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## The Path of Most Resistance: Resisting Gang Recruitment as a Political Opinion in Central America's Join-or-Die Gang Culture

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# **The Path of Most Resistance: Resisting Gang Recruitment as a Political Opinion in Central America's Join-or-Die Gang Culture**

## *Abstract*

*In recent years, increasing numbers of asylum-seekers from Honduras, Guatemala, and El Salvador crossed into the United States, fleeing gang violence that has driven homicide rates to record levels. These countries, known collectively as the "Northern Triangle," now make up one of the most violent regions in the world. Transcending petty crime, gangs control entire communities in the Northern Triangle where they operate as de facto governments beyond law enforcement's control. Gangs practice forced recruitment in these communities, creating a join-or-die gang culture where resisting recruitment is tantamount to opposition. Opposition, in turn, is met with brutal retaliation.*

*The young men and women who refuse to join are fleeing to the United States and seeking asylum. However, United States courts routinely reject these asylum applicants under a restrictive interpretation of political asylum, failing to recognize the current realities of gang culture in the Northern Triangle. This Comment reviews gang-based political asylum claims under the courts' restrictive interpretation, analyzes these cases in their socio-political context, and explores a path to political asylum under a holistic asylum framework. Ultimately, this Comment advocates for an approach that properly accounts for the socio-political realities of the region while realigning federal asylum law with its original humanitarian and protective purpose.*

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## I. INTRODUCTION

*I do think that what people should do is, frankly, put themselves into the shoes of somebody who is desperate and good . . . and is treated in an inhuman way when they arrive at a border.*<sup>1</sup>

“I feel safe for the first time in my life,” Benito Zaldivar told an immigration court, pleading for asylum so that he could remain in the United States.<sup>2</sup> Benito fled his home country of El Salvador, where he had become a prime recruitment target of Mara-18 (also known as “Barrio 18”)—one of the most powerful gangs in Central America.<sup>3</sup> The gang attempted to recruit Benito for years, threatening violence against his family if he refused to join.<sup>4</sup> When he could no longer safely resist the gang’s advances, he fled to the United States to join his parents in Missouri.<sup>5</sup> He applied for asylum, warning the court that the gang would retaliate if he returned to El Salvador because he resisted recruitment.<sup>6</sup> The Board of Immigration Appeals found that Benito did not have a well-founded fear of persecution and deported him back to El Salvador.<sup>7</sup> Two months after he returned home, a white van pulled alongside Benito as he rode his bicycle, and a Mara-18 gunman shot him in the face.<sup>8</sup> Benito’s sister dissuaded their father from returning to El Salvador for Benito’s funeral. “She said the gangs could blow [him] away, too.”<sup>9</sup>

Benito is one of many Central Americans who sought safe haven in the United States but were instead deported to their deaths. Forthcoming research indicates that in the past two years, at least eighty migrants deported from the United States were murdered within months—some

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1. Madeleine Albright, *Is Migration a Basic Human Right?*, FREAKONOMICS RADIO (Dec. 17, 2015, 9:56 AM), <http://freakonomics.com/podcast/is-migration-a-basic-human-right-a-new-freakonomics-radio-podcast/>.

2. Julia Preston, *Losing Asylum, then His Life*, N.Y. TIMES (June 28, 2010), [http://www.nytimes.com/2010/06/29/us/29asylum.html?\\_r=0](http://www.nytimes.com/2010/06/29/us/29asylum.html?_r=0).

3. *Id.*

4. *Id.*

5. *Id.* Although his parents were both legal immigrants, their temporary status prevented them from bringing their son to the United States through legal channels. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

within days—of their deportation.<sup>10</sup> Unfortunately, the actual number is likely much higher.<sup>11</sup>

Gang violence is a driving force behind the “migration crisis” at America’s border.<sup>12</sup> When the United States deported Los Angeles-based gang members to war-torn Central America en masse, an insurgency began to grow.<sup>13</sup> As gangs swept across Central America, they drove homicide rates to record levels in El Salvador, Honduras, and Guatemala (the Northern Triangle), making it one of the most violent regions in the world.<sup>14</sup> Transcending petty crime, the two dominant gangs—*Mara Salvatrucha* (MS-13) and Barrio 18 (also known as the 18th Street Gang or Mara-18)—are controlling entire communities, establishing themselves as de facto governments and operating beyond law enforcement control.<sup>15</sup> Along with their rise to power, gangs began practicing forced recruitment.<sup>16</sup> Now, resisting the gangs has become synonymous with opposing them; opposition, in turn, is met with brutal retaliation.<sup>17</sup> Resistance is not viewed merely as resistance, but as a deliberate choice—an express or implied

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10. Sibylla Brodzinsky & Ed Pilkington, *U.S. Government Deporting Central American Migrants to Their Deaths*, GUARDIAN (Oct. 12, 2015), <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> (citing forthcoming study from Elizabeth Kennedy, a social scientist who is compiling a comprehensive estimate of U.S. deportees murdered upon returning to their homes in Central America based on news reports).

11. Sonia Nazario, *The Refugees at Our Door*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/2015/10/11/opinion/sunday/the-refugees-at-our-door.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&r=1>. In her forthcoming report, Kennedy notes that the actual number is likely much higher, presumably because it is difficult to connect each gang-related death given the extremely high murder rates in these regions. *Id.*

12. E.g., Julie Turkewitz, *Fear Is Driving Young Men Across the U.S. Border*, ATLANTIC (June 20, 2014), <http://www.theatlantic.com/international/archive/2014/06/credible-fear-whats-driving-central-americans-across-the-us-border/373158/>.

13. See, e.g., CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 2–3 (2014) (noting that some contend the Los Angeles gang culture was “exported” to Central America); Ana Arana, *How the Street Gangs Took Central America*, FOREIGN AFF. (May–June 2005), <https://www.foreignaffairs.com/articles/central-america-caribbean/2005-05-01/how-street-gangs-took-central-america> (noting that youth gangs “transformed themselves into powerful, cross-border crime networks” after migrating from the United States to Central America).

14. Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS: CFR BACKGROUNDS, <http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286> (last updated Jan. 19, 2016).

15. See *id.* (noting the failure of harsh mano dura policies, incarcerations, and peace-deal attempts); see also *infra* Section III.B.

16. See *infra* Section III.C.

17. See *infra* Sections III.C, IV.B.

opinion—denouncing the most powerful insurgency in the region, and arguably invoking a claim for political asylum.<sup>18</sup>

In this “join-or-die” gang culture, some are choosing an alternative: fleeing to the United States.<sup>19</sup> But U.S. courts—blind to the disturbing socio-political climate in the Northern Triangle—are routinely dismissing these asylum claims under the current restrictive interpretation of political asylum.<sup>20</sup> This Comment explores the role of political asylum in gang resistance and advocates for the adoption of a holistic analysis of these claims, realigning our asylum jurisprudence with its original humanitarian foundations.<sup>21</sup>

Part II gives a brief overview of the history of asylum law and its requirements, as well as political asylum and the persecution nexus.<sup>22</sup> Part III discusses the current gang violence crisis in Central America and its effect on the region.<sup>23</sup> Part IV reviews gang-based political asylum claims under U.S. courts’ restrictive interpretations, and Part V analyzes these claims within their socio-political context.<sup>24</sup> Part VI explores a holistic approach as an alternative political asylum analysis that takes into account the current socio-political context of the Northern Triangle.<sup>25</sup> Part VII concludes that the current U.S. asylum system has strayed perilously far from its original purpose, warranting a new approach.<sup>26</sup>

## II. ASYLUM LAW

America has long been a safe haven for refugees, opening its doors to “huddled masses yearning to breathe free.”<sup>27</sup> This promise has inspired

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18. *See infra* Part IV.

19. *See* Renwick, *supra* note 14. Nearly ten percent of Northern Triangle residents have left their countries, and most have fled to the United States. *Id.*

20. *See infra* Section IV.A.

21. *See infra* Parts IV–V.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Parts IV, V.

25. *See infra* Part VI.

26. *See infra* Part VII.

27. Emma Lazarus, *The New Colossus* (1883), POETRY FOUND., <https://www.poetryfoundation.org/poems-and-poets/poems/detail/46550> (last visited Apr. 10, 2017); *Emma Lazarus (1849–1887)*, POETRY FOUND., <https://www.poetryfoundation.org/poems-and-poets/poets/detail/emma-lazarus> (last visited Apr. 10, 2017) (“Lines from that 1883 sonnet, ‘The New Colossus,’ were engraved on the pedestal of the Statue of Liberty in 1903.”).

thousands of Central Americans to make the arduous, often deadly, trek through Mexico to reach the U.S. border.<sup>28</sup> For many, the dangerous journey—and the very real possibility of death along the way—is preferable to staying in their gang-plagued hometowns<sup>29</sup> for good reason: the United States resettles more refugees than any other country.<sup>30</sup>

Unfortunately, asylum's legal protection did not always provide a beacon of hope.<sup>31</sup> Modern refugee law was a response to a collective failure to protect refugees and the consequences that followed.<sup>32</sup> In 1939, the S.S. *St. Louis*, a ship carrying Jewish refugees, sought safety at the U.S. border.<sup>33</sup> Adhering to the strict immigration quotas of the U.S. Immigration and Nationality Act,<sup>34</sup> America turned them away.<sup>35</sup> The Second World War began just three months later.<sup>36</sup> The passengers were forced to return to Europe, where 254 were killed by the Nazis.<sup>37</sup> The plight of the *St. Louis* passengers and millions of others displaced by the war sparked the beginning of asylum in the United States and across the globe, creating a humanitarian solution to the tragedy.<sup>38</sup>

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28. Nazario, *supra* note 11 (documenting one Honduran woman's journey through Mexico, where she and her children dealt with violence, extortion, and exhaustion).

29. WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 8 (Oct. 2012), <https://womensrefugeecommission.org/component/zdocs/document?id=844-forced-from-home-the-lost-boys-and-girls-of-central-america>. A majority of detained children interviewed by the Women's Refugee Commission expressed that they would make the journey from Central America to the United States again, despite the danger involved: "If you stay you will die, if you leave, you might . . . either way it's better to try." *Id.* at 9.

30. UNHCR, UNHCR GLOBAL RESETTLEMENT STATISTICAL REPORT 2014, at 48 (2014), <http://www.unhcr.org/52693bd09.html> (last visited Apr. 10, 2017).

31. Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts our Refugee Policy Today*, VOX (Nov. 19, 2015, 9:20 AM), <http://www.vox.com/policy-and-politics/2015/11/19/9760060/refugees-history-holocaust>.

32. *Id.*

33. *Id.*

34. *Voyage of the St. Louis*, HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last visited Apr. 10, 2017).

35. *Id.*

36. *Id.*

37. Mike Lanchin, *SS St. Louis: The Ship of Jewish Refugees Nobody Wanted*, BBC NEWS (May 13, 2014), <http://www.bbc.com/news/magazine-27373131>.

38. See Lind, *supra* note 31.

*A. The Origins of United States Asylum Law*

In the wake of World War II, the United Nations established the Convention Relating to the Status of Refugees in 1951 (the Convention) and later an expanded Protocol Relating to the Status of Refugees in 1967 (the Protocol).<sup>39</sup> The Convention defined a “refugee” as anyone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>40</sup>

In 1980, the United States codified these protections in the Refugee Act, responding to the “urgent needs of persons subject to persecution in their homelands” and attempting “to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.”<sup>41</sup> Congress intended to bring the United States into compliance with the Protocol, to which the United States assented in 1968,<sup>42</sup> incorporating the United Nation’s (UN) concept of refugee protection into U.S. law.<sup>43</sup> Thus, even at its inception, U.S. asylum law was intended to emulate the same

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39. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). While the 1951 Convention applied solely to individuals who fled atrocities in Europe before January 1951, the subsequent 1967 Protocol Relating to the Status of Refugees expanded the term to include any individual without geographic or time limitation, recognizing the global need for refugee protection. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

40. Convention Relating to the Status of Refugees, *supra* note 39.

41. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 (codified as amended in scattered sections of 8 U.S.C.).

42. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

43. Refugee Act § 207, 94 Stat. at 102. Through this incorporation of the Protocol, the United States adopted a similar definition of “refugee” in its own Refugee Act. *Compare* Convention Relating to the Status of Refugees, *supra* 39 (defining “refugee” as anyone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”), *with* Refugee Act § 207, 94 Stat. at 102 (defining “refugee” as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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”).

protective ethic embodied in the Protocol.<sup>44</sup>

However, asylum law became increasingly difficult to access.<sup>45</sup> In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act<sup>46</sup> introduced an “expedited removal process,” a “credible fear” requirement in asylum interviews, a one-year filing deadline for asylum applicants, and broader grounds for detaining an asylum-seeker, including detention for the interim period during the review of a claim.<sup>47</sup> This, coupled with the new asylum bars under the USA PATRIOT Act of 2001<sup>48</sup> and the Homeland Security Act of 2002 (HSA),<sup>49</sup> significantly affected access to asylum and strayed considerably from the protective foundation of asylum law.<sup>50</sup>

## *B. Political Asylum*

### 1. Establishing Asylum Eligibility

To be eligible for asylum, an applicant must establish that he or she suffered past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (the “five grounds”).<sup>51</sup> To establish a “well-

44. See Refugee Act § 207, 94 Stat. at 102.

45. See *infra* notes 46–50 and accompanying text.

46. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 22 U.S.C.A.) (enacted as Division C of the Omnibus Consolidated Appropriations Act of 1997).

47. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:3 (2015 ed.) (citing Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009-546 (1996)).

48. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter PATRIOT Act]. The PATRIOT Act provisions aimed at curbing terrorist activity were so broad that they barred asylum from groups with no terrorist connections, including victims of terrorist extortion and women raped by militias. HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM (2006), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/06925-asy-abandon-persecuted.pdf>.

49. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) [hereinafter HSA]. The HSA limited administrative review of asylum claims. *Id.*

50. ANKER, *supra* note 47, at § 1:3.

51. 8 C.F.R. § 208.13(b)(1)–(2) (2013). The burden of proof lies with the applicant to establish by a preponderance of the evidence the well-founded fear of persecution required under the statute. *Id.* § 208.13(b)(1)(ii). A finding of past persecution creates a rebuttable presumption that a well-founded fear of future persecution also exists. *Id.* § 208.13(b)(1). The government may rebut the presumption by proving that there has been a fundamental change in circumstances and thus the fear of future persecution no longer exists or that the applicant could relocate to another part of the

founded fear,” the applicant must prove a “reasonable possibility” that he will suffer persecution based on one of the five grounds if returned and that the applicant is unable or unwilling to avail himself to the protection of that country as a result.<sup>52</sup>

## 2. The Political Opinion Ground: What Is “Opinionated Enough”?

If an individual establishes a well-founded fear of persecution because he or she holds a certain political opinion, even if that opinion was merely attributed to them by another, the applicant may be eligible for asylum.<sup>53</sup> The United Nations High Commissioner for Refugees (UNHCR) interprets the concept of political opinion broadly, defining it as “any opinion on any matter in which the machinery of State, society, or policy may be engaged.”<sup>54</sup>

Political asylum does not require the individual to adhere to any particular political ideology or party, nor does it require that the opinion be outwardly expressed or acted upon.<sup>55</sup> The UNHCR rejects the notion that political asylum involves opinions that are inherently political, but takes context into account when determining whether an activity or opinion is political in nature.<sup>56</sup> Nonconformist behavior can also constitute a political opinion if it leads the persecutor to impute an opinion to the individual.<sup>57</sup> It is, however, presupposed that the authorities or relevant parts of society consider the individual to have an opinion “not tolerated by the authorities, which are critical of their policies or methods” or that this kind of opinion is imputed to the individual.<sup>58</sup> Importantly, the persecution need not be at the

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country to avoid future persecution. *Id.* § 208.13(b)(2)(ii).

52. *Id.* § 208.13(b)(2)(i)(B). The applicant must be unable to avoid this persecution by relocating to another part of the country. *Id.* § 208.13(b)(2)(ii).

53. UNITED NATIONS HIGH COMM’R FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 86 (1979, rev. ed. 1992), <http://www.unhcr.org/4d93528a9.pdf> [hereinafter UNHCR REFUGEE HANDBOOK].

54. UN Refugee Agency, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* 14 (Nov. 21, 2008), [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/UNHCR\\_Guidelines\\_Sexual\\_Orientation.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/UNHCR_Guidelines_Sexual_Orientation.pdf).

55. ANKER, *supra* note 47, § 5:17; *see, e.g.*, *Rivas-Martinez v. I.N.S.*, 997 F.2d 1143, 1147 (5th Cir. 1993) (finding the applicant held a political opinion in refusing to join a guerrilla group despite that she initially told guerrilla recruiters that she could not join because of parental obligations).

56. UNHCR REFUGEE HANDBOOK, *supra* note 53, ¶ 86.

57. *Id.* ¶ 80.

58. *Id.*

hands of the state for the individual to be eligible for political asylum, but may be perpetrated by a non-state actor.<sup>59</sup>

United States law has yet to explicitly and consistently define a “political opinion” in asylum jurisprudence or legislation but generally recognizes that it may be expressed through membership in an organization, labor union activity, individual acts of resistance or activism, violation of certain laws, and similar oppositional activity.<sup>60</sup> Courts have, however, also recognized less overt expressions to be political opinions, depending upon the circumstances—most notably, finding that neutrality<sup>61</sup> or refusal to engage or join a movement<sup>62</sup> can be a political opinion in some cases, considering factors such as the environment in which the neutrality or refusal was expressed.<sup>63</sup>

### 3. Persecution: Mere Threats and Non-State Actors

Though persecution plays a vital role in securing political asylum eligibility, the term itself operates without a specific definition in the

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59. See UN Refugee Agency, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶ 32 (May 7, 2002), <http://www.unhcr.org/3d58ddef4.pdf>. The UNHCR states that political opinions entitled to asylum may be against the state or “*parts of the society*” that are not tolerated by “the authorities *or society*,” and that have been noticed by “the authorities *or relevant parts of the society*.” *Id.* (emphases added).

60. ANKER, *supra* note 47, §§ 5:18–5:19, 5:21, 5:23, 5:26.

61. See, e.g., *Sangha v. I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997) (recognizing neutrality as a political opinion when consciously expressed in “an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-governmental forces”); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286–88 (9th Cir. 1984) (holding that “[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction” and the government should not inquire into the reasons behind an individual’s complex choice to remain neutral). But see *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (rejecting petitioner’s argument that refusing to take sides with any political faction is in itself a political opinion and finding no grounds for a “well-founded” fear that a political opinion would in fact be the basis of future persecution).

62. See, e.g., *Mayorga-Esguerra v. Holder*, 409 F. App’x 81, 84 (9th Cir. 2010) (finding that a former military officer’s refusal to join the ELN guerrilla forces was an imputed political opinion because the ELN understood the refusal as a rejection of their cause); *Martinez-Buendia v. Holder*, 616 F.3d 711, 717 (7th Cir. 2010) (holding that the petitioner’s repeated refusals to cooperate with FARC was interpreted by FARC members as “expressing an anti-FARC political opinion”); *Chang v. I.N.S.*, 119 F.3d 1055, 1069 (3d Cir. 1997) (finding refusal to comply with Chinese law mandating the reporting of security rule violations to be a “political opinion” in light of the government’s human rights standards).

63. *Sangha*, 103 F.3d at 1488; *Chang*, 119 F.3d at 1064–67.

international community.<sup>64</sup> The Refugee Convention drafters intentionally chose to leave persecution undefined to allow for adapting interpretations and avoid excluding a harm deserving of protection.<sup>65</sup> As some scholars have noted: “[p]ersecution is a concept only too readily filled by the latest examples of one person’s inhumanity to another, and little purpose is served by attempting to list all its known measures.”<sup>66</sup>

While there is no universally accepted definition, there is a general inference that a threat to life, freedom, or another fundamental human right on account of one of the five grounds constitutes persecution.<sup>67</sup> Whether other actions or threats constitute persecution depends on the surrounding geographical, historical, and ethnological circumstances, along with the perspective of the individual affected.<sup>68</sup> Even several non-persecutory acts may constitute persecution in the aggregate.<sup>69</sup> Consequently, there is much variation in the interpretation of persecution.<sup>70</sup>

Similarly, persecution has been left essentially undefined in U.S. legislation; courts have repeatedly held there is no universally accepted definition and thus assess persecution on a case-by-case basis.<sup>71</sup> Generally,

64. *E.g.*, UNHCR REFUGEE HANDBOOK, *supra* note 53, ¶ 51; JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 182 (Cambridge University Press, 2d ed. 2014); 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 193 (A.W. Sijthoff, ed., 1966).

65. *See* Volker Turk & Frances Nicholson, *Refugee Protection in International Law: An Overall Perspective*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 3, 39 (Erika Feller et al. eds., 2003) (suggesting that the lack of definition of persecution indicated that the drafters intended for various kinds of persecution to fall within the definition in the future).

66. GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 93–94 (3d ed. 2007).

67. UNHCR REFUGEE HANDBOOK, *supra* note 53, ¶ 51.

68. *Id.* ¶¶ 52–53.

69. *Id.* ¶ 53. United States law similarly recognizes “cumulative grounds” for persecution under the totality of the circumstances. *See, e.g.*, *Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1095–96 (9th Cir. 2010) (finding persecution where the petitioner was expelled from school, placed in detention, and fined for resisting China’s population control policy); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding persecution when the petitioner was detained for a day and a half and was forced to sign a document renouncing Christianity); *Korablina v. I.N.S.*, 158 F.3d 1038, 1045 (9th Cir. 1998) (holding that evidence of specific threats on an individual’s life “in conjunction with evidence of political and social turmoil” establishes prima facie eligibility for asylum).

70. *See supra* note 69 and accompanying text.

71. *See, e.g.*, *Mei Fun Wong v. Holder*, 633 F.3d 64, 71–72 (2d Cir. 2011) (stating that courts have not “settled on a single, uniform definition”); *Baba v. Holder*, 569 F.3d 79, 85 (2d Cir. 2009) (noting that the Immigration and Nationality Act does not define persecution but distinguishes it on a

definitions involve some threat to life or freedom,<sup>72</sup> but need not involve actual physical harm.<sup>73</sup> Courts have repeatedly recognized threats as a method of persecution, considering the severity of the threat, its direct nature, its repetition, and the accompanying use of a weapon.<sup>74</sup> Actual persecution or threats of violence need not be made directly to the individual concerned, but may be directed toward a member of the individual's family.<sup>75</sup> This becomes important in gang-based asylum claims where the gang threatens the resister's family members, or where the threats have not yet been accompanied by physical violence.<sup>76</sup>

The term "persecution" is used in the Refugee Convention<sup>77</sup> to denote

case-by-case basis); *Japarkulova v. Holder*, 615 F.3d 696, 699 (6th Cir. 2010) (stating that neither the Immigration Nationality Act nor the Board of Immigration Appeals have defined persecution); *Kazemzadeh v. U.S. Att'y. Gen.*, 577 F.3d 1341, 1357 (11th Cir. 2009) (finding "[t]here is no universally accepted definition of persecution").

72. *Matter of Acosta*, 19 I. & N. Dec. 211, 222–23 (B.I.A. 1985) (defining persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ [on the basis of race, religion, political opinion, etc.] in a way regarded as offensive"); *see also Rife v. Ashcroft*, 374 F.3d 606, 612 (8th Cir. 2004) (defining persecution as "the infliction or threat of death, torture, or injury to one's person or freedom on account of a statutory ground"); *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 341 (2d Cir. 2006) (quoting *Fatin v. I.N.S.*, 12 F.3d 1233, 1230 (3d Cir. 1993)) (defining persecution as "[t]hreats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom").

73. ANKER, *supra* note 47, § 4:19. Threats alone may constitute persecution, provided they are sufficiently imminent or menacing as to cause significant actual suffering or harm. *Id.* Threats made over a prolonged period that cause the recipient to "live in a state of constant fear" can also meet the standard for persecution. *Id.* (quoting US CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART I: DEFINITION OF REFUGEE; DEFINITION OF PERSECUTION; ELIGIBILITY BASED ON PAST PERSECUTION 18 (Mar. 6, 2009), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf>).

74. *See, e.g., Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (finding three direct death threats in addition to threats against the applicant's family members amounted to more than "mere threats and harassment" and thus constituted persecution); *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008) ("[W]e have often acknowledged that credible threats can, depending on the circumstances, amount to persecution, especially when the assailant threatens the petitioner with death, in person, and with a weapon."); *Smolnikova v. Gonzales*, 422 F.3d 1037, 1049 (9th Cir. 2005) (holding that "[r]epeated death threats, especially when those threats occurred in conjunction with other forms of abuse, require a finding of past persecution").

75. ANKER, *supra* note 47, § 4:20 (quoting Memorandum from Joseph Langlois, Deputy Dir., Dep't of Justice, Office of Int'l Affairs, Asylum Div., on Persecution of Family Members (June 30, 1997)).

76. *Id.*

77. United Nations Convention Relating to the Status of Refugees Art. 1(A), *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; *accord.* United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606

both the violation of human rights and the state's inability to protect the individual from those violations.<sup>78</sup> Particularly relevant to the violence in the Northern Triangle, this persecution need not be at the hands of the government—discrimination, harassment, and violence by groups that the government is unable or unwilling to control can also constitute persecution.<sup>79</sup> According to the UNHCR, where persecutory acts are committed by the local populace and the authorities tolerate the actions or are unable to provide protection, those acts can be considered persecution.<sup>80</sup> Thus, if the perpetrator is a non-state actor such as a gang member, an applicant can still be successful in a claim for political asylum<sup>81</sup> if she can establish that her political opinion was “at least one central reason” for the persecution, fulfilling the “nexus” requirement between the persecution and the applicant's political opinion.<sup>82</sup>

### III. THE CENTRAL AMERICAN GANG CRISIS

Thousands of Central Americans are seeking to fulfill these asylum requirements in the United States in an effort to escape the gang violence—El Salvador, Guatemala, and Honduras—gripping the region.<sup>83</sup> While gangs have a stronghold in these countries, known as the Northern Triangle, the gangs' origins lie in the United States.<sup>84</sup> The most powerful gangs in Central America today, Barrio 18 and MS-13, were formed in Los Angeles in the 1960s and 1980s respectively.<sup>85</sup> In 1996, changes in U.S. immigration reform ushered in the mass deportation of these gangs from the United

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U.N.T.S. 267.

78. ANKER, *supra* note 47, § 4:8.

79. Singh v. I.N.S., 94 F.3d 1353, 1359 (9th Cir. 1996) (citing *Arteaga v. I.N.S.*, 836 F.2d 1227, 1231 (9th Cir. 1988)) (holding that “[n]on-governmental groups need not file articles of incorporation before they can be capable of persecution” and granting asylum to an applicant assaulted by a group of Fijians not associated with the state).

80. UNHCR REFUGEE HANDBOOK, *supra* note 53, ¶ 65.

81. *See id.*

82. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(i), 119 Stat. 231, 303. The REAL ID Act of 2005 established the nexus requirement, stating that an applicant must prove that one of the five grounds was or will be a central reason for the applicant's persecution. *Id.* The protected ground need not be the *only* reason for the persecution. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

83. Turkewitz, *supra* note 12.

84. *See, e.g.,* SEELKE, *supra* note 13, at 2–3.

85. *Id.* at 3.

States.<sup>86</sup> As new policies expanded the list of deportable crimes to include minor offenses, over 200,000 Central Americans—many of whom were native English-speakers who arrived in the United States as young children—were repatriated, accelerating gang expansion in Central America.<sup>87</sup>

#### *A. The Scope and Effects of Gang Violence in the Northern Triangle*

As Central American countries were inundated with these newcomers from the United States, they were still struggling to rebuild after decades of civil unrest, and their recovering criminal justice systems were ill-prepared to cope.<sup>88</sup> Gangs flourished among the weakened legal and governmental structures, poverty, and “post-war cultures of violence” that lingered in Central America.<sup>89</sup> MS-13 and Barrio 18 emerged as the most dominant gangs and continue to operate in violent opposition to their governments today.<sup>90</sup> Estimates of the number of members currently operating in the Northern Triangle vary: in 2012, the United Nations Office on Drugs and Crime reported a total of 54,000 members,<sup>91</sup> while the State Department estimated as many as 85,000.<sup>92</sup> More recently, news reports have estimated there are 70,000 gang members in El Salvador alone.<sup>93</sup>

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86. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.) (enacted as Division C of the Omnibus Consolidated Appropriations Act of 1997); see ANKER, *supra* note 47, § 5:25.

87. See, e.g., SEELKE, *supra* note 13, at 2–3; ANKER, *supra* note 47, § 5:25; Arana, *supra* note 13.

88. ANKER, *supra* note 47, § 5:25; Arana, *supra* note 13.

89. Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109, 122 (2013).

90. See Jonathan Watts, *One Murder Every Hour: How El Salvador Became the Homicide Capital of the World*, GUARDIAN (Aug. 22, 2015), <http://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place> (noting that August 2015 saw the “deadliest day of the century” as a result of the MS-13 and Barrio 18 violence).

91. U.N. OFFICE ON DRUGS & CRIME (UNODC), TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 29 (Sept. 2012) (reporting 22,000 members in Guatemala, 12,000 in Honduras, and 20,000 in El Salvador).

92. William R. Brownfield, Assistant Sec’y, Bureau of Int’l Narcotics & Law Enf’t Affairs, Remarks at the Institute of the Americas: Gangs, Youth, and Drugs—Breaking the Cycle of Violence and Crime (Oct. 1, 2012).

93. E.g., *El Salvador Violence up to Civil War-Era Level*, BBC NEWS (Sept. 2, 2015), <http://www.bbc.com/news/world-latin-america-34124090> [hereinafter *El Salvador Violence*];

While the number of gang members operating within the Northern Triangle is debated, their effect on the region is clear.<sup>94</sup> A wide variety of criminal activity is regularly attributed to gangs: kidnapping, human trafficking, drug and weapon smuggling, and extortion.<sup>95</sup> Moreover, as the dominant gangs expanded to operate on a larger scale, they “developed a degree of politicization, sophistication, and international reach to qualify [them] as [what is termed] ‘third generation gangs.’”<sup>96</sup> Distinct from first-generation (turf-oriented street gangs) and second-generation (entrepreneurial drug-trafficking gangs), third-generation gangs “inevitably begin to control ungoverned territory . . . or begin to acquire political power in poorly governed space.”<sup>97</sup> Beyond committing petty crimes and facilitating drug trade, third-generation gangs seek to control and change the societies in which they operate.<sup>98</sup>

In many respects, MS-13 and Barrio 18 are recognized<sup>99</sup> as third-generation gangs, “powerful enough to destabilize, challenge, and destroy targeted societies and states.”<sup>100</sup> In areas where violence is particularly prevalent and the government particularly weak, “gangs have become the true arbiters of internal order.”<sup>101</sup> Both MS-13 and Barrio 18 are known to

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Michael Kaplan, *El Salvador Murder Rate, Gang Violence Surge to Civil War Era Levels as Government Vows to Stem Crime*, INT’L BUS. TIMES (Sept. 2, 2015), <http://www.ibtimes.com/el-salvador-murder-rate-gang-violence-surge-civil-war-era-levels-government-vows-stem-2079090>; Arana, *supra* note 13.

94. See *infra* notes 99–107 and accompanying text.

95. SEELKE, *supra* note 13, at 3.

96. ANKER, *supra* note 45, § 5:25 (citing LIEUTENANT COLONEL L. GRAY, GANGS AND TRANSNATIONAL CRIMINALS THREATEN CENTRAL AMERICAN STABILITY 7 (2009), <http://www.hsd.org/?view&did=740050>).

97. GRAY, *supra* note 96, at 7 (quoting John P. Sullivan & Robert J. Bunker, *Drug Cartels, Street Gangs, and Warlords*, 13 SMALL WARS & INSURGENCIES 40, 48–49 (2002)).

98. See *id.* at 7–8.

99. ANKER, *supra* note 47, § 5:25; LAURA PEDRAZA FARIÑA ET AL., NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR 60 (Harvard Univ. Press 2010). El Salvador’s Supreme Court declared the country’s gangs to be terrorist groups attempting to “assert powers belonging to the state.” Vishakha Sonawane, *El Salvador Declares Street Gangs as Terrorist Groups, Supreme Court Rules*, INT’L BUS. TIMES (Aug. 25, 2015), <http://www.ibtimes.com/el-salvador-declares-street-gangs-terrorist-groups-supreme-court-rules-2066665>. In 2012 and 2013, the U.S. Treasury declared MS-13 “and their supporters a ‘transnational criminal organization (TCO),’ pursuant Executive Order 13581.” CRISTINA EGUIZABAL ET AL., CRIME AND VIOLENCE IN CENTRAL AMERICA’S NORTHERN TRIANGLE 39 (Eric L. Olson ed., 2015).

100. MAX G. MANWARING, STREET GANGS: THE NEW URBAN INSURGENCY 21 (2005).

101. HAL BRANDS, CRIME, VIOLENCE, AND THE CRISIS IN GUATEMALA: A CASE STUDY IN THE EROSION OF THE STATE, at i, 6 (2010), <http://strategicstudiesinstitute.army.mil/pdf/files/PUB986.pdf>.

extort “*renta*” from families, business owners, and bus and taxi drivers—their own form of taxation.<sup>102</sup> In Guatemala, Barrio 18 has reportedly murdered as many as 900 bus drivers in an extortion scheme that lasted several years, terrorizing the country’s transit system and making bus driving in Guatemala one of the most dangerous jobs in the world.<sup>103</sup> In response to anti-gang legislation, MS-13 and Barrio 18 members in El Salvador issued a joint warning to cease public transport for three days or face “reprisals”—completely halting the country’s transit.<sup>104</sup>

It is the alarmingly high homicide rate that drives most to seek safety abroad.<sup>105</sup> Honduras, the world’s murder capital, reported 85.5 murders per 100,000 people.<sup>106</sup> Recent statistics indicate that El Salvador surpassed Honduras in 2015, reporting a homicide rate of 104 people per 100,000.<sup>107</sup> The United States, by comparison, reported a homicide rate of 4.7 per 100,000.<sup>108</sup>

It is difficult to calculate how many of these deaths are the result of gang violence or the result of other societal factors, because cities lack the time and resources to thoroughly investigate these deaths.<sup>109</sup> In Honduras’s crime-ridden San Pedro Sula, “[t]en percent [of homicides] or less are

102. PEDRAZA-FARIÑA, *supra* note 99, at 68–69; ANKER, *supra* note 47, at § 5:25; Uchimiya, *supra* note 89, at 147.

103. Saul Elbein, *The Most Dangerous Job in the World*, NEW REPUBLIC (June 3, 2013), <https://newrepublic.com/article/113293/900-bus-drivers-dead-guatemala-city-worlds-most-dangerous-job>.

104. SEELKE, *supra* note 13, at 4.

105. *E.g.*, Turkewitz, *supra* note 12.

106. Watts, *supra* note 90 (providing statistics from the Igarape Homicide Monitor). The U.N. Office on Drugs and Crime reported the Honduras murder rate at 90.4. U.N. OFFICE ON DRUGS & CRIME (UNODC), GLOBAL STUDY ON HOMICIDE 2013: TRENDS, CONTEXTS, DATA 24, fig.1.5 (Mar. 2014), [http://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf) [hereinafter GLOBAL STUDY ON HOMICIDE]. It should be noted that homicide rates are notoriously difficult to calculate accurately: reporting countries may change their methodology, and methods may vary between countries. EGUIZABAL ET AL., *supra* note 99, at 21.

107. Alan Gomez, *El Salvador: World’s New Murder Capital*, USA TODAY (Jan. 8, 2016), <http://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/>; Joshua Partlow, *Why El Salvador Became the Hemisphere’s Murder Capital*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/01/05/why-el-salvador-became-the-hemispheres-murder-capital/>. Homicides in El Salvador increased by seventy percent in 2015, the highest rate since the 1992 civil war. *Id.*

108. Watts, *supra* note 90.

109. See EGUIZABAL ET AL., *supra* note 99, at 23 (noting the possible causes of violence in Central America, including drug trafficking, government corruption, poverty, and inequality).

investigated and the rest are just forgotten,” making it difficult to assess the gangs’ role.<sup>110</sup> But the link between homicide rates and gang violence is much more than tenuous.<sup>111</sup> In 2012, the government facilitated a truce between MS-13 and Barrio 18 in El Salvador to end the killings, which led to a forty percent drop in homicides.<sup>112</sup> When the truce began to unravel in 2014, the homicide rate soared, eventually reaching its current record-breaking height.<sup>113</sup> While the exact statistical impact remains unclear, gangs are playing an undisputed role in the widespread murder culture of the Northern Triangle, and it serves as an integral method through which they terrorize their communities and retain control.<sup>114</sup>

#### *B. Law Enforcement Response in Central America: A Powerless State*

Law enforcement efforts to abate the violence have been relatively ineffective.<sup>115</sup> Harsh anti-gang policies implemented in response, known as “*mano dura*” or “heavy hand,” often include practices that were ultimately found unconstitutional: profiling and arbitrary arrests based on physical appearance, extrajudicial killings, detention, and inhuman prison conditions.<sup>116</sup> Rather than controlling gang violence, these policies in practice violate individual rights and unite gang members against law enforcement.<sup>117</sup> In response, gangs have adapted: members began dressing

110. Rob Crilly, *The Majority of Homicides Are Young People. It's So Sad*, TELEGRAPH (Aug. 3, 2015), <http://www.telegraph.co.uk/sponsored/lifestyle/honduras-gangs/11701324/honduras-murder-rate.html>.

111. See *infra* notes 112–13 and accompanying text.

112. Randal C. Archibold, *Gangs' Truce Buys El Salvador a Tenuous Peace*, N.Y. TIMES (Aug. 27, 2012), [http://www.nytimes.com/2012/08/28/world/americas/in-el-salvador-gang-truce-brings-tenuous-peace.html?\\_r=0](http://www.nytimes.com/2012/08/28/world/americas/in-el-salvador-gang-truce-brings-tenuous-peace.html?_r=0); EGUIZABAL ET AL., *supra* note 99, at 21; *El Salvador Violence*, *supra* note 93.

113. EGUIZABAL ET AL., *supra* note 99, at 21; Joshua Partlow, *El Salvador Is on Pace to Become the Hemisphere's Most Deadly Nation*, WASH. POST (May 17, 2015), [https://www.washingtonpost.com/world/the\\_americas/el-salvador-is-on-pace-to-become-the-hemispheres-most-deadly-nation/2015/05/17/fc52e4b6-f74b-11e4-a47c-e56f4db884ed\\_story.html](https://www.washingtonpost.com/world/the_americas/el-salvador-is-on-pace-to-become-the-hemispheres-most-deadly-nation/2015/05/17/fc52e4b6-f74b-11e4-a47c-e56f4db884ed_story.html).

114. See Uchimiya, *supra* note 89, at 121.

115. SEELKE, *supra* note 13, at 4.

116. U.N. High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 9 (Mar. 2010) [hereinafter UNHCR Guidance Note]; Uchimiya, *supra* note 89, at 129 (noting that the Supreme Court of El Salvador “deemed unconstitutional those provisions . . . that disregard the presumption of innocence by authorizing punishment based on physical appearance, personal characteristics, and lifestyle”).

117. UNHCR Guidance Note, *supra* note 116, at ¶ 9; Uchimiya, *supra* note 89, at 129.

differently, hiding or removing tattoos, and generally concealing visible gang affiliations to evade law enforcement detection and arrest.<sup>118</sup>

Even if their members are arrested, gangs continue to operate and even strengthen their ranks within prison walls.<sup>119</sup> Due to severe overcrowding<sup>120</sup> and law enforcement corruption in the prisons, gang activity can continue and even flourish undetected.<sup>121</sup> Rather than deterring or rehabilitating criminals, prisons have been described as “finishing schools,” where inmates either strengthen their existing gang affiliations or are recruited into gangs.<sup>122</sup>

In addition, only about five percent of these arrests actually lead to a conviction.<sup>123</sup> Gang-related homicides tend to have lower clearance and conviction rates than other types of homicide; despite the increase in gang membership and murder rates in Central America, conviction rates have not kept pace.<sup>124</sup> The lack of resources prevents the necessary investigation and prosecution of these crimes, and the current rate of crime drains any existing resources law enforcement may have.<sup>125</sup>

A struggling justice system, coupled with governmental corruption, fosters low conviction rates, public distrust of law enforcement, and low crime reporting.<sup>126</sup> Through bribery and intimidation, gangs permeated the system: “the police, the judiciary, and entire local and departmental governments are rife with criminal collaborators and infiltrators.”<sup>127</sup> In many cases, governments are either facilitating gang violence in their

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118. SEELKE, *supra* note 13, at 6.

119. *Id.*

120. *Id.* (“In El Salvador, for example, as of December 2012, some 27,038 inmates, including 10,212 current or former gang members, were being held in prisons designed to hold a maximum of 8,328 people.”).

121. *Id.*

122. *Id.* at 6–7; *see also* Uchimiya, *supra* note 89, at 129 (reporting that some who were wrongfully arrested under *mano dura* policies were subsequently recruited into gangs while incarcerated).

123. EGUIZABAL ET AL., *supra* note 99, at 2 (reporting an impunity rate of ninety-five percent or more).

124. GLOBAL STUDY ON HOMICIDE, *supra* note 106, at 18. The high overall homicide rate in the Central American–Caribbean sub-region (26.5 per 100,000) is largely attributable to the Northern Triangle and Jamaica. *Id.* at 33.

125. *Id.* at 18.

126. EGUIZABAL ET AL., *supra* note 99, at 2.

127. Brands, *supra* note 101, at 2.

countries or remain powerless to stop it.<sup>128</sup>

*C. Forced Recruitment Practices and the Join-or-Die Gang Culture*

Operating with relative impunity, gangs are free to openly, and often forcefully, recruit new members.<sup>129</sup> As gang presence grows more prevalent, joining seems to be the only viable option for young men to lead an “undisturbed, normal life.”<sup>130</sup> Joining the ranks may give these young men the opportunity to gain crucial status or resources, but the price of refusing to join is even more costly.<sup>131</sup>

While young men once had the “luxury of joining voluntarily,” today, many are left with no choice.<sup>132</sup> More accurately, they are often left with a very difficult one: join or die.<sup>133</sup> Former gang members themselves attest to the mentality: “[t]oday if you’re not part of the gang, they kill you; joining a gang is the only way of surviving in the environment.”<sup>134</sup> Refusal is perceived as disrespecting the gang.<sup>135</sup> Preserving the gang’s reputation is a central tenant of gang culture, and disrespect triggers a punitive and often brutal response.<sup>136</sup> At the least, targeted youth face harassment, physical abuse, or threats to their own lives or the lives of family members, if they refuse to join.<sup>137</sup> At worst, they face torture and death: in one documented case, when a civilian refused to continue collecting *renta*<sup>138</sup> for the gang, members ambushed him, gouged out his eyes, cut out his tongue, and then killed him.<sup>139</sup>

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128. *Id.*

129. *See infra* notes 130–41 and accompanying text.

130. *See* Alexandra Grayner, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G*, 63 HASTINGS L.J. 1417, 1425 (2012) (quoting Edgardo Amaya Cobar, El Salvador’s Ministry of Justice and Security).

131. *See infra* notes 130–36 and accompanying text.

132. INTERNATIONAL HUMAN RIGHTS CLINIC: HUMAN RIGHTS PROGRAM HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 30 (2007).

133. *Id.*

134. *Id.* at 76–77 (quoting a former gang member in San Salvador).

135. UNHCR Guidance Note, *supra* note 116, at ¶ 6.

136. *Id.*; Uchimiya, *supra* note 89, at 128.

137. Uchimiya, *supra* note 89, at 128.

138. Pedraza-Fariña, *supra* note 99, at vi. “Renta” refers to the money gangs extort from local businesses, public transportation employees, families, individuals, etc. *Id.*

139. Uchimiya, *supra* note 89, at 128.

Young men are the most vulnerable to this kind of forced recruitment, and gangs are increasingly recruiting younger members.<sup>140</sup> Gangs use both schools and the streets as recruiting grounds, threatening or harassing students and extorting money from schools.<sup>141</sup> Gangs initially seek younger recruits to run errands, such as distributing contraband or delivering messages, but the penalty for refusing remains.<sup>142</sup> Adonai, an eight-year-old from San Salvador, witnessed gang members shoot his friend for refusing to work for them; he now delivers the gang's messages.<sup>143</sup> Girls as young as nine years old are targeted by gangs for sexual assault.<sup>144</sup> Children describe gang violence conditions that have "escalated to such a degree that they make life virtually unbearable for children in those countries."<sup>145</sup>

As gangs continue to operate with impunity, the violence in the Northern Triangle has driven thousands to the U.S. border.<sup>146</sup> In 2014, 486,651 migrants were apprehended at the U.S. border, including over 68,000 unaccompanied minors, garnering national attention.<sup>147</sup> Nearly half of the migrants came from Honduras, Guatemala, and El Salvador.<sup>148</sup> The

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140. See Grayner, *supra* note 130, at 1425–26 (noting that individuals from gang-controlled neighborhoods, incarcerated young men, and at-risk youth are the most susceptible to gang recruitment). "Several sources indicate that gangs target children less than twelve years old because they are too young to face legal charges." *Id.*

141. *Id.* Social workers attribute a one-year decline in street children from 5000 to 800 to gang recruitment in 2008. *Id.* at 1426.

142. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 432 (2011).

143. *Id.*

144. WOMEN'S REFUGEE COMM'N, *supra* note 29, at 8.

145. *Id.* at 7. In a focus group of young girls from Central America, children reported rampant violence in their home countries, including incidents of gang members burning entire buses of passengers when the drivers do not pay *renta* and finding chopped-up bodies on their own doorsteps. *Id.*

146. See Jerry Markon & Joshua Partlow, *Unaccompanied Children Crossing Southern Border in Greater Numbers Again, Raising Fears of New Migrant Crisis*, WASH. POST (Dec. 16, 2015), <https://www.washingtonpost.com/news/federal-eye/wp/2015/12/16/unaccompanied-children-crossing-southern-border-in-greater-numbers-again-raising-fears-of-new-migrant-crisis/> ("They are not fleeing because they can't find a good-paying job. They are fleeing because of violence.").

147. Mariano Castillo, *Immigration: More Central Americans Apprehended than Mexicans*, CNN (Dec. 19, 2014), <http://www.cnn.com/2014/12/19/us/dhs-immigration-statistics-2014/index.html>. The number of unaccompanied minors apprehended increased by 76% compared to 2013, and the number of family units apprehended increased by 356%. *Id.*

148. *Id.* (noting that in 2014, for the first time since 1992 when recording began, U.S. Customs and Border Protection apprehended more Central Americans than Mexicans); J. Weston Phippen, *Young, Illegal, and Alone*, ATLANTIC (Oct. 15, 2015), <http://www.theatlantic.com/>

surge overwhelmed an immigration system that was woefully ill-equipped to respond, prompting President Obama to declare a humanitarian crisis and forcing the United States to grapple with an important question: Who will receive safe haven, and who will be sent back?<sup>149</sup>

#### IV. THE CURRENT STATE OF THE LAW: GANG RESISTANCE IN U.S. POLITICAL ASYLUM JURISPRUDENCE

Historically, courts have not looked favorably upon gang-based asylum claims.<sup>150</sup> Applicants have had limited success arguing these asylum claims under a “Particular Social Group” (PSG) theory, asserting that those targeted by gangs constitute a particular social group that falls within the five protected grounds.<sup>151</sup> While limited success may signal a shift in courts’ attitudes toward gang-based asylum claims, PSG jurisprudence remains unclear and inconsistent, and many asylum-seekers fail to establish the “social visibility” and “particularity” required for relief under the elusive PSG standard.<sup>152</sup> Asylum-seekers that do not fall into neat categories, such as a former gang member or an individual who has testified against gang members in court, often fail to meet the standard.<sup>153</sup> Courts have largely

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politics/archive/2015/10/unaccompanied-minors-immigrants/410404/ (reporting that almost 80% of unaccompanied minors apprehended in 2014 came from Central America).

149. See Josh Voorhees, *Obama’s Border Bet*, SLATE (July 7, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/07/child\\_migrant\\_crisis\\_obama\\_says\\_there\\_s\\_a\\_humanitarian\\_crisis\\_at\\_our\\_border.html](http://www.slate.com/articles/news_and_politics/politics/2014/07/child_migrant_crisis_obama_says_there_s_a_humanitarian_crisis_at_our_border.html).

150. ANKER, *supra* note 45, at § 5:25.

151. See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (finding that those who actively opposed gangs in El Salvador by agreeing to be prosecutorial witnesses constituted a particular social group); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (finding former MS-13 members to constitute a particular social group); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1094 (9th Cir. 2013) (finding that individuals who testified against gang members in court constituted a particular social group).

152. See *Uchimiya*, *supra* note 89, at 154–55 (noting the inconsistency in interpretation of “particular social group” in court precedent).

153. Compare, e.g., *Martinez v. Holder*, 740 F.3d 902, 913 (4th Cir. 2014) (rejecting the BIA’s determination that former gang membership is not an immutable characteristic), *Urbina-Mejia v. Holder*, 597 F.3d 360, 366–67 (6th Cir. 2010) (finding a former Barrio 18 gang member to be a part of a particular social group), and *Benitez Ramos*, 589 F.3d at 431 (holding that former membership in MS-13 was not too amorphous to constitute a particular social group), with *Gaitan v. Holder*, 671 F.3d 678, 682 (8th Cir. 2012) (holding that “young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang” were not a sufficiently narrow social group), *Zelaya v. Holder*, 668 F.3d 159, 167 (4th Cir. 2012) (finding that the BIA did not abuse its discretion in determining that

failed to find that those targeted for recruitment by gangs—and subsequently harassed, threatened, or killed for their resistance—constitute a “social group.”<sup>154</sup>

While not typically considered a particular social group, these individuals are ultimately fleeing because of the persecution that stems from their stance toward gang membership.<sup>155</sup> If a group operating outside law-enforcement control persistently seeks out a young man because he refused to join their ranks, it follows that he could have a viable claim for political asylum.<sup>156</sup> However, those who seek recourse under political asylum are often met with the same resistance in the courts.<sup>157</sup>

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“young Honduran males who refuse to join MS-13, have notified the police of MS-13’s harassment tactics, and have an identifiable tormentor within the gang” did not constitute a social group), and *Orellana-Monson v. Holder*, 685 F.3d 511, 522 (5th Cir. 2012) (holding that El Salvadorian males who refused gang recruitment due to opposition lacked the particularity and visibility necessary for a social group).

154. See, e.g., *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653–54 (10th Cir. 2012) (finding that El Salvadorian women between the ages of twelve and twenty-five who resisted gang recruitment did not satisfy the “social visibility” requirement of PSG); *Oliva-Flores v. Holder*, 477 F. App’x 774, 775–76 (2d Cir. 2012) (upholding the BIA’s decision that Guatemalan men resisting gang recruitment were not a particular or socially visible enough group for purposes of a PSG analysis); *Aguilar-Guerra v. Holder*, 343 F. App’x 640, 641–42 (2d Cir. 2009) (finding that El Salvadorian males who were actively pressured to join a gang but refused did not constitute a sufficiently particularized or socially visible group); *Matter of S-E-G*, 24 I. & N. Dec. 579, 588 (B.I.A. 2008) (holding that young El Salvadorans who refused gang recruitment for personal, religious, or moral reasons “fail the ‘social visibility’ test” and did not qualify as a PSG). For a more detailed discussion of PSG in gang-related asylum cases, see Adreanna Orlang, *Clearly Amorphous: Finding a Particular Social Group for Children Resisting Gang Recruitment*, 61 CATH. U. L. REV. 621 (2012).

155. Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES (July 9, 2014), [http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html?\\_r=0](http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html?_r=0). Border Control Statistics show a strong correlation between cities with high violence rates in the Northern Triangle and child arrivals at the U.S. border. *Id.* In 2014, more children fled from San Pedro Sula—the city with the highest homicide rate in the world—than any other Central American city. *Id.* See also Dep’t of Homeland Sec., *Unaccompanied Alien Children (UACs) by Location of Origin for CY 2014: Honduras, El Salvador, and Guatemala* (May 27, 2014), <http://adamisacson.com/files/dhsuacmap.pdf> [hereinafter *UAC Map*].

156. UNHCR Guidance Note, *supra* note 116, at ¶ 46–47.

157. See, e.g., *Rivera-Barrientos*, 666 F.3d at 647 (finding that the petitioner’s persecution was motivated by her resistance to gang recruitment, not her political opposition to the gang’s agenda); *Barrios v. Holder*, 581 F.3d 849, 855–56 (9th Cir. 2009) (holding that a young Guatemalan man who resisted gang recruitment failed to meet either PSG or political opinion asylum requirements); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578–79 (8th Cir. 2009) (stating that the mere refusal to join a gang did not necessitate a finding that the subsequent threats were on account of an imputed political opinion); *In re E-A-G-*, 24 I. & N. Dec. 591, 596–97 (B.I.A. 2008) (denying petitioner’s political asylum claim on the grounds that persecution appeared to be motivated by gang rivalry).

A. *Elias-Zacarias: Misunderstanding Precedent*

The unfavorable precedent traces back to the Supreme Court's decision in *INS v. Elias-Zacarias*.<sup>158</sup> In *Elias-Zacarias*, the Court denied relief to an asylum-seeker who feared retaliation for refusing to join a Guatemalan guerilla group.<sup>159</sup> Since then, many courts relied on *Elias-Zacarias* to deny political asylum to applicants who resisted gang recruitment, asserting that resistance is not a political opinion.<sup>160</sup> This, however, is a flawed understanding of the *Elias-Zacarias* holding.<sup>161</sup> The Court found that resistance alone does not *necessarily* constitute a political opinion in these cases; it did not hold that resistance can *never* constitute a political opinion.<sup>162</sup> The Court's ruling hinged on the factual record of Elias-Zacarias's case: it found that Elias-Zacarias did not present sufficient evidence that the guerillas' motive was political.<sup>163</sup> Thus, the asylum claim failed on evidentiary grounds, not legal grounds.<sup>164</sup>

Under this current precedent, it remains possible for gang resistance to give rise to a viable political asylum claim.<sup>165</sup> In *Martinez-Buendia v. Holder*,<sup>166</sup> the Seventh Circuit explained that *Elias-Zacarias* did not draw a bright-line rule: "Rather, *Elias-Zacarias* instructs courts to carefully consider the factual record of each case when determining whether the petitioner's fear of future persecution due to his refusing recruitment

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rather than political opinion).

158. 502 U.S. 478 (1992).

159. *Id.* at 483–84.

160. See, e.g., *Mayorga-Vidal v. Holder*, 675 F.3d 9, 18–19 (1st Cir. 2012) (citing *Elias-Zacarias* for the proposition that "mere refusal to join a gang, without more, does not compel a conclusion that the alleged persecutor viewed the alien's resistance as an expression of a political opinion"); *Zavaleta-Lopez v. Att'y Gen. of U.S.*, 360 F. App'x 331, 334 (3d Cir. 2010) (referencing *Elias-Zacarias* to assert that the petitioner did not present sufficient evidence that he would be persecuted on account of political opinion); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (using *Elias-Zacarias* to deny a political asylum claim because the petitioner did not show that his persecution by the LRA was motivated for political reasons beyond increasing LRA numbers).

161. ANKER, *supra* note 47, § 5:25 (highlighting the fact that *Elias-Zacarias* did not go so far as to hold that refusing recruitment was apolitical in *all* cases).

162. *Id.*; see also *Elias-Zacarias*, 502 U.S. at 481 (rejecting the appellate court's finding that attempting to conscript the applicant into guerilla forces was persecution on account of political opinion).

163. *Elias-Zacarias*, 502 U.S. at 483–84.

164. *Id.*

165. ANKER, *supra* note 47, at § 5:25.

166. 616 F.3d 711 (7th Cir. 2010).

attempts constitutes persecution on account of political beliefs.”<sup>167</sup> Courts recognize the importance of context in analyzing political asylum claims, considering factors like the human rights conditions in the country, the political climate, the nature of the persecution, and the nature of the group perpetuating it.<sup>168</sup> The door remains open to gang-based political asylum claims, but only if courts begin to recognize that the current conditions in Central America warrant such protection.<sup>169</sup>

Unfortunately, courts remain reluctant to find a nexus between gang resistance and political opinion, despite the body of jurisprudence that considers a broad range of opinions as political.<sup>170</sup> Courts have found refusing sexual subjugation,<sup>171</sup> holding certain views about gender,<sup>172</sup> affiliating with a certain geographic area,<sup>173</sup> refusing extortion by guerilla movements,<sup>174</sup> and even resisting guerilla recruitment<sup>175</sup> to be implied or express political opinions. Unfortunately, courts have stopped short of recognizing this nexus in gang resistance cases, and the consequences are disturbing.<sup>176</sup>

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167. *Id.* at 716.

168. *Id.*; *see, e.g.*, *Osorio v. I.N.S.*, 18 F.3d 1017, 1030 (2d Cir. 1994) (rejecting the government’s narrow definition of political opinion as “an impoverished view of what political opinions are” in light of Guatemala’s political context); *Desir v. Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988) (concluding that refusing to pay a bribe to a criminal organization was an expression of political opinion, given the context of systemic human rights abuses the group perpetuated); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1284–85 (9th Cir. 1984) (rejecting the government’s argument that specific threats against the applicant were merely evidence of general violence affecting all Salvadorans).

169. *See supra* notes 158–68 and accompanying text.

170. Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGR. BRIEFINGS 1, 15 (2012).

171. *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987), *overruled in part on judicial notice grounds by* *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996) (finding resistance to rape and sexual subjugation to be an imputed political opinion).

172. *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) (recognizing feminism as a political opinion).

173. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076–77 (9th Cir. 2004) (finding that anti-guerilla forces imputed anti-guerilla political opinion to entire group based on residence in a certain village).

174. *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1296 (9th Cir. 1997) (ruling that refusal to pay bribes to guerillas constituted a political opinion).

175. *Del Carmen Molina v. I.N.S.*, 170 F.3d 1247, 1249–50 (9th Cir. 1999) (rejecting the BIA’s ruling that threats by guerillas were not due to actual or imputed political opinion of opposition).

176. *See Frydman & Desai, supra* note 170, at 15–16.

*B. Rivera-Barrientos: Misunderstanding Context*

In 2006, Ms. Rivera-Barrientos fled her native town in El Salvador and sought asylum in the United States after becoming a MS-13 recruitment target one year earlier.<sup>177</sup> She had repeatedly refused recruitment, telling gang members: “No, I don’t want to have anything to do with gangs. I do not believe in what you do.”<sup>178</sup> The gang responded with threats, telling Ms. Rivera-Barrientos that if she did not want to join them, she was against them, and her family would pay for her refusal; however, she continued to refuse their demands in the following months.<sup>179</sup> When she refused them yet another time during an encounter at a bus station, MS-13 members blindfolded her and forced her into a car at knifepoint, drove her to into a field, dragged her out of the car, and asked her if she had changed her mind.<sup>180</sup> When she responded that she had not, they brutally raped her.<sup>181</sup> After repeated visits from MS-13 at her home following the attack, she fled to the United States.<sup>182</sup> Even after she left, gang members continued to return to her house in search for her.<sup>183</sup>

Despite Ms. Rivera-Barrientos’s vocal opposition to the gang, the gang’s expressed interpretation of her refusal as being “against” the gang, and the brutal attack that immediately followed her refusal, the court affirmed the BIA’s decision to deny her asylum claim.<sup>184</sup> Instead, it simply cited *Elias-Zacarias* and drew a distinction between resisting gang recruitment and opposition to the gang.<sup>185</sup> This analysis makes the critical mistake of mischaracterizing not only the important factual evidence, but also the socio-political context in which gangs operate less like a group of petty criminals and more like insurgents who harshly punish anyone who

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177. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 643–44 (10th Cir. 2012).

178. *Id.* at 644.

179. *Id.*

180. *Id.*

181. *Id.* The Immigration judge found Ms. Rivera-Barrientos’s testimony of all events to be credible. *Id.* at 644–45.

182. *Id.* at 644. Ms. Rivera-Barrientos did not report the rape to the police because gang members had threatened to kill her and her mother if she did so, and she did not believe the police could protect her. *Id.*; see also *supra* Section III.B (discussing law enforcement’s response to gang violence in the Northern Triangle).

183. *Rivera-Barrientos*, 666 F.3d at 644; see also *infra* Part VI (discussing the difficulties of avoiding gang pursuit while remaining in one’s own country).

184. *Rivera-Barrientos*, 666 F.3d at 647.

185. *Id.* at 646–47.

opposes them.<sup>186</sup>

Indeed, another reason behind the court's hesitation to grant relief in gang-based asylum cases is a fundamental misunderstanding of the context in which these claims arise.<sup>187</sup> Dismissing large-scale violence as "economic terrorism,"<sup>188</sup> "pervasive non-political criminality,"<sup>189</sup> or "civil strife,"<sup>190</sup> ignores the degree of control gangs exert over communities in the Northern Triangle.<sup>191</sup> As the dominant gangs continue to grow, they are expanding into something resembling an insurgency that will "seize political power to guarantee the freedom of action and the commercial environment they want."<sup>192</sup> They are not a group of individuals committing crimes for personal gain, but an entity maintaining control over the population.<sup>193</sup>

#### V. THE ARGUMENT FOR POLITICAL ASYLUM: UNDERSTANDING THE SOCIO-POLITICAL CONTEXT OF THE NORTHERN TRIANGLE

Against the backdrop described in the previous section, choosing to resist gangs is not just a moral, nonpolitical personal choice—it is a choice in opposition of the dominant power and, in many instances, the de facto government.<sup>194</sup> In fact, in current recruitment practice, it is not much of a choice at all.<sup>195</sup> In the join-or-die gang culture, a neutral response is an oppositional one, and one that warrants retaliation.<sup>196</sup> The dominant gangs have evolved into sophisticated, transnational crime organizations, and their countrywide influence is strikingly clear.<sup>197</sup>

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186. See Frydman & Desai, *supra* note 170, at 17.

187. ANKER, *supra* note 47, § 5:25.

188. López-Castro v. Holder, 577 F.3d 49, 54 (1st Cir. 2009).

189. Quevedo v. Ashcroft, 336 F.3d 39, 44 (1st Cir. 2003).

190. Escobar v. Holder, 698 F.3d 36, 38 (1st Cir. 2012).

191. ANKER, *supra* note 47; see also Section III.A.

192. MANWARING, *supra* note 100, at v.

193. Alexandra M. Gonçalves-Peña, *Challenging the "Political": U.S. Asylum Law and Central American Gang Warfare*, 65 GUILD PRAC. 242, 246 (2008).

194. See *infra* Section V.A.

195. See *supra* Section III.C.

196. ANKER, *supra* note 47, § 5:24; see Uchimiya, *supra* note 89, at 128 (detailing the violent responses to gang resistance).

197. MANWARING, *supra* note 100, at 10.

*A. Gangs as De-Facto Governments*

Gangs are challenging and even eroding national sovereignty and stability in the communities they control.<sup>198</sup> To properly assess gang resistance asylum claims, courts must understand the political climate where the resistance occurs.<sup>199</sup> To dismiss gang resistance as simply a moral aversion to criminal activity completely outside the political sphere is to severely mischaracterize what resistance means and underestimate the forces asylum-seekers are resisting.<sup>200</sup> As professor of military strategy Max G. Manwaring cautions:

In describing the gang phenomenon as a simple mutation of a violent act we label as insurgency, we mischaracterize the activities of nonstate organizations that are attempting to take control of the state. We traditionally think of insurgency as primarily a military activity, and we think of gangs as a simple law-enforcement problem. Yet, insurgents and third generation gangs are engaged in a highly complex political act—political war.<sup>201</sup>

In this political climate, gang resistance is tantamount to opposing a force arguably stronger than the government.<sup>202</sup> Gangs, however, operate largely without accountability.<sup>203</sup> At best, law enforcement and local governments are ineffective in their efforts to combat gang violence; at worst, they are complicit in it.<sup>204</sup>

Uncontested, gangs have created “virtual fiefdoms” where they extort

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198. *Id.* at 11.

199. *See supra* notes 150–52 and accompanying text; *see also* UNHCR Guidance Note, *supra* note 116, ¶ 46.

200. ANKER, *supra* note 47, § 5:25. “A lack of understanding of the increasing political nature of the gangs contributes to a denigration (e.g., characterization of opposition as ‘mere moral aversion’ to criminal activity).” *Id.* (citation omitted).

201. MANWARING, *supra* note 100, at 3.

202. *See, e.g.*, ANKER, *supra* note 47, § 5:25 (noting that MS-13 “rules entire municipalities” in El Salvador and that even the police must request permission from gang leaders to enter certain areas under gang control).

203. MANWARING, *supra* note 100, at 14; EGUIZABAL ET AL., *supra* note 99, at 2 (reporting a 95% higher impunity rate for crime in the Northern Triangle).

204. Uchimiya, *supra* note 89, at 130 (stating that corruption “may be the greatest inhibiting factor to Central American governments’ effective response to the gang crisis”).

entire communities, businesses, and transit systems.<sup>205</sup> Not only have the government's *mano dura* policies failed to solve the problem, but they have incited more violence.<sup>206</sup> Thus, while gangs like MS-13 and Barrio 18 possess the power equivalent to a government, they have effectively transcended government control.<sup>207</sup> This is the force asylum-seekers are resisting when they refuse recruitment, and this is the force they are fleeing when they arrive at the U.S. border.<sup>208</sup>

*B. Neutrality and Imputed Political Opinion: Why Resistance Equals Opposition*

While an individual may resist forced recruitment in an effort to remain neutral, a neutral stance can express a political opinion.<sup>209</sup> Choosing to remain neutral is no less a political choice than choosing to align with one side.<sup>210</sup> Many individuals remain neutral precisely because they possess a political opinion at odds with the two parties in contention.<sup>211</sup> The purpose of political asylum is to protect those who hold unpopular ideologies from persecution, including those who disagree with the most powerful political forces.<sup>212</sup> Arguably, this group is in greatest need of protection.<sup>213</sup> Consequently, courts have recognized neutrality as a political opinion,

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205. See *supra* Section III.A; see also Gonçalves-Peña, *supra* note 193, at 243–44.

206. Gonçalves-Peña, *supra* note 193, at 243–44; see also Watts, *supra* note 90 (noting that the government's abuse of power in implementing *mano dura* policies motivates the gangs to strengthen their insurgence movement).

207. See *supra* Section III.B.

208. See, e.g., Markon & Partlow, *supra* note 146.

209. See *Sangha v. I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997) (holding that an applicant can establish a political opinion by showing neutrality in an environment when neutrality is hazardous to the applicant); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286 (9th Cir. 1984) (stating that choosing to remain neutral is no less a political decision than choosing to align with one faction); ANKER, *supra* note 47, § 5:24 (noting that action or flight may be enough to express an opinion); *supra* Section II.B.2.

210. *Bolanos-Hernandez*, 767 F.2d at 1286 (finding the conscious choice to refuse to join guerilla forces and remain neutral to be a political choice). The Ninth Circuit in *Bolanos-Hernandez* also paid particular attention to the typical response of guerillas to those who refuse to join, including killing five of the petitioner's friends for refusing, and found that "it would be unreasonable to conclude that the threat to Bolanos' life or freedom was not a serious one." *Id.*

211. *Id.*

212. *Id.*; see also Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

213. See *Bolanos-Hernandez*, 767 F.2d at 1286; Refugee Act § 207.

especially in situations where it is hazardous to remain neutral.<sup>214</sup> In the join-or-die environment that gangs perpetuate, even neutrality can be dangerous.<sup>215</sup> Neutrality is not neutral; neutrality is opposition.<sup>216</sup>

At least, it is certainly perceived as such.<sup>217</sup> There is a saying in some neighborhoods of the Northern Triangle: “if you’re not in a gang, then you’re against gangs.”<sup>218</sup> Regardless of the intent behind it, gangs perceive resistance as disrespectful opposition and retaliate in response.<sup>219</sup> Thus, gangs impute a political opinion to an individual who refuses to join, whether an actual political opinion is expressed.<sup>220</sup> As the Ninth Circuit observed of the recruitment practices of guerillas in El Salvador:

[They] do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.<sup>221</sup>

Similarly, targets of recruitment can effectively challenge the gang, as far as the gang is concerned, through mere resistance.<sup>222</sup> Resistance is not perceived as an innocuous, polite decline of an invitation, but as deliberate opposition.<sup>223</sup> As discussed in the previous section, opposition is punished severely.<sup>224</sup> Some courts have dismissed gang retaliation to resistance as motivated purely by the gang’s effort to increase the size of the gang.<sup>225</sup> But

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214. *Sangha*, 103 F.3d. at 1488.

215. *See supra* note 134 and accompanying text.

216. *See id.*

217. *See infra* notes 218–23 and accompanying text.

218. Fogelbach, *supra* note 143, at 429 (quoting the Director General of El Salvador’s national police).

219. UNHCR Guidance Note, *supra* note 116, ¶ 51; *see also supra* Section II.B.2.

220. UNHCR Guidance Note, *supra* note 116, ¶ 51.

221. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1287 (9th Cir. 1984).

222. *E.g.*, UNHCR Guidance Note, *supra* note 116, ¶ 6 (noting that refusal to succumb to demands is equivalent to disrespect); Uchimiya, *supra* note 89, at 128 (reporting that murder is a possible consequence for refusing gang demands); Grayner, *supra* note 130, at 1424 (noting that resistance to recruitment is perceived as disrespect).

223. *See supra* note 222.

224. *See supra* Section III.C.

225. *Matter of S-E-G*, 24 I. & N. Dec. 579, 589 (B.I.A. 2008) (finding insufficient evidence to prove that retaliation based on the applicant’s refusal to join was motivated by applicant’s political opinion, but was instead motivated by gang rivalry and a desire to increase membership).

this analysis ignores the context in which the violence occurs and its political aims.<sup>226</sup> Gangs have created a power vacuum in the Northern Triangle that the state is either unable or unwilling to enter, and violence is the primary method through which the gangs maintain control.<sup>227</sup> Gang members are not merely seeking personal gain, but also the consolidation of power.<sup>228</sup> In the same way, they do not just retaliate against resistance to increase their numbers; they punish those who challenge their power.<sup>229</sup> While their exact political goals remain ill-defined, “the fact that they exercise political power, however crude, cannot be denied.”<sup>230</sup> As a result, there remains a chasm between the actual socio-political conditions in the Northern Triangle and the perception of these conditions in the mind of the courts, resulting in an asylum framework that is falling dangerously short and highlighting the need for a new approach to fill the gap.<sup>231</sup>

#### VI. A HOLISTIC ALTERNATIVE: THE PROTECTIVE ETHIC OF ASYLUM

Some U.S. courts have shown willingness to consider resistance asylum claims in light of their socio-political context, but the current asylum jurisprudence is not keeping pace with the realities of gang culture.<sup>232</sup> Even worse, these restrictive interpretations are deporting asylum-seekers back into that reality.<sup>233</sup> By our courts’ own admissions, deportation is a harsh measure with potentially dangerous consequences for those fleeing

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226. Gonçalves-Peña, *supra* note 193, at 246 (quoting *Osorio v. I.N.S.*, 18 F.3d 1018, 1029 (2d Cir. 1994), in criticizing the failure to consider political context).

227. *Id.*

228. *Id.* at 246–47.

229. See *Jabr v. Holder*, 711 F.3d 835, 839–40 (7th Cir. 2013) (finding that Jihadi group’s motives went beyond increasing their numbers). While *initial* persecution may be to increase numbers, subsequent persecution can be motivated by the desire to punish resistance. *Id.*; see also *Martinez-Buendia v. Holder*, 616 F.3d 711, 717 (7th Cir. 2010) (noting that, while it may be unclear why the FARC targeted the applicant initially, it was clear that the later persecution was “a result of her refusal to cooperate”); *Delgado v. Mukasey*, 508 F.3d 702, 706–07 (2d Cir. 2007) (noting the fact that the applicant’s initial kidnapping was not politically motivated does mean that her subsequent refusal to help the group was not an imputed political opinion).

230. Gonçalves-Peña, *supra* note 193, at 247.

231. See *infra* Part VI.

232. See *supra* Section IV.A (discussing the *Elias-Zacarias* precedent followed by many courts to deny gang-based asylum claims); see, e.g., *supra* note 157.

233. Brodzinsky & Pilkington, *supra* note 10.

persecution.<sup>234</sup> At its inception, the central purpose of U.S. asylum law was to respond to their needs as they arise across the globe.<sup>235</sup> While the U.S. has since strayed from its roots, this protective ethic still has a place on the international stage.

#### *A. A Contextual Approach*

The concept of asylum first expressed in the UN's Convention is inherently humanitarian.<sup>236</sup> As humanitarian conditions are in constant flux around the world, asylum was intended to adapt along with them.<sup>237</sup> To adequately protect, asylum laws must be able to respond to new risks of political persecution.<sup>238</sup> Accordingly, the UNHCR advocates for a holistic, broad understanding of political opinion as "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged . . . reflect[ing] the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin."<sup>239</sup> This holistic, context-specific analysis leaves room for courts to consider the political conditions in which the resistance occurred and the dangerous environment a deported asylum-seeker may face after returning home.<sup>240</sup>

International standards mirror the decision of some U.S. courts regarding neutrality and imputed opinion.<sup>241</sup> They recognize that declining gang recruitment can be considered a deliberate choice, not a lack of opinion, especially if it takes place in an environment where neutrality is dangerous.<sup>242</sup> Resisting recruitment, according to the UNHCR, can express

234. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 488 (1992) (Stevens, J., dissenting) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

235. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

236. See Convention Relating to the Status of Refugees, *supra* note 39; Protocol Relating to the Status of Refugees, *supra* note 39; see also *supra* Section II.A.

237. Gonçalves-Peña, *supra* note 193, at 247.

238. GOODWIN-GILL & MCADAM, *supra* note 66, at 93–94 ("Persecution is a concept only too readily filled by the latest examples of one person's inhumanity to another . . ."); see also *supra* Section II.B.3.

239. UNHCR Guidance Note, *supra* note 116, ¶ 45–46.

240. See *id.*

241. See *id.* ¶ 45–51.

242. *Id.* ¶ 50 (citing *Matter of Calderon-Medina*, No. A 78-751-1981 (U.S. Exec. Office for Immigration Review 2002), <http://www.refworld.org/docid/4b6bfb332.html>). Political asylum

anti-gang sentiment just as strongly as criticizing gangs in a public forum would.<sup>243</sup>

In addition, international standards address another important issue often overlooked in U.S. court opinions: the relative ability of gang resisters to flee within their own country.<sup>244</sup> Under U.S. law, there is no well-founded fear of persecution if the applicant could relocate to another part of his or her country to avoid the persecution.<sup>245</sup> Generally, U.S. courts find that resisting gang recruitment does not constitute a political opinion without addressing whether the asylum-seeker could viably find safety within their country.<sup>246</sup> The viability of an “internal flight alternative” for a victim to evade persecution and remain in-country should be an important factor in asylum decisions, but whether this alternative is a reasonable one hinges on the ability of the persecutor to pursue their victims in other country locations.<sup>247</sup> MS-13 and Barrio 18 have transnational reaches that extend not only across the Northern Triangle but across Central America and even into major American cities.<sup>248</sup> Given the pervasiveness of their network, it is not only feasible but also highly likely that gang members would be able to pursue an individual within a country as small as El Salvador.<sup>249</sup> Additionally, not

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claims may also arise from opposing the government’s handling of gang-related crime, particularly in cases of government corruption where gang activity and the State are “closely intertwined.” *Id.* ¶ 49.

243. *Id.* ¶ 50.

244. *Id.* ¶ 52–54.

245. 8 C.F.R. § 208.13(b)(2)(ii) (2013).

246. *See supra* Section IV.B.

247. UNHCR Guidance Note, *supra* note 116, ¶ 52–54.

248. Freddy Funes, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. MIAMI L. REV. 301, 304–06 (2008). In addition to their extensive reach in Central America, MS-13 operations have spread from Los Angeles to other cities, such as Washington D.C. and Seattle. *Id.* at 306.

249. *See* WOLA, CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 2–3 (May 2008), <https://www.wola.org/analysis/central-american-gang-related-asylum-guide/> (noting that relocation does not provide safety due to of gang pervasiveness, small geographic areas, and lack of economic security). El Salvador is approximately 8000 square miles, making it slightly smaller than Massachusetts. *El Salvador*, NATIONS ENCYCLOPEDIA, <http://www.nationsencyclopedia.com/economies/Americas/El-Salvador.html> (last visited Apr. 12, 2017). One adolescent from El Salvador reported moving three times to escape gangs; each time, the same gang found him. Elizabeth Kennedy, *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AM. IMMIGR. COUNCIL 1, 4 (2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/no_childhood_here_why_central_american_children_are_fleeing_their_homes.pdf). Another lived in six different neighborhoods in El Salvador and even fled to Guatemala, but the same gang tracked him down each time. *Id.*

only is their reach extending beyond borders, but also beyond law enforcement protection in many of these alternative locations.<sup>250</sup> Some research has gone so far as to report that “[i]nternal relocation to avoid gangs is not possible in El Salvador, Honduras, or Guatemala.”<sup>251</sup>

Scores of young people are, in a very real sense, trapped.<sup>252</sup> They literally cannot run away from gang violence and forced recruitment within their own countries.<sup>253</sup> For many, their final option is to undertake the dangerous journey to the United States.<sup>254</sup>

When war and genocide left other communities in the same position, the international community responded with asylum.<sup>255</sup> It was the heavy consequences of America’s failure to protect Jewish refugees that moved lawmakers to shift the country’s position toward migration.<sup>256</sup> Now, the juxtaposition between the protective ethic of asylum and U.S. law’s narrow, fragmented interpretation is stark, and it is troubling.<sup>257</sup> The United States’ position toward Central American refugees has already yielded fatal consequences for deportees: Benito Zaldivar’s story<sup>258</sup> is disappointingly common, and many more like him will suffer the same fate if the government fails to adopt a more accurate and holistic approach to their cases.<sup>259</sup> Unlike in 1939, asylum law stands ready to protect them only if our courts will allow it.<sup>260</sup>

#### *B. Addressing the “Immigration Floodgate”*

Perhaps the greatest criticism of actually allowing this reform is the potential for “opening the floodgates” of immigration.<sup>261</sup> The fear that

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250. UNHCR Guidance Note, *supra* note 116, ¶ 52–54.

251. WOLA, *supra* note 249, at 2.

252. *See supra* notes 247–51 and accompanying text.

253. WOLA, *supra* note 249, at 2–3.

254. Kennedy, *supra* note 249, at 4.

255. *See supra* Section II.A.

256. *See* Lind, *supra* note 31.

257. *See supra* Section IV.A.

258. *See supra* Part I.

259. *See* Brodzinsky & Pilkington, *supra* note 10.

260. *See supra* Part IV.

261. *See, e.g.,* Francis Robles & Michael D. Shear, *U.S. Considering Refugee Status for Hondurans*, N.Y. TIMES (July 24, 2014), [http://www.nytimes.com/2014/07/25/world/americas/administration-weighs-plan-to-move-processing-of-youths-seeking-entry-to-honduras-.html?\\_r=0](http://www.nytimes.com/2014/07/25/world/americas/administration-weighs-plan-to-move-processing-of-youths-seeking-entry-to-honduras-.html?_r=0)

expanding asylum relief will cause a new influx of immigrants to seek asylum is an underlying rationale behind criticism of reform and judicial resistance to granting asylum.<sup>262</sup> However, even if courts adopt a more holistic approach to gang-based asylum claims, the system would not necessarily morph into the kind of indiscriminate, open gate that critics fear.<sup>263</sup>

The refugee and asylum process itself is far from an open gate for immigration. Those who seek to be admitted to the United States as refugees still must surmount substantial hurdles before actually being admitted.<sup>264</sup> Refugee admission requires extensive screening of the applicant and can take years to complete.<sup>265</sup> Before reaching the vetting process, an applicant must first fulfill the eligibility requirements set out by the UNHCR.<sup>266</sup> Only strong candidates are selected: less than one percent of the global refugee population moves forward in the resettlement process.<sup>267</sup> If an applicant does move forward, he or she must undergo a number of security clearances, an in-person interview, DHS approval, medical screenings, and a cultural orientation—a process that can take anywhere from eighteen months to two or three years.<sup>268</sup> The refugee admission

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(quoting Mark Krikorian, executive director for the Center for Immigration and supporter of tighter immigration control, who noted that new programs allowing Hondurans to apply for asylum would increase the flood of immigrants by “[o]rders of magnitude more”); Jeffrey D. Corsetti, *Marked For Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 435 (2006) (describing immigration judges as “loath to open the immigration floodgates” with their decisions).

262. See Corsetti, *supra* note 261, at 408, n.4 (citing *Romero-Roderiquez v. U.S. Att’y Gen.*, 131 F. App’x 203, 204 (11th Cir. 2005) and the concern the immigration judge expressed in ushering in a “deluge of asylum claims” from individuals seeking economic opportunities).

263. See *infra* notes 264–69 and accompanying text.

264. See *Security Screening of Refugees Admitted to the United States: US Resettlement Security Screening Process*, U.S. COMMITTEE FOR REFUGEES & IMMIGRANTS, <http://refugees.org/explore-the-issues/our-work-with-refugees/security-screening/> (last visited Apr. 12, 2017) [hereinafter USCRI].

265. *U.S. Refugee Admissions Program*, U.S. DEP’T STATE, <http://www.state.gov/j/prm/ra/admissions/index.htm> (last visited Apr. 12, 2017). The State Department estimates the average time for resettlement is eighteen to twenty-four months. *Id.*

266. Amy Pope, *The Screening Process for Refugee Entry into the United States*, WHITE HOUSE BLOG (Nov. 20, 2015, 7:09 PM), <https://www.whitehouse.gov/blog/2015/11/20/infographic-screening-process-refugee-entry-united-states>. Applicants must pass an initial UNHCR biometrics and interview screening process before moving on to further resettlement screenings; the majority of applicants do not advance. *Id.*

267. *Id.*

268. See USCRI, *supra* note 264 (outlining the step-by-step resettlement process). The State

process has been described as the most extensive screening process for visitors in the entire country.<sup>269</sup>

In addition, those who first come to the United States and apply for asylum must still meet the requirements of the definition of a refugee and prove that they have a credible fear of persecution.<sup>270</sup> This requires the applicant to establish before an asylum officer or an immigration judge that there is a significant possibility that the applicant has been or will be persecuted in his home country.<sup>271</sup> If an applicant is found to be a security threat or is already firmly resettled, the judge may find a mandatory bar to asylum.<sup>272</sup> Even if asylum interpretation is expanded to include claims of gang resisters, these checks on the refugee and asylum process will remain in place and ensure that those who seek asylum are genuinely fleeing persecution.<sup>273</sup>

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Department estimates that the process generally takes eighteen to twenty-four months, but may take almost three years for Syrian refugees, according to U.S. Committee for Refugees and Immigrants president Lavina Limon. Linda Qiu, *Jeb Bush: 'It Takes Almost a Year for a Refugee to Be Processed in the United States,'* POLITIFACT (Nov. 15, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/nov/15/jeb-bush/jeb-bush-it-takes-almost-year-refugee-be-processed/>.

269. Qiu, *supra* note 268 (noting that Limon described the process for refugees as the “most extensive security screening we have for visitors,” making it more difficult to enter as a refugee than as a tourist, student, or businessman).

270. See 8 U.S.C. § 1225(b)(B)(iii) (2012); *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Oct. 19, 2015).

271. *Obtaining Asylum in the United States*, *supra* note 270. If an applicant is applying through the affirmative asylum process, where the individual initiates the filing with DHS, an asylum officer reviews the applicant's claim. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 3–4 (Jan. 15, 2009). In the defensive asylum process (where the individual applies for asylum while in removal proceedings), an immigration judge hears the applicant's claim and evaluates whether she is eligible. *Id.* at 4.

272. See Immigration and Nationality Act § 208 (b)(2)(A)(i)–(vi). If the applicant persecuted others for one of the five grounds, was convicted of a particularly serious crime, committed a serious nonpolitical crime outside the United States, engaged in terrorist activity, was firmly resettled elsewhere, or was a danger to the security of the United States, the applicant may be ineligible for asylum. *Id.*; see also *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last updated July 15, 2015).

273. Catherine Betts, *Can I Get a Witness? A Case for Asylum for Prosecutorial Witnesses Who Testify Against Gangs and Other Gang-Related Claims*, 40 T. MARSHALL L. REV. 5, 10 (2014) (recognizing that the floodgates argument fails to consider that expanding asylum recognition does not guarantee every individual in the group will be eligible for asylum, because asylum-seekers still must demonstrate a well-founded fear of persecution on the basis of one of the five grounds).

This Article does not advocate for a blanket grant of asylum to anyone fleeing gang violence in the Northern Triangle.<sup>274</sup> Rather, it looks to a specific group within that region: those who are *targeted* by gangs because of their resistance.<sup>275</sup> This approach does not grant asylum to everyone who flees violence, but merely recognizes the fact that certain individuals are resisting a group akin to an insurgency from which the government is unable to protect them. It is these individuals who warrant protection under the analysis presented in this Comment.

The argument that a change in asylum practice will open the floodgates often presupposes that some of the immigrants in this influx will seek to stay in the United States not for safety, but for economic opportunity.<sup>276</sup> However, while the Northern Triangle is an impoverished region relative to the United States, there is substantial evidence that violence is the primary reason that many flee.<sup>277</sup> Data from Customs and Border Protection in 2014 indicates a strong correlation between cities with high homicide rates and cities from which the most child migrants arrived at the U.S. border.<sup>278</sup> The greatest number of children fled from San Pedro Sula—the homicide capital of the world in 2014.<sup>279</sup> In comparison, virtually no migrants from the 2014 surge came from bordering Nicaragua, which is similarly plagued with poverty but is significantly less violent.<sup>280</sup> In fact, droves of the Northern Triangle residents are fleeing to countries like Nicaragua, Panama, Costa Rica, Belize, and Mexico—countries with arguably similar economic opportunity, but less gang violence.<sup>281</sup>

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274. See *infra* Part VII.

275. See *supra* Section V.B.

276. See *supra* notes 264–65 and accompanying text.

277. See Brian Resnick, *Why 90,000 Children Flooding Our Border Is Not an Immigration Story*, ATLANTIC (June 16, 2014), <http://www.theatlantic.com/politics/archive/2014/06/why-90000-child-ren-flooding-our-border-is-not-an-immigration-story/453654/> (reporting UNHCR data indicating the majority of children who fled the Northern Triangle in 2014 did so because of violence). According to Leslie Velez, Senior Protection Officer at the UNHCR, “These people aren’t coming here for economic opportunity. They are fleeing for their lives.” *Id.*

278. Robles, *supra* note 155 (reporting statistics from Customs and Border Protection revealing a correlation between high homicide rates and migration).

279. *Id.* While Honduras previously was the murder capital of the world, it was recently surpassed by El Salvador. Partlow, *supra* note 107.

280. Robles, *supra* note 155.

281. See *Unaccompanied Minors: Humanitarian Situation at US Border*, UNHCR, <http://www.unhcr.org/en-us/children-on-the-run.html> (last visited Apr. 12, 2017) (documenting a 1185% increase in asylum applications in Mexico, Panama, Nicaragua, Costa Rica, and Belize combined).

While the United States may provide an economic incentive for migrants, when the UNHCR interviewed over four hundred Central American children, almost sixty percent said the reason they crossed the border was safety from violence.<sup>282</sup> It remains an unfortunate possibility that asylum protections may be abused.<sup>283</sup> The question is whether preventing the possibility of economic migrants seeking asylum is worth denying protection to those who genuinely need it.<sup>284</sup>

It is critical for U.S. asylum law to recognize the distinction between common urban crime or poverty and the current stronghold of transnational gangs in the Northern Triangle.<sup>285</sup> Adopting a holistic approach to the asylum analysis provides an avenue for courts to finally recognize that critical distinction.<sup>286</sup> It allows courts to analyze resistance and neutrality within their contexts: in this case, a socio-political context where gangs are de facto governments, where resistance or neutrality is akin to treason, where there is virtually no state protection, and where fleeing the country is the only viable option.<sup>287</sup>

This approach will not “open the floodgates” of immigration; instead, it will allow an avenue of safety for a vulnerable group that has long been turned away from America’s border—a group of citizens that the United States should be readily accepting.<sup>288</sup> As one retired immigration judge noted when addressing those who resist gang recruitment:

What kind of resistance would it take, what kind of moral strength would it take to say no? I don’t think we have a difficulty

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from 2008 to 2014); *see also* AILA Doc. No. 14071546, AM. IMMIGR. L. ASS’N (Mar. 16, 2016), <http://www.aila.org/infonet/resources-central-american-humanitarian-crisis>.

282. Resnick, *supra* note 277. Of the 404 children interviewed, 58% were found to be “forcibly displaced” by violence. *Id.*

283. DAN CADMAN, CTR. IMMIGR. STUD., ASYLUM IN THE UNITED STATES: HOW A FINELY TUNED SYSTEM OF CHECKS AND BALANCES HAS BEEN EFFECTIVELY DISMANTLED 8 (Mar. 2014), <http://cis.org/sites/cis.org/files/cadman-asylum.pdf>.

284. *See* Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1285 (9th Cir. 1984) (recognizing that not requiring asylum applicants to present independent corroborating evidence of a specific threat “may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. . . . [T]he imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy.”).

285. Corsetti, *supra* note 261, at 435.

286. *See supra* Section VI.A.

287. *See supra* Sections V.A–B.

288. *Id.*

understanding what conscience is in a circumstance like that. . . . We admire that. We say that person has character, that person has some sort of moral strength. . . . If they're going to be harmed because of that . . . , then it's perfectly in line with our law to grant them political asylum.<sup>289</sup>

## VII. CONCLUSION

Under both international and U.S. law, anyone unwilling or unable to return to their country because of a well-founded fear of persecution based on political opinion from which their government is unable to protect them is a refugee eligible for protection.<sup>290</sup> It is difficult to dispute that the current violence committed by gangs in the Northern Triangle, particularly the targeted violence toward resisters, is a threat to life and freedom and constitutes persecution.<sup>291</sup> In the current join-or-die gang culture where MS-13 and Barrio 18 act as de facto governments over entire communities, resisting recruitment has become synonymous with opposition; opposition is in turn met with relentless pursuit and brutal retaliation.<sup>292</sup> In an environment where gangs effectively rule, going against the grain is more than neutrality; it is a deliberate and costly political choice.<sup>293</sup>

As gang presence becomes inescapable, resisters flee to America where U.S. courts resist them just as strongly.<sup>294</sup> In doing so, courts ignore the disturbing reality of what is happening in the Northern Triangle.<sup>295</sup> Gangs are wielding unprecedented power in their communities, and those who resist them are resisting a societal force from which their government cannot

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289. Eyder Peralta, *Why a Single Question Decides the Fates of Central American Migrants*, NPR (Feb. 25, 2016), <http://www.npr.org/2016/02/25/467020627/why-a-single-question-decides-the-fates-of-central-american-migrants> (quoting retired immigration judge William Van Wycke).

290. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102; Protocol Relating to the Status of Refugees, *supra* note 39; Convention Relating to the Status of Refugees, *supra* note 39.

291. *See supra* Section II.B.3 (noting that the definition of persecution is intentionally left open to interpretation to meet newly arising persecution methods).

292. *See supra* notes 132–43 and accompanying text (discussing the repercussions resisters suffer for declining recruitment).

293. *See supra* Section V.B (suggesting that gangs impute an anti-gang political opinion to neutral resisters).

294. *See supra* Section IV.A (outlining the history of jurisprudence that consistently denies gang-resistance political asylum claims).

295. *See supra* Part IV.

protect them.<sup>296</sup> Those who resist become not only bystanders to the violence, but also its target;<sup>297</sup> they are in desperate need of protection, and the narrow interpretation of U.S. asylum law affords them none.<sup>298</sup>

“El Salvador is bleeding,” journalists report.<sup>299</sup> Guatemala is “immersed in a full-blown crisis of the democratic state.”<sup>300</sup> As those caught in the literal crossfire flee to America’s border, they bring a historic opportunity to shift our policy.<sup>301</sup> Courts must decide whether to continue the restrictive, uninformed interpretation of political asylum or adopt a holistic analysis of these cases and return to the protective ethic that inspired asylum in the first place.<sup>302</sup> Courts must decide which legacy our asylum system should leave: one of strict adherence to precedent or one of protecting the persecuted.<sup>303</sup>

Seventy years ago, after it turned away the S.S. St. Louis, America made a promise to protect the refugee.<sup>304</sup> Today, when victims of the gang war that America itself exported arrive at our border seeking a safe haven, we shy away from that promise.<sup>305</sup> We have changed our laws once before to reflect the value of human life; the question is whether we changed our minds.

Ericka Welsh\*

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296. See *supra* Part III.

297. See *supra* Part III.

298. See *supra* Section IV.A.

299. Danny Gold, *The Neverending War in El Salvador*, VICE (Nov. 23, 2015), <https://news.vice.com/article/the-neverending-war-in-el-salvador>; Andrew Buncombe, *El Salvador Suffers Most Violent Month Since Civil War as 650 People Killed*, INDEPENDENT (June 3, 2015), <http://www.independent.co.uk/news/world/americas/el-salvador-suffers-most-violent-month-since-civil-war-as-650-people-killed-10295449.html>.

300. Brands, *supra* note 101, at 3.

301. See *supra* Part VI (advocating for the adoption of a holistic approach that considers the Central American context to replace the current inflexible precedent).

302. See *supra* Part VI.

303. See *supra* Part VI.

304. See Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102.

305. Dara Lind, *The Paradox at the Heart of Obama’s Central American Refugee Policy*, VOX (Jan. 25, 2016), <http://www.vox.com/2016/1/25/10826010/refugee-deport-central-america>.

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