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“Third Generation” Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground

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The rise of powerful gangs in Central America since the late 1990s—particularly in El Salvador, Guatemala, and Honduras—and the efforts to suppress them have resulted in the increasing flight of Central Americans to the United States. There was a major surge in Central American migration in 2013,¹ including mothers with children and other individuals and groups. Particularly notable was an influx of unaccompanied children in 2014,² resulting in what President Barack Obama first called an obvious humanitarian crisis.³

The number of asylum claims based on fear of gang persecution has also increased. Although several immigration courts have granted asylum to those resisting recruitment or opposing Central American gangs,⁴ many others have denied them along with several federal courts on review.⁵ This *Briefing* addresses some of the challenges in these cases, primarily focusing on (and urging the increased use of) the political opinion ground. This ground has been virtually ignored in the jurisprudence, but we argue that it should play a more prominent role in the presentation and adjudication of asylum cases involving Central American gangs.⁶

Part I of this *Briefing* outlines the development and power of gangs (now referred to as third generation gangs) in Central America. Part II provides a basic overview of the requirements for asylum eligibility. Part III discusses the political opinion ground, including various categories of claims that are especially relevant to Central American gang cases. Part IV discusses obstacles to the use of the political opinion ground in these cases largely due to the misunderstood legacy of *I.N.S. v. Elias-Zacarias*.⁷ The argument that we present is not that political opinion is the only ground upon which Central American gang cases can be based but that it is viable and neglected. The caselaw involving Central American gang claims is in the early stages of development, and we hope that this *Briefing* will contribute to this nascent and evolving jurisprudence.

PART I: CENTRAL AMERICAN CONTEXT

The growth and sophistication of gangs in Central America has been fueled largely by the deportation of large numbers of Central American youth who joined gangs in the United States in the mid-1990s.⁸ In 1996, changes in U.S. immigration law resulted in mass deportation of these gang youths and others on the basis of expanding categories of criminal conduct.⁹ Between 1998 and 2005, more than 200,000 individuals were deported from the United States to Central America, and fledging criminal justice systems in receiving countries were unable to cope with these en masse arrivals.¹⁰ The gangs grew exponentially.

One military expert reports that these Central American gangs have developed a degree of politicization, sophistication, and international reach to qualify them as “third generation” gangs.¹¹ Third generation gangs function as de facto governments, controlling significant territory (competing with the state for power); the gangs often use brutal tactics to fight for territorial and political power.¹² One of the most powerful gangs in Central America, Mara Salvatrucha (MS-13), rules entire municipalities in countries such as El Salvador.¹³ The U.S. Agency for International Development (USAID) reports that these groups “exercise[, [their] own justice, demanding certain behavior from ... citizens and sanctioning those who do not obey.”¹⁴ Like a government, the MS-13, for example, collects “taxes” by extorting payments from bus drivers, cab drivers, and local business owners, among others.¹⁵ Those who resist paying are targeted for violent retribution.¹⁶ David Cantor also underscores the growing organization and brutality of the gangs driving migration to the United States.¹⁷ The sheer size of the gangs (also known as “maras”) alone makes them a formidable threat. One study estimates that MS-13 has 27,500 members

in El Salvador alone.¹⁸

According to a U.S. military expert, “The so-called Northern Triangle of Guatemala, El Salvador and Honduras is the deadliest zone in the world outside of active war zones.”¹⁹ Drug cartels operate similarly in Mexico, causing increased migration from that country as well.²⁰ U.S. military officials report that, in terms of the level of violence, the Mexican and Central American conflicts now rival the conflicts of recent years in Iraq and Afghanistan.²¹

As Max Manwaring, Military Strategy Professor at the Strategic Studies Institute of the United States Army War College, wrote in his examination of gang violence in Central America:

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.²²

Although several Central American governments have attempted to control gang violence with a “firm hand” (or “mano dura”) policy, these attempts have so far been ineffective at best—if not actively contributing to the violence through corruption and collaboration with the gangs.²³ The gangs have reacted to “mano dura” policy with violent retaliation.²⁴

PART II: BASIC OVERVIEW OF ASYLUM

To establish eligibility for asylum²⁵ under U.S. law, an applicant bears the burden of proving himself or herself a refugee within the meaning of § 101(a)(42)(A) of the Immigration and Nationality Act (INA).²⁶ U.S. refugee and asylum law is based on and implements obligations under the Convention on the Status of Refugees.²⁷ An individual qualifies as a refugee if he or she is “unable or unwilling to return to [his last country of residence] ... 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.”²⁸ An asylum seeker’s fear of persecution must be “both subjectively genuine and objectively reasonable.”²⁹ Credible testimony alone can establish his or her claim. An asylum seeker must show that “a reasonable person in [his or her] circumstances would fear persecution”;³⁰ under some circumstances, corroborating evidence may be required.³¹

Certainly physical assaults or assaults to bodily integrity can constitute persecution;³² verbal or other “mere” harassment does not, but “the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs.”³³ Under some circumstances, threats can constitute persecution,³⁴ and they may be significant evidence of a well-founded fear of future persecution.³⁵

Under U.S. and international law, the agent of harm need not be a state actor; a state fails in its duty to protect if it is unwilling or unable to respond to a risk to core human rights created by nonstate actors.³⁶ The U.S. Citizenship and Immigration Services (USCIS) Asylum Office’s training materials make clear: “Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the *government* of the country where the applicant fears persecution, or by a *person or group that the government is unable or unwilling to control*.”³⁷

Under U.S. law and the U.N. Refugee Convention on which it is based,³⁸ persecution must be “for reasons of” or “on account of” one of the iterated grounds: race, religion, nationality, membership in a particular social group, or political opinion.³⁹ There must be a causal, noncoincidental link between the past experience or future risk of persecution and the person’s protected status or belief.⁴⁰ The REAL ID Act of 2005 states that an applicant must “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.”⁴¹ Thus, “nexus” can be established where the reasons for persecution or fear of persecution were mixed (i.e., involving both protected and nonprotected grounds).⁴²

PART III: THE POLITICAL OPINION GROUND

This section focuses on the interpretation of the political opinion ground in the refugee definition and how this ground can be applied to Central American gang cases.⁴³ It then focuses on and argues for a new emphasis on the use and applicability of the political opinion ground in such cases.

The refugee definition protects those who have been persecuted or fear persecution for reasons of “political opinion.”⁴⁴ Political opinion certainly encompasses beliefs associated with formal political parties or organizations that oppose a party or regime, but the political opinion ground does not require the applicant’s adherence to a formal political ideology or to the platform of an official political party.⁴⁵

Refugee protection is not the exclusive domain of the elite. As Atle Grahl-Madsen, the original commentator on the Refugee Convention, explained, refugee protection is “designed to suit the situation of common [people], not only that of philosophers... . The instinctive or spontaneous reaction to usurpation or oppression is [as] equally valid” as the “educated, cultivated, reflected opinion.”⁴⁶ Applicants need not be sophisticated in the expression of their beliefs “and applicants may sometimes be reluctant to characterize their conduct as political.”⁴⁷ Persons are protected from persecution for simply having a political opinion; expression of the opinion or taking action based upon it is not required.⁴⁸

The Refugee Convention’s concept of political opinion incorporates “any opinion on any matter in which the machinery of the State, government, and policy may be engaged”⁴⁹ or that of other persecutory agents where the state is unwilling or unable to provide protection.⁵⁰

Generally, beliefs protected as political opinions are those recognized as expressions of basic human rights. Persecution of persons who assert such rights—for example, the right to express a dissident viewpoint, the right to organize in any association, or the right to be free from torture or serious physical abuse—is persecution on account of political opinion.⁵¹ “Any real, alleged, or implied opinion which leads to persecution in violation of the Universal Declaration of Human Rights, may qualify as a ‘political opinion.’”⁵²

In addition, persecutors may impute a political opinion to an applicant based on past associations, family ties, race, nationality, or social class, among other characteristics.⁵³ The acceptance and elaboration of this doctrine of imputed political opinion is one of the most significant developments in the last 25 years. The doctrine of imputed political opinion focuses on the persecutor’s *perception* of the applicant’s beliefs; the applicant’s own opinions are irrelevant.⁵⁴ “If the persecutor thinks the person guilty of a political opinion, then the person is at risk.”⁵⁵ The doctrine is now well-established in federal court caselaw⁵⁶ and has been accepted by the Board of Immigration Appeals⁵⁷ (BIA or Board) and by USCIS.⁵⁸ An imputed political opinion may result from an applicant’s individual actions or associations with others that lead the persecutor to believe that the applicant is against him or her or aligned with another side in a political conflict.⁵⁹ Imputed political opinions may be based on specific family, organizational, governmental, or personal affiliations.⁶⁰

The sections that follow briefly describe some categories of political opinion, both express and imputed, with an emphasis on those relating to the Central American gang context.⁶¹ However, this list is not exhaustive. There are many other types of claims emerging out of the Central American gang context that may meet the requirements of the political opinion ground. An example is the case of one Guatemalan woman currently being represented by the Harvard Immigration and Refugee Clinical Program (HIRC) who was targeted by a gang member of an affiliate of M-18 based in part on her gender-based political opinion that she had a right to pursue an education.⁶²

Organizational Membership and Association⁶³

A person’s political opinion may manifest itself in various ways. The federal courts generally recognize that political opinion can be expressed through organizational membership, including affiliation with dissident parties and related organizations.⁶⁴ These courts have found membership in organizations promoting social, cultural, political, or economic rights to be evidence of protected political opinion. Some classic examples include membership in labor unions,⁶⁵ farmers’ cooperatives,⁶⁶ community-based religious organizations,⁶⁷ student organizations,⁶⁸ and organizations promoting the rights of national or ethnic minorities.⁶⁹

Under certain circumstances, mere membership in or association with a group may constitute a political opinion.⁷⁰ Several courts have ruled in favor of applicants based on their membership in groups viewed as oppositional⁷¹ and have reversed the Board when it imposed a prominence or leadership requirement.⁷² Courts have applied the same analysis to membership in groups opposing nongovernmental entities.⁷³ Persecution on account of political opinion should therefore be found where a Central American gang persecuted or targeted a person because of his or her membership in a group viewed as oppositional (even if the group is not a “political” party or group per se).

In one recent case involving opposition to a Central American gang, *Fuentes-Colocho v. Holder*,⁷⁴ the applicant, a native and citizen of El Salvador, was the leader of a soccer team that explicitly dedicated itself to gang opposition and antigang values. Colocho spoke out against the gang (MS-13) publically, and his opposition to it was otherwise known. Because of his positions and statements, he was viciously attacked. Colocho argued that he faced similar or increased violence upon return because of his political opinion (among other grounds). Colocho maintained that, rather than being a mere random and passive victim of criminal elements, he had clear beliefs and acted on them and that his actions were directed against an entity that targeted him because of his beliefs. HIRC and others submitted an amicus brief arguing the political opinion ground; many of the recorded facts described above are contained in it.⁷⁵

Individual Acts or Activism, Including Exposing Abuse and Testifying⁷⁶

Political opinions can be expressed through individual acts of resistance to oppression or even by flight itself.⁷⁷ Political opinion in this context may include refusal to be an informer⁷⁸ or exposure of corruption⁷⁹ or of human rights abuses. Although persons who express opinions in public—through speech, publication, leafleting, organizing, etc.—are often connected to organizations or political parties, or are joined in some association or cause with others, such organizational affiliation or membership is not required.⁸⁰

An example from the Central American context is *Henriquez-Rivas v. Holder*,⁸¹ where the Salvadoran applicant witnessed the killing of her father by members of the Mara Salvatrucha gang when she was 12 years old.⁸² She later testified in open court about the killing, was threatened as a result, and fled the country.⁸³ The court found that she was a member of a particular social group of witnesses who testify against gang members.⁸⁴ HIRC filed an amicus brief supporting the argument that the act of testifying in these circumstances constituted a political opinion.⁸⁵

Refusal to Join or Support Organization⁸⁶

Under some circumstances, refusing to join an organization or resisting recruitment can be an expression of political opinion or the basis of an imputed political opinion,⁸⁷ including in the Central American context.⁸⁸ In one recent case, *Pirir-Boc v. Holder*,⁸⁹ the Guatemalan applicant, Oliverto Pirir-Boc, refused to join the Mara Salvatrucha gang because of his belief that they were “criminals who rape women and rob people.”⁹⁰ His younger brother, however, joined the gang.⁹¹ In front of gang members, Pirir-Boc openly told his brother to leave the gang and eventually succeeded in convincing him. Gang members came looking for Oliverto and, after trying unsuccessfully to hide from the gang members threatening him and his family, he fled the country.⁹² The case was presented under the particular social group ground but could have been formulated as a political opinion claim. The political opinion formulation would have avoided the concerns with Board jurisprudence questioning the perspective of the persecutor as a way of defining a protected ground since in, for example, imputed political opinion cases, the perspective of the persecutor is the defining element of the claim.

Persons may resist giving monetary or other material support demanded by nonstate actors, including guerrilla organizations, based at least in part on express and implied differences with the organizations.⁹³ Courts have also found resistance to extortion by persons affiliated with opposition groups⁹⁴ or the government⁹⁵ as constituting a political opinion. In another recent Central American gang case, *Perez v. Holder*,⁹⁶ the court held that “both the [Board] and the [immigration judge] mistakenly concluded that Perez could have continued his social activism[, including his association with the FMLN],⁹⁷ provided he paid extortion money to the gang members.” Among other errors, that finding conflated Perez’s testimony that the gang demanded payment for the continued operation of his business with his testimony that the gang threatened to kill him for his continued social activism.

Neutrality or “Hazardous Neutrality”⁹⁸

Before the Supreme Court’s 1992 ruling in *Elias-Zacarias*⁹⁹ (discussed in more detail below), a number of decisions had recognized “neutrality”—the choice not to ally with any political faction—as an express political opinion.¹⁰⁰ The Supreme Court in *Elias-Zacarias*, however, seemed to question the neutrality theory,¹⁰¹ and, subsequently, fewer claims have been brought on this basis. Since the Supreme Court’s decision, neutrality generally has been subsumed within an imputed political opinion framework. Still, there remains a fairly well-developed body of jurisprudence finding that neutrality can constitute a political opinion; as the USCIS Asylum Office notes, “the persecutor may impute an opposition political opinion to anybody who is neutral.”¹⁰²

In cases recognizing neutrality as a political opinion, various circumstances point to the applicant’s awareness of the political conflict and conscious choice to remain neutral.¹⁰³ USCIS and the Ninth Circuit describe a doctrine of “hazardous neutrality” or “[r]emaining neutral in an environment where neutrality brings hazards from the government, or from uncontrolled anti-government forces.”¹⁰⁴ The Ninth Circuit has not required a verbal statement of refusal to join or expressed neutrality; actions such as flight may suffice in some cases.¹⁰⁵ In addition to the Ninth Circuit, the Board, the First Circuit, and the Eighth Circuit have recognized, at least in principle, that neutrality can constitute a political opinion.¹⁰⁶

PART IV: THE LINGERING AND MISCHARACTERIZED LEGACY OF *ELIAS-ZACARIAS*

The jurisprudence generally has shied away from use of the political opinion ground since *Elias-Zacarias*,¹⁰⁷ where the Supreme Court denied asylum to a young man who was targeted because of his refusal to join a Guatemalan guerilla group. The Court did not seem to reject the notion that opposition or refusal of recruitment could constitute a political opinion, but the Court found that there was no evidence that *Elias-Zacarias* had a political opinion or was targeted because of it.¹⁰⁸ Many courts, in upholding denials of asylum claims based on Central American persecution, misconstrue *Elias-Zacarias* as holding that mere refusal of recruitment does not constitute a political opinion. This is not what *Elias-Zacarias* held. The Court only stated that refusal to join does not necessarily constitute a political opinion, but the Court did not hold that in all cases such refusal to take a stance was apolitical.¹⁰⁹ Lower courts’ use of *Elias-Zacarias* to deny Central American gang cases is a misreading of the case and ignores the decision’s limited holding and the limited nature of the evidence presented.

Importantly, the *Elias-Zacarias* court endorsed the doctrine of imputed political opinion¹¹⁰ but found that the record and *Elias-Zacarias*’ limited testimony did not provide sufficient evidence that the guerillas imputed such an opinion to him. The Court denied the claim principally on evidentiary grounds but was clear that either direct or circumstantial evidence could suffice to prove the nexus to the political opinion ground.¹¹¹ Evidence that a group regards those who refuse to join it as their enemies should constitute such circumstantial evidence.¹¹² In Central American gang cases, a practitioner might present evidence in the form of statements by gang members or leaders that they view an applicant who opposes them as their enemy or articles or expert affidavits explaining the nature of third generation gangs.

The *Elias-Zacarias* court’s opinion suggests that whether refusal of forced recruitment is a political opinion deserves a case-by-case determination on whether the resistance flows from one’s political conviction or a political opinion that the applicant is assumed to have.¹¹³ Indeed, in *Martinez-Buendia v. Holder*,¹¹⁴ the Seventh Circuit observed that *Elias-Zacarias* “does not draw a bright line rule one way or the other.”¹¹⁵ It does not stand for the proposition that opposition to forced recruitment cannot constitute a political opinion. Instead, it “instructs courts to carefully consider the factual record of each case” before making a determination.¹¹⁶ Stereotypes of what constitutes a political opinion are inappropriate; context is critical.¹¹⁷

An additional reason for denials in Central American political opinion-based claims is lack of understanding of the “mixed reasons” nature of the nexus requirement as codified in the REAL ID Act of 2005.¹¹⁸ The Central American gangs do not have to have a single reason for targeting a person; rather, they can target a person based on that person’s political opinion and also for any other reason. Gangs can, for example, view a person who refuses extortion as an enemy opposing them and, at the same time, also want the funds.

PART V: CONCLUSION AND RECOMMENDATIONS

As described in the examples presented above, many Central American gang claims fit within the robust formulations under the political opinion ground, including opposition, express and implied, resistance to extortion, “hazardous” neutrality, speaking out against the gangs, including through testimony in court, publically denouncing them, belonging to anti-gang organizations, association with actual and perceived “antigang” persons, and gender-based opinions that women have a right to pursue their lives independently, economically, and otherwise.

In addition, practitioners, adjudicators, and courts should not be confused by the historic misunderstanding of the *Elias-Zacarias* decision, which clearly was decided on evidentiary grounds, accepted that evidence could be direct or circumstantial, did not reject out of hand resistance to recruitment claims, recognized neutrality as a political opinion, however grudgingly, and validated the imputed political opinion doctrine.

Many of these denials also reflect adjudicators’ and courts’ lack of knowledge (often because they are not presented with evidence) regarding the political nature and context of the present conflict in that region. A failure to understand the increasingly political nature of the gangs contributes to denigration (e.g., characterization of opposition as “mere moral aversion”¹¹⁹ or criminal activity) of these claims. Several courts characterizing gang violence as “economic terrorism”¹²⁰ or “pervasive non-political criminality”¹²¹ have simplistically labeled its victims as casualties of a general condition of “civil strife.”¹²² Adjudicators and courts need to be educated, and hopefully the discussion of context at the beginning of this *Briefing* will be useful in this regard.

It is time for a fresh look at Central American gang cases. This *Briefing* aims to move the caselaw forward by helping to ensure proper litigation, adjudication, and review of these cases.

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Footnotes

¹ Report: More Central American Migrants Coming to USA, available at <http://www.usatoday.com/story/news/nation/2013/09/24/central-american-migrants-on-rise/2860913/>.

² U.S. Customs and Border Patrol, Southwest Border Unaccompanied Children, available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

³ Border Crisis Scrambling the Politics of Immigration Policy, available at http://www.washingtonpost.com/politics/border-crisis-scrambling-the-politics-of-immigration-policy/2014/07/12/78b6ab16-0920-11e4-8a6a-19355c7e870a_story.html.

⁴ “Immigration and Refugee Clinic Lands Major Victory in Political Asylum Case,” available at <http://www.law.harvard.edu/academics/clinical/news/2009-news/hircasylumcase.html> (framing case successfully in terms of political opinion and family membership); *Matter of Hessmir Sharon Orozco-Polanco*, File No. A75-244-012, IJ decision, El Paso, TX (Dec. 18, 1997), available at <http://www.unhcr.org/refworld/docid/4b6beec42.html> (finding that the applicant had the political opinion of “believing in following the rule of law and earning an honest living and of opposing gang lifestyle and its accompanying illegal activities”); *Matter of Hector Gonzalo Calderon-Medina*, File No. A78-751-198, IJ decision, Los Angeles,

CA (May 1, 2002) (citing *Sangha v. I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997)), available at <http://www.refworld.org/docid4b6bfb332.html> (finding the applicant's refusal to join a gang was a political opinion of "neutrality in an environment in which political neutrality is fraught with hazard"). For other examples, see Anker, Law of Asylum in the United States § 5:25.

⁵ See, e.g., *Mayorga-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012); *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008).

⁶ See Part II infra for discussion of the definition of refugee under U.S. and international law.

⁷ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).

⁸ Many of these youths originally migrated to the United States when their families fled the Central American wars of the 1980s. Washington Office on Latin America, Central American Gang-Related Asylum: A Resource Guide 2 (2008), available at <http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf>. A study on El Salvador found that, while smaller neighborhood gangs existed prior to the 1990s, gangs have now developed a sophisticated international organization and use increasingly violent strategies to increase their wealth and power. Int'l Human Rights Clinic, Harvard Law Sch., No Place to Hide: Gang, State, and Clandestine Violence in El Salvador 20-29 (2007) (hereinafter No Place to Hide), available at [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf); United States Agency for International Development, Central America and Mexico Gang Assessment 45, 92 (April 2006), available at http://pdf.usaid.gov/pdf_docs/PNADG834.pdf. See generally United Nations High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, Division of International Protection (March 2010), available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html>. "Immigrants fleeing a bloody civil war in El Salvador formed these gangs in the 1980s in Los Angeles, initially, as a defense against already-established Chicano street gangs." Blue, Gangs Without Borders, SFGATE (Apr. 2, 2006), available at <http://www.sfgate.com/crime/article/Gangs-without-Borders-Violent-Central-American-2520854.php>. See generally, Blake, Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America, 38 Yale J. Intl. L. Online 31, 32 (2012).

⁹ No Place to Hide, supra note 8 at 30-37. The Illegal Immigration and Reform and Immigration Responsibility Act of 1996 and the Anti-Terrorism and Effective Death Penalty Act of 1996 expanded the removability of legal and undocumented immigrants convicted of various crimes. See generally Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 413(f), 110 Stat. 1214 (Apr. 24, 1996). Over the years, the definition of a removable crime expanded greatly. See generally Anker, Law of Asylum in the United States §§ 6:1 et seq.

¹⁰ 2011 World Development Report: Conflict, Security and Development, WORLD BANK 78 (2011), available at http://siteresources.worldbank.org/INTWDRS/Resources/WDR_Full_Text.pdf. See also Blake, Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America, 38 Yale J. Intl. L. Online 31, 32 (2012).

¹¹ Lieutenant Colonel Howard L. Gray, Gangs and Transnational Criminals Threaten Central American Stability, 7 U.S. Army War College, Strategy Research Project (2009), available at <https://www.hsdl.org/?view&did=740050>.

¹² "The third generation gang poses a challenge to the legitimate state monopoly on the exercise of control and use of violence within a given political territory. This challenge elevates the leader of the gang to warlord or drug baron status. That status clearly takes the gang into intrastate war or nonstate war. Third generation gangs have broad objectives that surpass petty criminal activities and work to erode the very core of national sovereignty. ... [T]hird generation gangs look to depose or replace the incumbent government, control parts or regions within a nation-state and work to change the values in a society to those of the gang."

Lieutenant Colonel Howard L. Gray, *Gangs and Transnational Criminals Threaten Central American Stability*, 7 U.S. Army War College, Strategy Research Project (2009), available at <https://www.hsdl.org/?view&did=740050>.

- ¹³ No Place to Hide, *supra* note 8, at 28-29; U.S. Agency for International Development Bureau for Latin America and the Caribbean, *Central America and Mexico Gang Assessment 51* (2006), available at http://pdf.usaid.gov/pdf_docs/PNADG834.pdf; Immigration and Refugee Board of Canada, *Response to Information Request, SLV101080.FE, The Mara Salvatrucha (MS-13)* (April 7, 2006), available at <http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=450161>; interview with Jose Miguel Cruz, specialist on violence in Central America, in San Salvador, El Salvador (Feb. 2, 2006) (on file with the author).
- ¹⁴ U.S. Agency for International Development Bureau for Latin America and the Caribbean, *Central America and Mexico Gang Assessment 51* (2006), available at http://pdf.usaid.gov/pdf_docs/PNADG834.pdf (citation omitted).
- ¹⁵ No Place to Hide, *supra* note 8, at 28-29. Beaubien, *Extortion, Gang Violence, Terrorize El Salvador*, National Public Radio (March 12, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=101426190>; Seelke, Cong. Research Serv., *RL34112, Gangs in Central America*, 4 (2008), available at <https://opencrs.com/document/RL34112/2008-10-17/>; interview with Jose Miguel Cruz, *supra* note 13.
- ¹⁶ “In 2010, for example, after bus drivers banded together to resist paying ‘taxes’ to MS-13, the gang attacked two crowded buses in the capital, San Salvador, spraying one bus with automatic weapons power and setting another on fire with the passengers inside.” Lerman and Humphreys, *Brief of Amici Curiae Harvard Immigration and Refugee Clinical Program and Other Immigration Rights Advocates in Support of Petitioner at 10*, in *Fuentes-Colocho v. Holder*, 13-70470 (9th Cir. Aug. 13, 2014) (citing Farah, *Central American: Changing Nature and New Partners*, 66 J. Int’l Aff. 53, 60 (Fall/Winter 2012)). See also No Place to Hide, *supra* note 8, at 76-79.
- ¹⁷ Cantor, *Gangs: the real “humanitarian crisis” driving Central American children to the U.S.* (August 22, 2014), available at <http://theconversation.com/gangs-the-real-humanitarian-crisis-driving-central-american-children-to-the-us-30672>.
- ¹⁸ Farah, *Central American Gangs: Changing Nature and New Partners*, 66 J. Int’l Aff. 53, 58 (Fall/Winter 2012). By comparison, during the civil war in El Salvador, the guerilla group Farabundo Marti National Liberation Front (FMLN) had no more than 9,000–12,000 members at its peak yet was strong enough to negotiate an end to civil war without surrendering. Lerman and Humphreys, *Brief of Amici Curiae Harvard Immigration and Refugee Clinical Program and Other Immigration Rights Advocates in Support of Petitioner at 10*, in *Fuentes-Colocho v. Holder*, 13-70470 (9th Cir. Aug. 13, 2014) (citing Farah, *Central American: Changing Nature and New Partners*, 66 J. Int’l Aff. 53, 59 (Fall/Winter 2012)).
- ¹⁹ Mulrine, *Pentagon: Central America “deadliest” non-war zone in the world*, *The Christian Science Monitor* (April 11, 2011), available at <http://www.csmonitor.com/USA/Military/2011/0411/Pentagon-Central-America-deadliest-non-war-zone-in-the-world> (describing conflict in Central America as tantamount to the wars in Afghanistan and Iraq in terms of scale, spending, and weapons used).
- ²⁰ For a brief history of drug trafficking organizations in Mexico and their relations with the government, see Blake, [Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America](#), 38 *Yale J. Intl. L. Online* 31, 33-34 (2012) (citing Beittel, Cong. Research. Serv., *R40582, Mexico’s Drug-Related Violence 4* (2009), available at <http://www.fas.org/sgp/crs/row/R40582.pdf>; Beittel, Cong. Research. Serv., *R41576, Mexico’s Drug-Trafficking Organizations: Source and Scope of the Rising Violence 4* (2011), available at http://assets.opencrs.com/rpts/R41576_20110107.pdf; Fainaru and Booth, *As Mexico Battles Cartels, the Army Becomes the Law*, *Wash. Post* (Apr. 2, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040104335.html>; Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico’s “War on Drugs,” *Human Rights Watch* (Nov. 9, 2011), available at http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf (citation omitted)). For a federal court’s discussion of cartel violence in Mexico, see generally [Madrigal v. Holder](#), 716 F.3d 499 (9th Cir. 2013).

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- ²¹ Blake, [Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America](#), 38 *Yale J. Intl. L. Online* 31, 33-34 (2012) (citing Mulrine, Pentagon: Central America “Deadliest” Non-War Zone in the World, *Christian Sci. Monitor*, Apr. 11, 2011, available at <http://csmonitor.com/usa/military/2011/0411/pentagon-central-america-deadliest-non-war-zone-in-the-world>).
- ²² Manwaring, *Street Gangs: The New Urban Insurgency*, Strategic Studies Institute at vi (Mar. 2005), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub597.pdf>.
- ²³ U.S. Agency for International Development Bureau for Latin America and the Caribbean, *Central America and Mexico Gang Assessment* (2006), available at http://pdf.usaid.gov/pdf_docs/PNADG834.pdf (citation omitted).
- ²⁴ *Id.*
- ²⁵ The U.S. withholding of removal provision protects a person against return to a country where his or her “life or freedom would be threatened in that country because of [his or her] race, religion, nationality, membership in a particular social group, or political opinion,” but it does not provide a person with status in the United States. INA § 241(b)(3) [8 U.S.C.A. § 1231(b)(3)].
- ²⁶ 8 U.S.C.A. § 1101(a)(42)(A).
- ²⁷ United Nations Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
- ²⁸ *Id.*
- ²⁹ *La v. Holder*, 701 F.3d 566, 572 (8th Cir. 2012).
- ³⁰ *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (B.I.A. 1987).
- ³¹ See generally, Anker, *Law of Asylum in the United States* §§ 3:4 to 3:5.
- ³² See Anker, *Law of Asylum in the United States* §§ 4:13 to 4:17.
- ³³ *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993).
- ³⁴ See Anker, *Law of Asylum in the United States* § 4:19.
- ³⁵ See generally Anker, *Law of Asylum in the United States* §§ 2:1 et. seq., 4:19.
- ³⁶ *Smolniakova v. Gonzales*, 422 F.3d 1037, 1048 (9th Cir. 2005) (“Asylum is not restricted to petitioners who have suffered persecution at the hands of state actors. Taken as true, as it must be for purposes of this appeal, [respondent’s] testimony compels

the conclusion that the government turned a blind eye to her persecution, refusing to intervene in any meaningful way to stop it.” (citations omitted)). See also [Bracic v. Holder](#), 603 F.3d 1027, 1034 (8th Cir. 2010) (noting that persecution can be inflicted “either by the government of a country or by persons or an organization that the government was unable or unwilling to control”); [Nikijuluw v. Gonzales](#), 427 F.3d 115, 121 (1st Cir. 2005) (observing that persecution can result from “government action, government-supported action, or government’s unwillingness or inability to control private conduct”); [Sarhan v. Holder](#), 658 F.3d 649, 657 (7th Cir. 2011) (“the record permits no conclusion other than that the government is ineffective when it comes to providing protection to women whose behavior places them in [a group which is] threatened with honor killings”).

³⁷ Asylum Officer Basic Training Course, Asylum Eligibility Part I: Definition of Persecution; Eligibility Based on Past Persecution 43–44 (Mar. 6, 2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf> (emphasis in original) (noting that factors to consider in “determining whether the government was unable or unwilling to control the entity that harmed the applicant” include “a) whether there were reasonably sufficient governmental controls and restraints on the action[s] that harmed the applicant; b) whether the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant; c) whether the applicant had access to those controls and constraints . . .”).

³⁸ United Nations Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

³⁹ INA § 101(a)(42) [8 U.S.C.A. § 1101(a)(42)].

⁴⁰ The United Nations High Commissioner for Refugees (UNHCR) describes the nexus element as requiring that the persecution or fear of persecution be “related to the grounds” so that the grounds “result” in the persecution. [United Nations High Commissioner for Refugees \(Geneva\), Inter-Office Memorandum/Field Office Memorandum \(unnumbered\) \(Mar. 1, 1990\)](#), quoted in [Brief for UNHCR as Amicus Curiae Supporting Respondent Elias-Zacarias](#), [Elias-Zacarias v. INS](#), 502 U.S. 478 (1992), 1991 WL 11003948 at *15.

⁴¹ INA § 208(b)(1)(B)(i) [8 U.S.C.A. § 1158(b)(1)(B)(i)] (emphasis added).

⁴² See Anker, *Law of Asylum in the United States* § 5:8.

⁴³ See generally Anker, *Law of Asylum in the United States* for a comprehensive discussion of this and other grounds.

⁴⁴ Goodwin-Gill, *The Refugee in International Law* 39 (1st ed. 1983), quoted in [Canada \(Attorney General\) v. Ward](#), [1993] 2 S.C.R. 689, 734 (Can.).

⁴⁵ See, e.g., [Zhiqiang Hu v. Holder](#), 652 F.3d 1011, 1017 (9th Cir. 2011) (“a political opinion encompasses more than just participation in electoral politics or holding a formal political ideology” (citation omitted)). See also [Hasan v. Ashcroft](#), 380 F.3d 1114, 1120 (9th Cir. 2004) (holding that the reporter’s “article was a political statement despite the fact that she did not espouse a political theory”).

⁴⁶ Grahl-Madsen, *The Status of Refugees in International Law* 228, 251 (1966); [Chang v. I.N.S.](#), 119 F.3d 1055, 1063 (3d Cir. 1997) (“[T]he evidence compels a reasonable fact finder to conclude that Chang has ‘manifested’ opposition to the Chinese government. His actions in defying the orders of the Chinese government because he disagreed with how they would treat those suspected of trying to defect did exactly that. *Simply because he did not call himself a dissident or couch his resistance in terms of a particular ideology renders his opposition no less political.*” (emphasis added)).

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- ⁴⁷ Hughes, Practising Law Institute, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, in *Basic Immigration Law* 312 (2009).
- ⁴⁸ Goodwin-Gill and McAdam, *The Refugee in International Law* 87, 92-93 (3d ed. 2007); Hathaway, *The Law of Refugee Status* 150 (1991) (“Since political expression is a core human right, the claimant must enjoy a reasonable expectation of tolerance of peacefully articulated views.”); Asylum Officer Basic Training Course, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics* 54 (Mar. 12, 2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf> (hereinafter AOBTC, Nexus) (citing Goodwin-Gill’s definition of political expression).
- ⁴⁹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 746 (Can.). See also *Chang v. I.N.S.*, 119 F.3d 1055, 1063 n. 5 (3d Cir. 1997) (defining “political” as “Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy.” (quoting Black’s Law Dictionary (5th ed. 1979))).
- ⁵⁰ *Smolnikova v. Gonzales*, 422 F.3d 1037, 1048 (9th Cir. 2005) (“Asylum is not restricted to petitioners who have suffered persecution at the hands of state actors.” (citations omitted)).
- ⁵¹ See, e.g., *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled on other grounds by, *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996)) (en banc) (finding that resistance to rape and beating through flight constituted assertion of political opinion opposing view that a man “has a right to dominate” and that the applicant was asserting her view that armed forces are responsible for “rape, torture, and murder” and that “no political control exists to restrain” her persecutor).
- ⁵² Grahl-Madsen, *The Status of Refugees in International Law* 228, 250 (1966).
- ⁵³ See Anker, *Law of Asylum in the United States* § 5:31.
- ⁵⁴ See, e.g., *Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1017 (9th Cir. 2011) (“Regardless of whether Hu actually held an anti-government opinion, the record compels the conclusion that the police imputed an anti-government political opinion to Hu.”); *Desir v. Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988) (“We must view Desir as possessing a political opinion because his persecutors ... both attributed subversive views to Desir and treated him as a subversive.”); *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985) (finding the applicant’s actual political view, whether neutral or partisan, irrelevant where government attributed certain political opinions to her).
- ⁵⁵ *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled on other grounds by, *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996)) (en banc).
- ⁵⁶ See, e.g., *De Brenner v. Ashcroft*, 388 F.3d 629, 635-36 (8th Cir. 2004) (“Where there has been persecution on account of political opinion, it does not matter if the applicant actually holds the political opinion. Rather, we consider the political views the persecutor rightly or in error attributes to a victim.” (citations and internal quotation marks omitted)); *Canas-Segovia v. I.N.S.*, 970 F.2d 599, 601-02 (9th Cir. 1992) (“[I]mputed political opinion is still a valid basis for relief after Elias-Zacarias.”).
- ⁵⁷ See *In re S-P-*, 21 I. & N. Dec. 486, 489, 1996 WL 422990 (B.I.A. 1996) (“Persecution for ‘imputed’ grounds (e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the

'refugee' definition.”).

⁵⁸ AOBTC, Nexus, *supra* note 48, at 58 (“Persecution ‘on account of political opinion’ includes persecution because of a political opinion that has been attributed to an applicant, even if the applicant does not actually possess that opinion.”).

⁵⁹ See *Sangha v. I.N.S.*, 103 F.3d 1482, 1489 (9th Cir. 1997) (citing *Nasseri v. Moschorak*, 34 F.3d 723, 729-30 (9th Cir. 1994) (overruled in part on other grounds by, *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996)) (en banc)) (discussing requirements).

⁶⁰ See Anker, *Law of Asylum in the United States* §§ 5:31 to 5:39.

⁶¹ A fuller description of these and other categories can be found in Anker, *Law of Asylum in the United States* §§ 5:18 to 5:39.

⁶² M. was targeted and attacked on numerous occasions in Guatemala by a gang affiliated with M-18. During each of these attacks, the gang members threatened her and made remarks about her race and gender. They insulted her by calling her an *india* and telling her that she was just an Indian woman who would never amount to anything. Her persecutors were particularly threatened by M.’s strong belief that she had a right to pursue an education. They frequently taunted her for attending school in Guatemala City where she was training to become a professional chef. Many indigenous women in the area where M. grew up have been attacked by the same handful of gang members because the gangs know they can act with impunity. Local authorities do not protect indigenous women from such violence. During a particularly brutal attack on M., during which she was raped, her persecutors even dared her to go to the authorities so she could see for herself how little they cared about her and other women like her.

⁶³ See Anker, *Law of Asylum in the United States* §§ 5:18; 5:20.

⁶⁴ See, e.g., *Vincent v. Holder*, 632 F.3d 351, 355 (6th Cir. 2011) (finding that the petitioner established past persecution based on political opinion where the petitioner was a vocal member of a group that actively opposed the rebels’ use of child soldiers).

⁶⁵ See, e.g., *Ruqiang Yu v. Holder*, 693 F.3d 294, 298-300 (2d Cir. 2012) (remanding to the Board for failing to consider the applicant’s efforts to organize workers opposed to wage theft and corruption); *Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1018 (9th Cir. 2011) (noting that petitioner’s pro-labor opinion constituted a protected political opinion where he had protested in favor of legal rights for laid-off workers).

⁶⁶ See, e.g., *Mendoza Perez v. U.S. I.N.S.*, 902 F.2d 760, 761-62 (9th Cir. 1990) (finding that petitioner had well-founded fear of persecution on account of political opinion from the Salvadoran government because of his work with the Communal Union, a group that assisted the formation of agricultural cooperatives among peasants).

⁶⁷ See, e.g., *Ladha v. I.N.S.*, 215 F.3d 889, 902-03 (9th Cir. 2000), as amended, (June 30, 2000) and (overruled on other grounds by, *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009)) (finding past persecution on account of both religion and political opinion of Khoja Shia community leader who was warned by members of a political group to stop supporting a rival political group); *In re D-V-*, 21 I. & N. Dec. 77, 79-80, 1993 WL 774484 (B.I.A. 1993) (finding persecution on account of political opinion for a female activist member of a pro-Aristide church group).

⁶⁸ See, e.g., *Sharma v. Holder*, 729 F.3d 407, 412-13 (5th Cir. 2013) (finding that the applicant experienced persecution on account of his political opinion, which he expressed by membership in the Nepal Student Union).

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- ⁶⁹ See, e.g., [Singh v. Ashcroft](#), 362 F.3d 1164, 1167-68 (9th Cir. 2004); [Woldemeskel v. I.N.S.](#), 257 F.3d 1185, 1190 (10th Cir. 2001), as amended on denial of reh'g and reh'g en banc, (Oct. 1, 2001) (finding past persecution on account of political opinion of Ethiopian applicant who had advocated for Amhara rights).
- ⁷⁰ See, e.g., [Niam v. Ashcroft](#), 354 F.3d 652, 655, 63 Fed. R. Evid. Serv. 417 (7th Cir. 2004) (“If the regime is after all opposition party members, it is irrelevant whether a member of an opposition party is active.”). The regulations recognize that a pattern or practice of persecution of a group or organization may be sufficient to establish an individual member’s well-founded fear of persecution. 8 C.F.R. §§ 208.13(b)(2)(iii), 1208.13(b)(2)(iii). See Anker, *Law of Asylum in the United States* §§ 2:1 et seq.
- ⁷¹ See, e.g., [Osaghae v. U.S.I.N.S.](#), 942 F.2d 1160, 1163 (7th Cir. 1991) (remanding where Board denied asylum to Christian activist in Biafran independence movement in Nigeria who was imprisoned for several months by hostile Muslim military regime and who feared persecution on account of past political activity); [Mendoza Perez v. U.S. I.N.S.](#), 902 F.2d 760 (9th Cir. 1990) (holding that petitioner’s well-founded fear was “politically motivated” where petitioner was involved in land reform organization opposed by Salvadoran government).
- ⁷² For example, in [Cordero-Trejo v. I.N.S.](#), the court rejected the Board’s reasoning that the applicant, who performed charitable work with a religious organization and was believed by the government to be inciting the poor, lacked a well-founded fear of persecution because he had held no office in the organization and participated in only two or three missions a year. [Cordero-Trejo v. I.N.S.](#), 40 F.3d 482, 490 (1st Cir. 1994).
- ⁷³ See, e.g., [Escobar v. Holder](#), 657 F.3d 537, 549 (7th Cir. 2011) (remanding where Board rejected applicant’s contention that FARC targeted him because of his Liberal Party affiliation).
- ⁷⁴ [Fuentes-Colocho v. Holder](#), 13-70470 (9th Cir. Aug. 13, 2014). Under court ordered mediation, the case was finally resolved by remand to the USCIS Asylum Office.
- ⁷⁵ <http://www.harvardimmigrationclinic.org> (brief available).
- ⁷⁶ See Anker, *Law of Asylum in the United States* § 5:21.
- ⁷⁷ See, e.g., [Lazo-Majano v. I.N.S.](#), 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled in part on other grounds by, [Fisher v. I.N.S.](#), 79 F.3d 955 (9th Cir. 1996)) (holding repeated rape of applicant by an army sergeant was an expression of male dominance and that the applicant, through her ultimate refusal to submit, including flight from the country, was expressing an opposing political belief). See also [Matter of Villalta](#), 20 I. & N. Dec. 142, 1990 WL 385749 (B.I.A. 1990) (granting asylum on account of political opinion based on Salvadoran applicant’s membership in an antigovernment student group and where he participated in demonstrations and printing of leaflets).
- ⁷⁸ See, e.g., [Chang v. I.N.S.](#), 119 F.3d 1055, 1064 (3d Cir. 1997) (finding evidence of political persecution where the applicant refused to report on violations of China’s Security Law).
- ⁷⁹ See, e.g., [Jin Hua Bian v. Holder](#), 538 Fed. Appx. 79, 80-81 (2d Cir. 2013) (citing [Castro v. Holder](#), 597 F.3d 93, 100 (2d Cir. 2010) (noting opposition to government corruption may constitute a political opinion)). See also [Matter of N-M-](#), 25 I. & N. Dec. 526, 529, 2011 WL 2297860 (B.I.A. 2011) (finding that refusal to falsify statistics, opposition to “rebuild[ing] a costly filing system,” and opposition to awarding of improperly vetted contracts may prove political opinion, but remanding to immigration judge to determine nexus).

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- 80 See, e.g., [Ngarurih v. Ashcroft](#), 371 F.3d 182, 189 (4th Cir. 2004) (recognizing past persecution of leader of tea farmer boycott on account of political opinion, but denying asylum application due to a finding of fundamentally changed circumstances); [Borca v. I.N.S.](#), 77 F.3d 210, 217 (7th Cir. 1996) (recognizing applicant’s expression of political opinion via attempts to inform fellow Romanians of an alleged government cover-up).
- 81 [Henriquez-Rivas v. Holder](#), 707 F.3d 1081 (9th Cir. 2013) (en banc).
- 82 *Henriquez-Rivas*, 707 F.2d at 1085.
- 83 *Henriquez-Rivas*, 707 F.2d at 1086.
- 84 *Henriquez-Rivas*, 707 F.2d at 1083.
- 85 <http://www.harvardimmigrationclinic.org>.
- 86 See Anker, Law of Asylum in the United States § 5:22.
- 87 See, e.g., [Jabr v. Holder](#), 711 F.3d 835, 839-40 (7th Cir. 2013) (opposition and resistance to recruitment for Islamic Jihad organization because applicant favored cooperation with Israel established his political opinion); [Sherpa v. Holder](#), 533 Fed. Appx. 827 (10th Cir. 2013) (applicant who “discouraged the villagers from joining the Maoists” showed that he had a political opinion).
- 88 See, e.g., [Mayorga-Esguerra v. Holder](#), 409 Fed. Appx. 81, 83 (9th Cir. 2010) (overruling the Board and finding that the petitioner was persecuted on account of imputed political opinion where he rejected membership in guerrilla organization, an act “understood by guerrillas to be motivated by political objection to the rebels’ cause”); [Martinez-Buendia v. Holder](#), 616 F.3d 711, 716-17 (7th Cir. 2010) (finding that Martinez-Buendia’s “political beliefs were the reason for her refusal to cooperate with the FARC” and the FARC “interpreted Martinez-Buendia’s repeated refusal to cooperate as her expressing an anti-FARC political opinion”); [Cordon-Garcia v. I.N.S.](#), 204 F.3d 985, 992 (9th Cir. 2000) (finding that guerrillas imputed an oppositional political opinion to a Guatemalan applicant who had taught literacy for the government and refused to join guerrillas); [Tecun-Florian v. I.N.S.](#), 207 F.3d 1107, 1112 (9th Cir. 2000) (holding applicant’s religiously-motivated refusal to join guerrilla group constituted expression of a political opinion and inferring that opinion was the reason for his torture); [Arteaga v. I.N.S.](#), 836 F.2d 1227, 1231 (9th Cir. 1988) (finding that resistance to forced recruitment is expression of political neutrality hostile to nonstate persecutor’s politically motivated conscription efforts).
- 89 [Pirir-Boc v. Holder](#), 750 F.3d 1077 (9th Cir. 2014).
- 90 *Pirir-Boc*, 750 F.3d at 1080.
- 91 *Pirir-Boc*, 750 F.3d at 1080.
- 92 *Pirir-Boc*, 750 F.3d at 1080.
- 93 See, e.g., [Espinosa-Cortez v. Attorney General of U.S.](#), 607 F.3d 101 (3d Cir. 2010) (overruling Board and holding that FARC’s threats to petitioner were centrally motivated by political opinion where petitioner refused to stop supplying food to the Colombian

government and military and act as an informant to FARC); *Martinez-Buendia v. Holder*, 616 F.3d 711, 713 (7th Cir. 2010) (overruling Board and holding that FARC had imputed anti-FARC political opinion to petitioner when she refused to attribute the work of her volunteer medical organization to the FARC); *Briones v. I.N.S.*, 175 F.3d 727, 729 (9th Cir. 1999) (holding that Filipino applicant who had refused to contribute money to the New People’s Army (NPA) had “sid[ed] with the military in a conflict that was political at its core [which would] certainly be perceived [by the NPA] as a political act”).

⁹⁴ See, e.g., *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1295-96 (9th Cir. 1997), opinion amended, 133 F.3d 726 (9th Cir. 1998) (overruling Board where Peruvian applicant told Shining Path guerrillas that he opposed them and would not pay their extortionate taxes in the future). But see *Khozhaynova v. Holder*, 641 F.3d 187, 195-96 (6th Cir. 2011) (finding that store owner’s “mere refusal to pay extortion demands [to the Russian mafia] does not constitute a political opinion in this instance”); *Rivera v. U.S. Atty. Gen.*, 487 F.3d 815, 822 (11th Cir. 2007) (the court appeared not to view the applicant’s opposition to extortion as an expression of political opinion that should be protected, basing its opinion on an immigration judge’s finding that “even a grudging payment of the war tax ordinarily ends the harassment”); *Desir v. Ilchert*, 840 F.2d 723, 727-28 (9th Cir. 1988) (finding refusal to pay bribes to the Macoutes because “Haitian government under Duvalier operated as a ‘kleptocracy,’ or government by thievery, from the highest to the lowest level,” and “[t]o challenge the extortion by which the Macoutes exist is to challenge the underpinnings of the political system” (internal quotations and citations omitted)).

⁹⁵ See, e.g., *Zhang v. Gonzales*, 426 F.3d 540, 546 (2d Cir. 2005) (holding that, if applicant could show that “what began as an attempt by government officials to extort him became an attempt to repress his challenge to the government’s legitimacy,” he would prove that his persecution was on account of political opinion). See also *Aliyev v. Mukasey*, 549 F.3d 111, 115, 117 (2d Cir. 2008) (remanding to Board where it failed to apply mixed-motives analysis in concluding that demands that applicant give his business to Kazakh nationalists were “extortionist in nature” rather than on account of protected grounds).

⁹⁶ *Perez v. Holder*, 761 F.3d 61 (1st Cir. 2014).

⁹⁷ For some of the facts underlying this case, see brief of petitioner at <http://www.harvardimmigrationclinic.org>.

⁹⁸ See Anker, *Law of Asylum in the United States* § 5:24.

⁹⁹ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).

¹⁰⁰ See, e.g., *Maldonado-Cruz v. U.S. Dept. of Immigration and Naturalization*, 883 F.2d 788, 791 (9th Cir. 1989) (finding that escape of a Salvadoran man from a guerrilla camp where he had been forcibly recruited two days earlier was a manifestation of his political opinion of neutrality); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286 (9th Cir. 1984) (citation omitted) (“A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology.”).

¹⁰¹ The Supreme Court did not reject the neutrality doctrine outright but rather found that mere refusal to join the guerrillas did not “compel[] the conclusion that Elias-Zacarias held a political opinion.” *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992) (“Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. ... But we need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a ‘well-founded fear’ that the guerrillas will persecute him because of that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit reversal of a BIA finding to the contrary; indeed, he has not done so at all.”). See also *Sangha v. I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997) (commenting on cases that held that refusal to join guerrilla forces or illegal government forces can be an expression of neutrality and noting that *Elias-Zacarias* had questioned but not overruled such reasoning).

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- ¹⁰² See AOBTC, Nexus, supra note 48, at 57.
- ¹⁰³ See *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1280, 1287 n. 18 (9th Cir. 1984) (noting that guerrillas “had killed five of his friends and had used similar tactics to recruit his brother-whom he believes they may have subsequently killed” and distinguishing cases of conscious refusal to join from “mere failure to join any side”).
- ¹⁰⁴ AOBTC, Nexus, supra note 48, at 56-57, citing *Rivera-Moreno v. I.N.S.*, 213 F.3d 481 (9th Cir. 2000).
- ¹⁰⁵ In *Bolanos-Hernandez*, the applicant expressed his opinion by announcing his refusal to join a guerrilla group and fleeing the country. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1281 (9th Cir. 1984). Expressions of neutrality can take a range of forms beyond verbal statement. See, e.g., *Argueta v. I.N.S.*, 759 F.2d 1395, 1397 (9th Cir. 1985) (holding that, through refusal to join and subsequent flight, Argueta had expressed a neutral political opinion although he never verbalized his opinion to the death squad members).
- ¹⁰⁶ See, e.g., *Lopez-Zeron v. U.S. Dept. of Justice*, I.N.S., 8 F.3d 636, 638 (8th Cir. 1993) (implying the possibility of recognizing neutrality as a political opinion by denying asylum to petitioners because they did not present evidence that they were “targeted by the government because of their political neutrality”); *Umanzor-Alvarado v. I.N.S.*, 896 F.2d 14, 15 (1st Cir. 1990) (superseded by statute with regards to separate voluntary departure claim) (noting that the Board had “assumed [the] possibility” that neutrality could be a political opinion); *Novoa-Umania v. I.N.S.*, 896 F.2d 1, 3 (1st Cir. 1990) (internal citations omitted) (“[w]e assume ... that in appropriate circumstances ‘neutrality’ may fall within the scope of the statute’s words ‘on account of ... political opinion’”); *Alvarez-Flores v. I.N.S.*, 909 F.2d 1, 2, 5, 6 (1st Cir. 1990) (assuming, without deciding, that neutrality may constitute a political opinion); *Matter of Vigil*, 19 I. & N. Dec. 572, 576-77, 1988 WL 235477 (B.I.A. 1988) (noting that applicant did not meet Ninth Circuit test where he “only expressed his ‘neutrality’ opinion during his deportation hearing in this country”).
- ¹⁰⁷ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).
- ¹⁰⁸ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). Elias-Zacarias testified only that he was unwilling to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did. There was no testimony or evidence presented that he opposed or was imputed with opposition to the guerrillas, their methods, or ideas.
- ¹⁰⁹ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481-83, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). For a discussion of neutrality as political opinion and *Elias-Zacarias*, see Anker, Law of Asylum in the United States § 5:24.
- ¹¹⁰ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992); *Canas-Segovia v. I.N.S.*, 970 F.2d 599, 601-02 (9th Cir. 1992) (“[I]mputed political opinion is still a valid basis for relief after *Elias-Zacarias*.”). See Anker, Law of Asylum in the United States § 5:31.
- ¹¹¹ See Anker, Law of Asylum in the United States §§ 5:5; 5:31. Unlike the majority, the dissenting opinion in *Elias-Zacarias* adopted a liberal reading of political opinion. Justice Stevens found that a desire to remain politically neutral is no less of a political opinion than an affirmative choice to join a political faction even if the underlying motivation was simply the “desire to continue living an ordinary life with one’s family.” *Elias-Zacarias*, 502 U.S. at 486 (Justice Stevens dissenting). The dissent was concerned that summarily denying political opinion to people who did not facially take a strong political stance “in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify” (internal quotations and citations omitted). 502 U.S. at 487 (Justice Stevens dissenting). See Anker, Law of Asylum in the United States § 5:24 for a discussion of neutrality.

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- ¹¹² See Anker, Law of Asylum in the United States § 5:8. [In re S-P-, 21 I. & N. Dec. 486, 495-96, 1996 WL 422990 \(B.I.A. 1996\)](#) (“Taking into account the context of [Sri Lanka], the information in the State Department Country Reports, and the circumstances, duration and extent of the abuse inflicted, we find that the applicant has produced evidence from which it is reasonable to believe that those who harmed him were in part motivated by an assumption that his political views were antithetical to those of [his persecutors].”).
- ¹¹³ [I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481-83, 112 S. Ct. 812, 117 L. Ed. 2d 38 \(1992\)](#). In both [Matter of S-E-G-, 24 I. & N. Dec. 579, 2008 WL 2927590 \(B.I.A. 2008\)](#), and [Matter of E-A-G-, 24 I. & N. Dec. 591, 2007 WL 5367673 \(B.I.A. 2008\)](#), the Board found that no testimony was presented that the applicants were politically opposed to the Mara Salvatrucha. See also [Santos-Lemus v. Mukasey, 542 F.3d 738, 745 \(9th Cir. 2008\)](#) (finding no political motive for applicant’s opposition or refusal to join the gang).
- ¹¹⁴ [Martinez-Buendia v. Holder, 616 F.3d 711 \(7th Cir. 2010\)](#). The petitioner, a Colombian native, was threatened by a FARC member to work for FARC or they would kill the petitioner’s sister. The petitioner refused because FARC was a rebellion group. The court found that the petitioner was persecuted on account of her political belief. The Court distinguished *Elias-Zacarias* because the petitioner testified that “[the FARC] is a rebel group to the democracy of Colombia ... and my beginnings would not allow me to do this” whereas *Elias-Zacarias* lacked any evidence that supports the allegation that the petitioner’s refusal to cooperate was politically motivated. Also, unlike *Elias-Zacarias*, the record in this case indicates that “the FARC imputed an anti-FARC political opinion to Martinez-Buendia which led to ... increasing[] violen[ce]” against her.
- ¹¹⁵ [Martinez-Buendia v. Holder, 616 F.3d 711, 714 \(7th Cir. 2010\)](#).
- ¹¹⁶ [Martinez-Buendia v. Holder, 616 F.3d 711, 714 \(7th Cir. 2010\)](#).
- ¹¹⁷ See Gonçalves-Peña, [Challenging the “Political”: U.S. Asylum Law and Central American Gang Warfare \(Winter 2008\)](#), 65 *Guild Prac.* 242, for analysis of a context-specific approach to political opinion in [Desir v. Ilchert, 840 F.2d 723 \(9th Cir. 1988\)](#). Desir was a Haitian fisherman who refused to pay bribes to the Macoutes (a lawless security forces operating in that country) in exchange for his fishing in certain areas. Because of his refusal, Desir was arrested three times, fired from his position, and severely beaten on multiple occasions. 840 F.2d at 724-25. The court found that Desir’s refusal to engage in illegal activity constituted an expression of political opinion because “Haitian government under Duvalier operated as a ‘kleptocracy,’ or government by thievery, from the highest to the lowest level” and “[t]o challenge the extortion by which the Macoutes exist is to challenge the underpinnings of the political system.” 840 F.2d at 726 (internal quotations and citation omitted).
- ¹¹⁸ A significant basis for denial in Central American “gang” opposition cases is that the applicant has failed to show a nexus to the political opinion ground, i.e., that the “gang” was not motivated to target or harm the applicant because of his or her political opinion. See, e.g., [Mendez-Barrera v. Holder, 602 F.3d 21, 27 \(1st Cir. 2010\)](#) (finding no evidence that the would-be persecutors knew of the political beliefs and targeted the belief holder for that reason). Many of these decisions ignore the long-standing “mixed motives” administrative rule, codified in the REAL ID Act of 2005. Gangs may have multiple reasons for attacking or targeting a person, e.g., a generalized desire to terrorize the population and to target those whom they assume are their enemies or of obvious opponents. It is established doctrine that, as long as a protected ground, in these cases often the political opinion (or perceived political opinion) of the applicant, is “at least one central reason” for the *targeting*, not the only or predominant reason for the persecution, the applicant has met the nexus requirement. For a detailed discussion of mixed motives and proving nexus post-REAL ID, Anker, Law of Asylum in the United States §§ 5:6 to 5:14.
- ¹¹⁹ [Matter of José Fuentes-Colocho](#), File No. A094-803-651, IJ decision, San Francisco, CA (June 20, 2011) (on file with the author) (finding that respondent had not demonstrated he held anything more than a moral aversion to gang life that did not have a political dimension).
- ¹²⁰ [Lopez-Castro v. Holder, 577 F.3d 49, 54 \(1st Cir. 2009\)](#).

¹²¹ [Quevedo v. Ashcroft](#), 336 F.3d 39, 44 (1st Cir. 2003).

¹²² [Escobar v. Holder](#), 698 F.3d 36 (1st Cir. 2012).

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