First, to establish religion as a basis for a well-founded fear of persecution, the applicant must do more than merely show he is religious and that his religious beliefs preclude involvement in the gangster lifestyle. Instead, the applicant must show that gang members knew his religious beliefs were a

98. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). (requiring applicant to provide direct or circumstantial evidence showing link between political opposition to guerilla movement, refusal to join guerilla movement, and subsequent fear of persecution); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249-50 (9th Cir. 1999) (respondent threatened on account of her political opinion when she provided uncontradicted, credible testimony of her [and her family's] opposition to a guerilla movement and refusal to join them); *Matter of Villalta*, 21 I. & N. Dec. 142, 147 (BIA 1990) ("Respondent established through his testimony that he . . . [was] singled out and threatened by a Death Squad. The respondent further established a link between the threatened harm and his political beliefs by testifying that [he] has received death threats because of his political activities in [a] student organization," and the mission of the death squads was "to annihilate suspected political opponents.").

99. See *Elias-Zacarias*, 502 U.S. at 483; see also *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (after *Elias-Zacarias*, "applicants can no longer establish that their persecution was on account of political opinions by inference, unless the inference is one that is clearly to be drawn from facts in evidence.").

central reason for his refusal to join the gang. This is important because if gang members did not know of the applicant's religious convictions, it would be quite awkward for the applicant to argue he has a well-founded fear of persecution on account of his religious beliefs.

As an evidentiary matter, the express statements of gang members are an ideal way to establish the nexus between religious beliefs and a well-founded fear of persecution. However, there are other ways to meet this requirement. For example, assuming the applicant was being recruited by gang members from his own neighborhood, he might present evidence in the form of lay witness affidavits that gang members would often see him attend church on Sundays. These witnesses could also attest to the fact that the applicant's involvement in church activities was well known throughout the neighborhood. The applicant could testify that he told gang members he would not join them because of his religious beliefs. There are many potential ways to attack this evidentiary burden. But, in sum, the applicant must demonstrate that gang members knew that his refusal to join them was based on his religious beliefs.

Second, if the applicant provides evidence that gang members in the past have targeted individuals similarly situated to him for retribution, this solidifies the nexus between fear of persecution and religious beliefs. Necessarily, the establishment of a nexus is specific to each case. This aspect of the asylum claim adopts the feel of an investigation (e.g., the applicant must search for examples of other individuals who faced persecution at the hands of gang members because of their religious beliefs). To establish this fact, the applicant, for example, might secure statements from expert witnesses. Ideally, these experts provide independent confirmation of the applicant's claim.¹⁰⁰ In addition, secondary sources (e.g., newspaper articles) often provide individual anecdotes of persecution, which, taken together, strengthen the proffered nexus.¹⁰¹ Put simply, the applicant provides corroborative evidence of his claim; the fact-finder discerns a pattern from this evidence; the fact-finder agrees gang members target individuals who refuse to join them because of religious beliefs. In this manner, the applicant

100. Securing affidavits from experts who reside in the applicant's country-of-origin is essential. Such experts have direct knowledge of gang activities and trends in gangs' retribution toward perceived opponents. For example, the applicant could contact the head of an NGO that specializes in the rehabilitation of ex-gang members or at-risk youth. Presumably, such an expert would be in a position to comment on the reasons why gang members target individuals who refuse to join them. In addition, the individual might even be in a position to provide the court with concrete examples of youths similarly situated to the applicant who were persecuted on account of their religious beliefs. The fact-finder might view this "on-the-ground evidence" as more persuasive than an affidavit from an expert who lives and works in the United States, and has little direct contact with the applicant's country-of-origin.

101. *Acribillan a Joven [Youth Murdered]*, SIGLO XXI, May 2, 2004 (Gang members murdered Jesus Sumale Lago, 22, because of his refusal to join on account of his religious beliefs; the assailants ambushed Mr. Sumale Lago on his way home from church); *79 Former Gang Members Killed*, SUN-SENTINEL (Fort Lauderdale), Sept. 8, 2003, at 14A (Erick Leonardo Pastor, 22, died from eight gunshot wounds after leaving the gang and joining an evangelical church).

demonstrates his connection between religious beliefs and fear of persecution.

Lastly, the applicant bolsters his case if he provides evidence that gang members are likely to target him because of his religious beliefs. The aforementioned discussion of similarly situated individuals goes to this point. However, if possible, the applicant should be prepared to demonstrate why he will receive the same treatment as similarly situated individuals. In other words, the question becomes, how similarly situated is the applicant to other individuals who have been persecuted by the gangs on account of their religious beliefs? For example, can the applicant point to siblings or friends who refused to join the gang on account of their religious beliefs and were shortly thereafter threatened, beaten, raped, or even killed? Alternatively, did the applicant inform gang members of his reasons for refusal and a few days later, for example, receive death threats? Are there medical records, photographic evidence of injuries, or police reports to corroborate such a claim?¹⁰² In other words, the applicant should provide the court with specific evidence as to why the gang members have marked him for death.

The applicant stands little chance of success if he relies on uncorroborated statements regarding his religious beliefs and his opposition to gang violence. Such evidence does little to establish the nexus. Rather, the applicant must provide the judge with specific and particularized evidence so that the link between religious beliefs and fear of persecution does not require a judicial leap of faith.

3. *Membership in a Particular Social Group*

The fear of persecution on account of membership in a social group must be the result of a specific, particularized fear, not some general, vague fear of gang members or gang violence.¹⁰³ Equally important, members of a particular social group must share an immutable trait or common characteristic that they should not be required to change.¹⁰⁴ In light of these basic principles, this subsection sets forth two possible classifications of applicants who may satisfy the nexus requirement: (1) individuals who have been recruited by gang members, but who have refused to join them because they oppose the gangs; and (2) the nuclear families of individuals who have resisted gang recruitment efforts.¹⁰⁵ In both contexts, to satisfy the nexus

102. For discussion of police reports as specific evidence of persecution, *see infra* n. 114 and Section III.D.2. *Unwilling Local Officials*.

103. *See Hassan v. Ashcroft*, 388 F.3d 661, 666 (8th Cir. 2004); *see also Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001) ("However, the evidence put forth by Abdille is also consistent with acts of private violence that fall short of persecution . . . The assaults . . . could represent random street violence . . . Such ordinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum.").

104. *Matter of Acosta*, 19 I. & N. Dec. at 233.

105. *Matter of D-V-*, slip op. at 9 (San Antonio Immigration Court, Sept. 9, 2004) (unpublished opinion).

requirement is to answer the question – why did gang members target (or persecute) the individual?

Individuals who refuse to become gang members are members of a particular social group (i.e., those who resist gang membership). Persecution of these individuals occurs because of their steadfast refusal to participate in a criminal organization. There is no reason for gang members to single out the individual (or his nuclear family) for persecution other than his refusal to join them. The unequivocal rejection of the gangster lifestyle, which includes acts of theft, murder, drug use, rape, and extortion, represents a common, immutable characteristic that the individual should not be required to change.¹⁰⁶

The establishment of a nexus between fear of persecution and membership in a particular social group presents two distinct challenges. First, the individual applicant (or the nuclear family applicants) must establish that gang members target individuals who defy their commands (e.g., the offer of gang membership). The provision of such evidence demonstrates that gang members view individuals similarly situated to the applicant as a threat to their control. Expert testimony and secondary sources are a means through which the applicant can illustrate this proposition. For example, one expert from Casa Alianza (Guatemala) notes that gang leaders attempt to recruit youths to join them on a continuous basis.¹⁰⁷ The rejection of these recruitment efforts for failure to share in the gang's ideals is reason enough to be killed.¹⁰⁸ In this manner, gangs pressure youths to join them, even when it is against their will.¹⁰⁹ In essence, the applicant should demonstrate that gang members murder, rape, assault, or otherwise threaten members of the particular social group to which the individual applicant belongs.¹¹⁰ Second, the applicant must persuade the fact-finder that in the individual applicant's specific case, gang members have targeted him because of his membership in the particular social group. The applicant's testimony is essential to establish this fact. However, the testimony of witnesses (e.g., friends and family) should corroborate the assertion of the applicant. The testimonial portion of the asylum claim establishes the nexus with respect to the facts of the specific case before the fact-finder.

As the preceding paragraphs illustrate, the nexus requirement demands the

106. See *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 671-73 (7th Cir. 2005); see also *Matter of Acosta*, 19 I. & N. Dec. at 233.

107. Telephone interview and written correspondence with Leonel Dubon, Program Dir., Casa Alianza – Guatemala (Mar. and Apr. 2005) (on file with author).

108. *Id.*

109. *Id.*

110. 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) (“[Mara] 18 threatens and kills those who refuse to join the gang. Once the gang, like [Mara] 18, has made a threat to kill someone . . . there is no way to take it back.”); Bruce Finley, *Death of Deportee Back in Guatemala: Teen Slain by Gang He Tried to Escape*, DENVER POST, Apr. 5, 2004, at A1.

applicant link his well-founded fear of persecution with his membership in a particular social group. This link must be particularized and specific. The applicant should provide evidence that (1) gangs target individuals who resist their recruitment efforts; (2) gang members have targeted the applicant for similar reasons; and (3) through their recruitment efforts, the gangs seek to overcome the applicant's anti-gang beliefs, an immutable characteristic that he should not be required to change.

C. *Unable and Unwilling to Protect*

Because the gangs constitute non-governmental entities, the applicant must demonstrate his persecutor is someone the government is unable and unwilling to control.¹¹¹ The goal is to rebut the internal relocation argument of the attorney for the Department of Homeland Security – that is, if the applicant moves to another part of the country, then he will no longer be in danger of persecution, and such relocation is reasonable.¹¹² So, with this in mind, the applicant should provide evidence showing that he cannot rely on the government for protection and that the threat of persecution exists on a country-wide basis.¹¹³ There is no set formula for what constitutes such a country-wide threat. However, the following is a non-exclusive list of some demonstrative factors: (1) gangs operate throughout the nation (e.g., in large cities and small towns alike); (2) the government does not consistently investigate and/or punish gang members for their criminal acts;¹¹⁴ and (3) government officials and gang members often work together to commit crimes.¹¹⁵ As one might imagine, this aspect of the applicant's asylum claim depends on the circumstances of each case. Yet, the aforementioned factors, as well as the discussions in Part II. D, Part II. E, and Part III. D, provide the applicant with a framework upon which to demonstrate the inability of the government to protect its citizens from gang violence.

111. See *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); see also *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996).

112. Compare 8 C.F.R. § 208.13(b)(2)(ii), and *Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004) (“Nor does substantial evidence support the BIA’s alternative finding that Petitioners could relocate safely within Pakistan without facing persecution.”), with 8 C.F.R. § 208.13(b)(3). See also *supra* note 59.

113. See *id.*; *Matter of Acosta*, 19 I. & N. Dec. 211, 236 (BIA 1985).

114. Some courts require the applicant to do more than show a general inability on the part of government officials to protect him from targeted acts of gang violence. Instead, these courts would have the applicant demonstrate that (1) he went to the police for assistance, and (2) the police could not and would not do anything about his specific plight. Yet, this presumes that government officials, and police in particular, are not corrupt, which, as this note illustrates, is far from certain in many areas of Central America. In other words, going to the police might do more harm than good – i.e., lead to the immediate persecution of the applicant. Sadly, IJs do not seem to recognize this well-documented threat. See, e.g., *Romero-Rodriguez v. U.S. Att’y Gen.*, 131 F. Appx. 203, 204 (11th Cir. 2004).

115. See *Kaiser*, 390 F.3d at 659; *Matter of Acosta*, 19 I. & N. Dec. at 236.

D. *The Convention Against Torture*

Claims pursuant to the Convention Against Torture (“CAT”) do not require the applicant to establish that he would be tortured on account of one of the five enumerated grounds.¹¹⁶ Instead, the burden is on the applicant to establish that it is more likely than not that he would be tortured if removed to his country of origin, and that such torture would be inflicted with the acquiescence of a public official.¹¹⁷ A public official’s acquiescence in torture “requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”¹¹⁸ Given the absence of a nexus requirement, CAT claims might seem like an easier path to relief than the asylum framework. Yet, CAT relief has its drawbacks. Applicants who are granted CAT relief are not entitled to all of the benefits of a successful asylum claimant.¹¹⁹ In addition, for political reasons, immigration courts are often reluctant to find that a government, especially one on good terms with the United States, acquiesces in the torture of its own citizens. Nevertheless, for relatively novel claims, like gang-based persecution, CAT relief might be a worthwhile option for the applicant to pursue.

No clear articulation exists for what constitutes awareness of torture. However, the BIA and the circuit courts have adopted standards that include some combination of willful blindness, actual knowledge, or willful acceptance of torturous activities.¹²⁰ Despite the absence of a clear standard or terminology for defining what constitutes governmental “awareness,” an interesting trend has emerged in the analysis of CAT claims. It seems possible for an applicant to demonstrate “awareness” if he shows (1) the inability of the national government to prevent acts of torture, and (2) the unwillingness

116. See, e.g., *In re S-V-*, 22 I. & N. Dec. 1306, 1311 (BIA 2000) (“However, an applicant is not required to demonstrate that he or she would be tortured on account of a particular belief or immutable characteristic.”).

117. 8 C.F.R. § 208.18(a); 8 C.F.R. § 208.16(c); *Amanfi v. Ashcroft*, 328 F.3d 719, 725 (3d Cir. 2003).

118. 8 C.F.R. § 208.18(a).

119. News Release, U.S. Dep’t. of Justice, Executive Office of Immigration Review, *Immigration Court Process in the United States* (Apr. 28, 2005), <http://www.usdoj.gov/eoir/press/05/ImmigrationCourtProcess2005.htm> (CAT protection is not the same as asylum. Some of the major differences are (1) the government can remove the person to a third country – other than the United States – where he or she would not be tortured; (2) CAT protection does not grant either permanent resident status or the ability to bring family members to the United States; and (3) one of the forms of relief under CAT is deferral of removal from the United States, which is more easily and quickly terminated if the individual no longer is likely to be tortured in the country of removal.)

120. *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-96 (9th Cir. 2003) (construing awareness of torture as willful blindness, and not requiring the applicant to demonstrate the government’s willful acceptance or actual knowledge of torturous activities); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2003) (holding that willful blindness suffices to prove acquiescence); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240-41 (4th Cir. 2004) (reasoning petitioner must show actual knowledge and willful blindness on the part of government officials); *In re S-V-*, 22 I. & N. Dec. at 1311-12 (requiring the applicant to do more than show that government officials are aware of the activity constituting torture but are powerless to stop; instead, applicant must demonstrate that government officials are willfully accepting of torturous activities).

of local officials to protect citizens from such actions.¹²¹ In other words, regardless of how the BIA or the circuit courts define acquiescence and awareness, if the applicant produces evidence that illustrates the inability and the unwillingness of the government to prevent acts of torture, the CAT claim has a chance of success.¹²² Using Guatemala as a case-study, this subsection applies the aforementioned proposition to a hypothetical gang-based CAT claim.

1. *Inability of National Governments*

On a general level, an applicant should demonstrate that his national government is unable to protect targeted individuals from torture at the hands of gangs, like Mara 18 or MS-13, notwithstanding its awareness of torturous activities. This aspect of the CAT claim is fact-specific to each case. The subsequent paragraph discusses a series of factors. These factors tend to show the inability of the Guatemalan government to protect its citizens from gang-initiated torture. Although the evidence to support the factors is specific to Guatemala, the factors themselves demonstrate governmental inability to protect citizens on a general level.

First, demonstrate gang infiltration of governmental institutions.¹²³ The resultant corruption enables gang members to have access to sensitive information (e.g., location of perceived enemies) and enables them to operate with impunity.¹²⁴ Second, the government underfunds the criminal justice

121. The *Ontunez-Tursios* court found that the Honduran government's actions to remove squatters with minimal force did not constitute torture, even if government officials had connections to powerful landlords who favored such removal measures. In addition, the court noted that a failure to prosecute vigilantes did not in itself constitute awareness and acquiescence to torture, especially where suspects denied involvement in crimes. 303 F.3d at 354-55. The *Lopez-Soto* court acknowledged that the Guatemalan government was powerless to stop the gangs and had a dysfunctional justice system. However, the Fourth Circuit wanted the petitioner to demonstrate willful blindness on the part of local officials (i.e., police) with respect to torturous conduct, and petitioner failed to meet this burden. 383 F.3d at 240-41. The *In re S-V-* court reasoned that to demonstrate acquiescence, the respondent must establish that (1) officials were aware of the torturous activities, but were powerless to stop it, and (2) officials willfully accepted the torturous conduct of the guerillas. In other words, awareness of torture occurs when the government's failure to protect its citizens is the result of willful acceptance of torturous activities. 22 I. & N. Dec. at 1311-12. So, in light of these aforementioned cases, the applicant should present evidence that shows the inability of the government to prevent torturous acts and the unwillingness of local government officials to stop the occurrence of such activities.

122. 8 C.F.R. § 208.16(c)(3) (2006) (demonstrating inability and unwillingness of government officials to protect the applicant and similarly situated individuals as means of defeating logic of internal relocation).

123. 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).

124. Telephone interview and written correspondence with a Central American gang expert (identity withheld) (2005) (on file with author) ("In 2003, corrupt authorities and gang members murdered three of my co-workers . . . [t]he civic education activities had been coordinated with the police in advance . . . [the police] left in vans. Within ten minutes gang members managed to kill them . . . [w]e still have not gotten a response from the police.").

system,¹²⁵ and as a consequence, the authorities are ill-equipped and ill-trained to battle gang members on the street and in the courtroom.¹²⁶ Third, the police force suffers from a severe lack of professionalism. Many police lack even the most basic level of education.¹²⁷ Comprehensive training programs for new recruits are rare because of a lack of funds.¹²⁸ Lastly, given the pervasiveness of gang violence in Guatemala, there are too few police officers. In fact, experts believe the police force must double in size to effectively combat the gang problem.¹²⁹ The result is that the national government cannot possibly protect its citizens (i.e., it lacks the manpower and resources to ensure such protection).¹³⁰

As the aforementioned discussion illustrates, the Guatemalan government recognizes the problem of gang violence, but can do very little to protect its citizens who are marked for death by the gangs. The goal of the applicant is to provide the fact-finder with enough evidence to compel such a conclusion.

2. *Unwilling Local Officials*

The more localized the applicant demonstrates the unwillingness of government officials to protect him (and others) from gang-initiated acts of torture, the stronger the argument of governmental acquiescence to torture.¹³¹ There are many possibilities for how an applicant might demonstrate such conduct, but specific examples of localized police corruption or localized failure to protect citizens from gang violence are most helpful. For example, can the applicant provide evidence of police corruption in his town or neighborhood? Did the applicant seek police protection, but to no avail? Is there evidence of police-gang collusion in the applicant's town, which would make reliance on police protection unreasonable? Have gang members

125. See, e.g., Consular Information Sheet, Guatemala, U.S. Dep't of State, Mar. 21, 2005 ("The police force is young, inexperienced, and under-funded.")

126. See U.S. Dep't of State Report, Guatemala – 2004, *supra* note 36.

127. *Id.*; 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).

128. 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) ("[D]rastic budget cuts have greatly hindered the force's effectiveness in combating the growing crime . . . the PNC [police] academy is close to collapse."); Consular Information Sheet, Guatemala, U.S. Dep't of State, Mar. 21, 2005.

129. 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) ("The Director of the National Civil Police stated there should be at least 35,000 police officers, but there are only 21,000.")

130. Telephone interview and written correspondence with a Central American gang expert (identity withheld) (2005) (on file with author) ("The [police] force is currently unable to protect people . . . who have been marked for death by the gangs . . . the police are under-trained, under-equipped, under-motivated, and corrupt.")

131. This is an inference gleaned from analysis of legal reasoning in several cases, but demonstration of such "local unwillingness" does not appear to be an express requirement for CAT claims. However, in cases where courts have denied CAT claims, the applicant's failure to demonstrate this fact seems to have been a fatal element of the claim.

hunted down and tortured individuals similarly situated to the applicant?

In other words, the applicant's argument is twofold: (1) demonstrate a general unwillingness on the part of local officials to protect targeted individuals from torture, and (2) demonstrate the unwillingness of local officials to protect the specific applicant. First, the applicant should present evidence that collusion between gang members and local police is commonplace.¹³² For example, in certain areas of Guatemala, police often rent weapons to gang members, who in turn commit crimes with them. The gang members then return the weapons to the police. There is no fear of criminal investigation because of this arrangement.¹³³ In addition, even if the entire local police force is not corrupt, the good cops lack the resources (e.g., patrol cars, weapons) to prevent gang-initiated acts of torture.¹³⁴ Second, the applicant should demonstrate that in his particular neighborhood (or town) local officials are unwilling to protect individuals, like the applicant, who are targeted for retribution because of their opposition to the gangster lifestyle. In other words, if possible, the applicant should provide specific examples of the unwillingness of local police to protect members of the local community from acts of torture at the hands of gang members.

To illustrate these factors in a more concrete fashion, assume, for example, the applicant lives in Zone 6, Guatemala City. He might show that even by Guatemalan standards, the police in his neighborhood are particularly corrupt and ill-equipped. To bolster this argument, the applicant could present evidence that the local leaders of Mara 18 or MS-13 operate with impunity in his neighborhood, even though local authorities know of their identities. In fact, a recent U.S. Dep't of State report on Guatemala supports this contention (and the inference that the police are unwilling to protect targeted individuals). The report singled out a police station in Zone 6, Estacion 12, as a repository of corrupt and ineffective law enforcement officials.¹³⁵ Furthermore, experts and secondary news sources bolster the proposition that the applicant will more likely than not be tortured if compelled to return to this

132. *One Dead and Two Injured in Gang Shooting*, LA HORA, June 19, 2002 (Gang members murdered a young man in Zone 6, Guatemala City; investigators recalled there were eye-witnesses to the attack, but no one dared to accuse the gang members out of fear of retaliation); *Surrounded by Violence: Half a Million Neighbors in Zones 6, 7, 12, 18, 21, Between Gangs and Drugs*, PRENSA LIBRE, Feb. 21, 2005 (discussing inability of the police to control the gangs).

133. See *supra* Part II.D, E, note 48, and accompanying text.

134. See, e.g., Julio Lara, *Living in Gang Territory: Violence Turns Into an Everyday Event in Zones 7 and 18*, PRENSA LIBRE, July 19, 2004 (The [citizens] believe that the gang members and the police are in collaboration. One resident noted that if an individual reports a crime to the police, the police tell the gang members who reported on them, and in a short time the gang members target that individual.).

135. U.S. Dep't of State Report, Guatemala – 2004, *supra* note 36 (describing that on January 31, 2004, 8 agents from Station 12 violently beat a civilian; only one agent was ever charged as a result of this violent assault; furthermore, on March 8, 2004, three police officers from Station 12 beat a human rights advocate; the agents involved have not been investigated).

gang-infested area of Guatemala City.¹³⁶ In other words, gang members operate with impunity, right under the noses of the police force, and, perhaps, even in conjunction with them. This evidence illustrates the unwillingness of local officials in some areas of Guatemala to confront gang members and protect individuals marked for death.

3. *CAT Claims a Viable Option?*

CAT claims do not require the applicant to fit his claim into one of the five enumerated grounds, but corroborative evidence is still vital. The applicant must provide evidence to demonstrate that the government cannot and will not protect him (i.e., not just vague generalities about the threat of harm at the hands of gang members) from torture. This is a difficult task, but not an impossible burden. Collect evidence to support allegations of corruption. Provide evidence of police collusion with gang members. Demonstrate the failure of the authorities to protect the applicant or similarly situated individuals from gang members. Such evidence might convince the fact-finder that the government acquiesces to the torture of its citizens, that more likely than not the applicant will be tortured if he returns to his homeland.

PART IV. CONCLUSION

At present, gang-based asylum claims exist on the margins of asylum law. Yet, innocent people die for their refusal to become gang members. Innocent family members die because of their kin's rejection of the gang lifestyle. Those who fear the wrath of the *maras* possess a well-founded fear of persecution. This fear represents much more than a desire to flee common crime or civil strife. However, because of the lack of binding precedent, there is no clear framework for gang-based claims. Nevertheless, trends emerge from an examination of relevant cases and statutes. And so, while there is no evidentiary magic bullet, the ideas put forth in this note are meant to function as a starting point for asylum applicants and their representatives. These ideas are summarized below.

First, the more specific evidence the applicant provides to corroborate his claim, the likelier the fact-finder to grant asylum. Fact-finders attempt to weed out illegitimate claims. The applicant must provide credible testimony. In addition, the testimonial assertions of witnesses are essential to corrobo-

136. 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); *One Dead and Two Injured in Gang Shooting*, LA HORA, June 19, 2002 (Gang members murdered a young man in Zone 6, Guatemala City; investigators recalled there were eye-witnesses to the attack, but no one dared to accuse the gang members out of fear of retaliation); *Surrounded by Violence: Half a Million Neighbors in Zones 6, 7, 12, 18, 21, Between Gangs and Drugs*, PRENSA LIBRE, Feb. 21, 2005 (discussing inability of the police to control the gangs). Of course, the applicant must persuade the fact-finder that relocation to another part of his country of origin will not reduce the likelihood of torture to an acceptable level (from a legal standpoint).

rate the applicant's version of events.

Second, expert affidavits provide the intellectual and practical backbone of gang-based asylum claims. On balance, reputable experts from the applicant's country-of-origin are preferable to experts who reside in the United States. In-country experts possess greater direct knowledge of and contact with the *maras*. As such, these experts are in a better position to corroborate the circumstances and claims of the applicant. Put simply, experts, among other factors, help establish the nexus – that gang members target individuals who refuse to join them on account of one of the given enumerated grounds.

Third, basing the applicant's claim on "membership in a particular social group" is an uphill battle. Immigration judges are loath to open the immigration floodgates. The applicant must present evidence to counterbalance this fear. One might argue, the narrower the social group, the better. But, of course, the social group must be large enough to include individuals other than the applicant.

Fourth, the fate of similarly situated individuals will impact the outcome of the applicant's claim. Evidence that gang members target individuals like the applicant strengthens the argument that the applicant's well-founded fear of persecution is on account of the five enumerated grounds for asylum. Similarly, the applicant strengthens his claim if he demonstrates the unwillingness and inability of the police to protect similarly situated individuals from targeted acts of gang violence.

In sum, the asylum apparatus in the United States (including the Department of Homeland Security, Immigration Judges, and Congress) must recognize the distinction between a fear of common crime and a fear of persecution at the hands of violent, transnational gangs. Such recognition will not open the immigration floodgates. Rather, the United States will gain a class of potential citizens who are among the most desirable – those individuals who reject the false allure of the gangster lifestyle, those individuals who seek a refuge from their fear of persecution and torture. Toward this end, Immigration Judges must be given the discretion to award asylum or CAT relief to those who flee targeted acts of gang violence, and Immigration Judges must have some assurance that recognition of such claims will not result in summary reversal on appeal.

