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## An Administrative Stopgap for Migrants from the Northern Triangle

Collin Schueler

*University of Kentucky College of Law*

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## AN ADMINISTRATIVE STOPGAP FOR MIGRANTS FROM THE NORTHERN TRIANGLE

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Collin Schueler\*

*From 2011–2014, the United States Department of Homeland Security recorded an extraordinary increase in the number of unaccompanied children arriving at the southern border from Central America’s “Northern Triangle”—the area made up of El Salvador, Guatemala, and Honduras. In fact, in fiscal year 2014, United States Customs and Border Protection apprehended over 50,000 unaccompanied children from the Northern Triangle. That is thirteen times more than just three years earlier.*

*This Article examines the intersecting humanitarian and legal crises facing these children and offers an administrative solution to the problem. The children are fleeing a genuine humanitarian crisis—a region overrun by violent gangs that regularly target young people for recruitment. Once in the United States, these children face their own legal crisis. Indeed, they must confront numerous procedural and substantive hurdles, trying to avoid removal. As a result, many of the children are at serious risk of being deported and subsequently killed by the very gangs that they fled. Given this situation, the Article argues that President Obama’s administration should provide temporary humanitarian protection to these migrants by exercising its congressionally delegated power to designate El Salvador, Guatemala, and Honduras as new “temporary protected status” countries. Under this proposal, the United States would provide a temporary safe haven to nationals of these three countries until the horrific gang violence in the Northern Triangle subsides.*

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\* Visiting Assistant Professor of Law, University of Kentucky College of Law. I would first like to thank Scott Bauries for numerous thoughtful discussions throughout the writing process. I am also grateful to Albertina Antognini, James Donovan, Joshua Douglas, Anthony Farley, Brian Frye, Jane Grise, Michael Healy, Nicole Huberfeld, Mark Kightlinger, Cortney Lollar, Melynda Price, and Andrew Woods for their helpful comments. I would also like to thank Faculty Services Librarian Franklin Runge for his advice and research assistance. Thanks also to participants at the University of Kentucky College of Law workshop in October 2014 and the Arizona State University Sandra Day O’Connor College of Law conference in September 2014.

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INTRODUCTION

When Benito Zaldívar was a young boy in El Salvador, his parents left him in his grandparents’ care, and they came to work in the United States.<sup>1</sup> Before Benito was even a teenager, members of the 18th Street Gang (M-18), an extremely violent gang with American roots,<sup>2</sup> started trying to recruit Benito into their ranks. The gang members repeatedly threatened to kill Benito and his grandparents if he did not join. Nevertheless, Benito consistently rebuffed the gang’s advances.

However, after Benito’s grandmother passed away, he believed that he could no longer safely resist the gang. Therefore, when he was just fifteen years old, Benito fled El Salvador and traveled to the United States with the hope of reuniting with his parents. As Benito tried to cross into the United States, border patrol agents stopped him. Benito quickly applied for asylum, arguing that if he was sent back to El Salvador, members of M-18 would kill him for refusing to join their gang.<sup>3</sup> Immigration officials allowed Benito to join his parents in Missouri while his asylum case moved through the legal system.

Benito started going to high school and began to feel safe for the first time in his life. That feeling was short-lived, however, because the Board of Immigration Appeals (BIA), the highest administrative body that adjudicates immigration cases,<sup>4</sup> ultimately denied his asylum application and ordered him removed from the United States. The government then deported Benito back to El Salvador.

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1. Benito’s story comes from Julia Preston, *Losing Asylum, Then His Life*, N.Y. TIMES, June 28, 2010, at A16. His story is also recounted in DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 148–49 (2012).

2. See *infra* Part I (discussing M-18’s roots in the United States).

3. See Preston, *supra* note 1 (“He applied for asylum, saying that if he returned to El Salvador, the Mara-18 would exact revenge for his refusal to join.”).

4. See *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/coir/board-of-immigration-appeals> (last visited Oct. 2, 2015).

Benito was murdered eight weeks later. According to witnesses, he was riding his bicycle through the Salvadoran coastal town of La Libertad when a white van pulled alongside him and a M-18 gang member shot him in the face. Benito's father was still living in Missouri when a family member informed him that his son had been killed. The family member begged Benito's father not to return to El Salvador for Benito's funeral due to the ongoing violence. Reluctantly, Benito's father agreed. "It left me with an empty place," Benito's father later recalled; "But she said the gangs could blow me away, too."<sup>5</sup>

Benito's tragic story illustrates the intersecting humanitarian and legal crises facing so many people from Central America. The humanitarian crisis is staggering. Over the past decade, more than 140,000 homicides were recorded in Central America's "Northern Triangle"—the area made up of El Salvador, Guatemala, and Honduras.<sup>6</sup> And the problem is only getting worse.<sup>7</sup> A recent United Nations (U.N.) report shows that the Northern Triangle is now among the most violent regions in the world.<sup>8</sup> In Honduras, the homicide rate has more than doubled since 2006, and the country now has the highest murder rate on earth.<sup>9</sup> In El Salvador, the homicide rate has been increasing since mid-2013, and it just reached its highest level in years.<sup>10</sup> And in Guatemala, which has the fifth highest homicide rate in the world, murders are also on the rise.<sup>11</sup>

Organized gangs like M-18 are responsible for much of the violence.<sup>12</sup> As the U.N. has said, "Central America's gang-related

5. Preston, *supra* note 1.

6. See ASSESSMENT CAPACITIES PROJECT, OTHER SITUATIONS OF VIOLENCE IN THE NORTHERN TRIANGLE OF CENTRAL AMERICA: INVISIBLE BORDERS, VICIOUS SPIRALS, AND THE NORMALISATION OF TERROR 2 (2014). This report notes that (1) "the rate of underreporting is very high throughout the region," and (2) "this number [does not] include the numerous people who go missing and whose bodies are later found." *Id.* at 4–5. Therefore, the actual number of homicides in the Northern Triangle is almost certainly much higher.

7. In 2012, Michael Shifter wrote in a Council on Foreign Relations report that "Central America is increasingly beset by spreading criminal violence." MICHAEL SHIFTER, COUNCIL ON FOREIGN RELATIONS, COUNTERING CRIMINAL VIOLENCE IN CENTRAL AMERICA 3 (2012). More recent reports, which are discussed below, show that Shifter's statement remains true as violence in the region continues to grow. See, e.g., *infra* notes 8–18.

8. See U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2013: TRENDS, CONTEXTS, DATA 23–24, 33 (2013) [hereinafter U.N. HOMICIDE REPORT].

9. See *id.* at 126.

10. See Elisabeth Malkin, *El Salvador Cracks Down on Crime, but Gangs Remain*, N.Y. TIMES, (Aug. 11, 2105), <http://www.nytimes.com/2015/08/12/world/americas/el-salvador-cracks-down-on-crime-but-gangs-remain-unbowed.html>.

11. See U.N. HOMICIDE REPORT, *supra* note 8, at 126.

12. See SHIFTER, *supra* note 7, at 6 ("Soaring homicide rates and widespread perceptions of insecurity are also largely due to the proliferation of local gangs.").

homicides have been driving the extremely high levels of homicide in the sub-region.”<sup>13</sup> The gangs are also responsible for numerous other crimes, including drug trafficking, violent street crime, weapons smuggling, robbery, extortion, human trafficking, sexual assaults, and kidnapping.<sup>14</sup> This gang violence affects all segments of the Northern Triangle’s population.<sup>15</sup>

That said, the chief victims of gang violence are young people, particularly those who, like Benito, refuse to join the gangs.<sup>16</sup> Indeed, the gangs regularly threaten, beat, rape, kidnap, and kill youth who oppose recruitment.<sup>17</sup> A senior U.N. official said:

[G]angs are really operating with significant impunity and targeting children at a younger and younger age. Recently, there was a very public massacre and dismemberment of children as young as seven who had refused to join the gang. . . . It’s a humanitarian crisis in the region.<sup>18</sup>

This humanitarian crisis has prompted a growing number of children to flee the Northern Triangle.<sup>19</sup> Since October 2011, the U.S. Department of Homeland Security (DHS) has recorded an extraordinary increase in the number of unaccompanied children arriving at the southern border from El Salvador, Guatemala, and

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13. U.N. HOMICIDE REPORT, *supra* note 8, at 45; *see also id.* at 43 (indicating that, in Central America, the number of homicides linked to gangs and organized criminal groups is significant and increasing); *id.* at 18 (“[H]omicides in the Americas are often connected to organized crime or gang activity.”).

14. *See* CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 4–5 (2014); SHIFTER, *supra* note 7, at 6.

15. *See In re M-E-V-G-*, 26 I. & N. Dec. 227, 250 (BIA 2014) (saying that, in the context of Central America, “victims of gang violence come from all segments of society”) (citation omitted).

16. *See* U.N. HIGH COMM’R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 4 (2010) [hereinafter UNHCR GUIDANCE NOTE] (recognizing, in the context of Central America, that “[t]he primary victims of youth-gang related violence are other young people,” including individuals who refuse recruitment); LAURA PEDRAZA FARIÑA ET AL., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 88–92 (Harvard Univ. Press 2010) (discussing how young people who refuse to join the gangs are among the most vulnerable people in Central America).

17. *See* FARIÑA ET AL., *supra* note 16, at 72–77, 89–92.

18. Brian Resnick, *Why 90,000 Children Flooding Our Border is Not an Immigration Story*, NAT’L J. (June 16, 2014), <http://www.nationaljournal.com/congress/2014/06/16/why-90-000-children-flooding-our-border-is-not-immigration-story>.

19. *See* U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 26–27 (2014) [hereinafter UNHCR CHILDREN ON THE RUN REPORT] (surveying 404 unaccompanied or separated children from Mexico and the Northern Triangle and finding that many were fleeing “violence in society,” including “gang-related harm”).

Honduras.<sup>20</sup> In fact, in fiscal year (FY) 2014,<sup>21</sup> U.S. Customs and Border Protection apprehended 51,705 unaccompanied children from the Northern Triangle—thirteen times more than just three years earlier.<sup>22</sup>

As a result of this influx, some government officials and members of the media have started to acknowledge that these children are fleeing a humanitarian crisis in their home countries. But what is being overlooked is that these children now face their own legal crisis here in the United States.

The children face numerous procedural hurdles in removal proceedings.<sup>23</sup> Indeed, these proceedings can be very intimidating, they are legally complex, and most children must attend their hearings without a lawyer.<sup>24</sup> Therefore, many childrens' immigration cases have little chance of even getting off the ground.

Beyond these procedural hurdles, many children will also face significant substantive hurdles while trying to avoid deportation.<sup>25</sup> It is true that the children may apply for asylum,<sup>26</sup> the main form of relief available to individuals fleeing humanitarian crises.<sup>27</sup> But the BIA has repeatedly rejected the two most common asylum claims made by children fleeing gang recruitment—that they have been or will be targeted back home (1) because of their membership in the particular social group of youth who have been recruited by gangs but refused to join,<sup>28</sup> or (2) because of their anti-gang political opinions.<sup>29</sup> And while the children may apply for other forms of relief from removal, such as protection under the Convention Against Torture,<sup>30</sup> visas for victims of human trafficking or other crimes,<sup>31</sup> or special immigrant juvenile status,<sup>32</sup> these forms of relief are relatively narrow and appear unlikely to protect large numbers of people.<sup>33</sup> Accordingly, many children are at serious risk of being deported and facing the same fate as Benito Zaldívar.

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20. See *Southwest Border Unaccompanied Alien Children*, U.S. DEP'T OF HOMELAND SEC., <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Oct. 2, 2015) [hereinafter U.S. Customs and Border Protection Statistics].

21. FY 2014 ran from Oct. 1, 2013–Sept. 30, 2014. See *id.*

22. See *id.*

23. See *infra* Part II.B.

24. See *infra* Part II.B.

25. See *infra* Part II.C.

26. 8 U.S.C. § 1158(b)(1)(A) (2012).

27. See *infra* Part II.C.1.

28. See *infra* Part II.C.1.a.

29. See *infra* Part II.C.1.b.

30. See 8 C.F.R. §§ 208.16–208.18 (2015).

31. See 8 U.S.C. §§ 101(a)(15)(T)–(U) (2012).

32. See *id.* at § 101(a)(27)(J) (2012).

33. See *infra* Part II.C.2.

Given this situation, President Obama's administration should provide temporary humanitarian protection to migrants from the Northern Triangle. The administration should do this by exercising its congressionally delegated power to designate El Salvador, Guatemala, and Honduras as new "temporary protected status" (TPS) countries.<sup>34</sup> Under this proposal, the United States would provide a temporary safe haven to nationals of these three countries until conditions improve in the region.

To be sure, other scholars and commentators have also recently called on the U.S. government to issue these fresh TPS designations.<sup>35</sup> However, this is the first law review article to make the

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34. See 8 U.S.C. § 1254a(b) (2012) (regarding TPS designations).

35. See, e.g., Geoffrey A. Hoffman, *The Border Children—They are Not Criminals and They Need Counsel*, IMMIGRATION PROF BLOG (July 21, 2014), <http://lawprofessors.typepad.com/immigration/2014/07/the-border-children-they-are-not-criminals-and-they-need-counsel-by-geoffrey-a-hoffman.html> ("One possible way to deal with the issue is through temporary protected status (TPS), a form of humanitarian relief. TPS is a form of relief which Congress can create for certain persons from specified countries which are facing upheavals. This status is temporary but humanitarian in nature."); Ira Kurzban, Opinion, *Migrant Children Deserve Protected Status*, MIAMI HERALD (July 15, 2014), <http://www.miamiherald.com/opinion/op-ed/article1975667.html> ("If we want to address this issue properly, address it at the source of the violence in Guatemala, Honduras and El Salvador. . . . At the same time, recognize these helpless children for who they are—victims of violence—and grant them Temporary Protected Status."); SHIFTER, *supra* note 7, at 29 (discussing the gang violence in the Northern Triangle and then briefly arguing that "the Obama administration should grant Temporary Protected Status (TPS) to Guatemalan migrants in the United States and extend it past 2013 for those from El Salvador and Honduras."). The BIA also suggested that, while individuals who flee gang violence in Central America may have a difficult time obtaining asylum, this violence might justify new TPS designations. See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 250–51 (BIA 2014).

Perhaps the most extensive and relevant work to date comes from American University (AU). The Center for Latin American and Latino Studies at AU recently issued a comprehensive report regarding "the recent surge in migration to the United States by unaccompanied children and families from the Northern Triangle countries." Dennis Stinchcomb & Eric Hershberg, *Unaccompanied Migrant Children from Central America: Context, Causes, and Responses* 1 (CLALS Working Paper Series No. 7, 2014). The report carefully examines the factors that prompted so many young migrants to flee Central America and then considers the likelihood that these individuals will be able to avoid deportation. See *id.* at 14–35. On the last page of the report, Mr. Stinchcomb and Professor Hershberg write:

[T]here is an urgent need for reforms to the existing legal frameworks for determining the status of individuals and groups fleeing the lethal environment that now prevails across much of El Salvador, Guatemala, and Honduras. The expansion of Temporary Protected Status to encompass recent arrivals from those three countries is an appropriate first step.

*Id.* at 39. Soon after releasing the report, Professor Hershberg and Law Professor Jayesh Rathod co-authored a brief commentary in *Roll Call*, also urging the United States to designate the Northern Triangle countries for TPS. See Eric Hershberg & Jayesh Rathod, Commentary, *The Case for Protected Status for Central American Migrants*, ROLL CALL (Dec. 22, 2014), [http://www.rollcall.com/news/the\\_case\\_for\\_protected\\_status\\_for\\_central\\_american\\_migrants\\_commentary-238919-1.html](http://www.rollcall.com/news/the_case_for_protected_status_for_central_american_migrants_commentary-238919-1.html) ("Conditions in El Salvador, Guatemala, and Honduras more than justify a current TPS designation.").



comprehensive case for TPS as the proper response to the intersecting humanitarian and legal crises facing so many migrants from the Northern Triangle.

TPS is the right answer to this complex problem because the gang violence in the Northern Triangle constitutes an “ongoing armed conflict,” one of the statutory criteria for designating foreign states as TPS countries.<sup>36</sup> At the very least, the violence perpetrated by the gangs in the region represents other “extraordinary and temporary conditions,” preventing nationals of El Salvador, Guatemala, and Honduras from safely returning to their countries; this also justifies new TPS designations.<sup>37</sup> Plus, designating the Northern Triangle countries for TPS would be in line with prior designations.<sup>38</sup> It would also be consistent with the purpose of the TPS statute, which is to temporarily protect individuals who have fled humanitarian crises in their home countries and are now in the United States struggling to obtain relief from removal.<sup>39</sup> Ultimately, designating El Salvador, Guatemala, and Honduras for TPS would simply constitute an administrative stopgap, preventing the U.S. government from deporting individuals back to the Northern Triangle until the horrific gang violence subsides. Given the unprecedented humanitarian crisis engulfing the region, and the fact that other forms of relief from removal are unavailable to many of the fleeing migrants, this is the best solution.

This Article proceeds in three Parts. Part I begins by acknowledging that many of the unaccompanied children who recently arrived at the southern border are fleeing a genuine humanitarian crisis—a region overrun by violent gangs that regularly target young people for recruitment. Part II examines the legal crisis that these children now face in the United States—that is, the procedural and substantive hurdles the children must confront in trying to avoid deportation. This Part concludes that, under our current immigration laws, many of these children are at serious risk of being deported and subsequently killed. Part III offers an administrative solution to this problem by calling on the Obama administration to exercise its congressionally delegated power to designate El Salvador, Guatemala, and Honduras as new TPS countries. This would save countless lives by temporarily preventing the U.S. government from deporting migrants back to the Northern Triangle.

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36. See 8 U.S.C. § 1254a(b)(1)(A) (2012).

37. See *id.* at 1254a(b)(1)(C) (2012).

38. See *infra* notes 461–67 and accompanying text.

39. See *infra* notes 468–73 and accompanying text.



## I. THE HUMANITARIAN CRISIS: GANG VIOLENCE IN THE NORTHERN TRIANGLE

This Part first examines the origins and history of the gangs in the Northern Triangle by tracing these organizations back to their roots in the United States. It then examines the modern situation in the Northern Triangle, a region that the Associated Press recently called “one of the most violent . . . on the planet.”<sup>40</sup>

### A. *The Origins and History of the Gangs*

The 1980s were a time of great turmoil in the Northern Triangle. Guatemala and El Salvador were both embroiled in devastating civil wars that killed hundreds of thousands of people, and the Honduran economy was in shambles, with over seventy percent of the population either unemployed or underemployed.<sup>41</sup> These conflicts and economic challenges prompted more than one million people to flee the Northern Triangle, with many coming to the United States.<sup>42</sup>

A large percentage of those who arrived in the U.S. settled in Los Angeles, where youth gangs already had a significant presence.<sup>43</sup> In part to protect themselves, many young Central Americans formed their own gangs based on shared ethnicities, such as the Mara Salvatrucha (MS-13) gang, which was established by Salvadoran youth.<sup>44</sup> Others joined the Mexican-American gangs that were already in place, such as the M-18.<sup>45</sup>

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40. *El Salvador's 'most violent month': homicide rate hits record high in May*, THE GUARDIAN (June 3, 2015), <http://www.theguardian.com/world/2015/jun/03/el-salvador-homicide-killings-gangs>.

41. See WASH. OFFICE ON LATIN AM., CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE (2008) [hereinafter WOLA Resource Guide].

42. See *id.* (“[O]ver a million Salvadorans, about 20% of the population, fled the country, most to the United States. . . . [H]undreds of thousands of Guatemalans fled the country, many of them arriving in the United States. . . . [M]any Honduran youth fled to the United States, either on their own or with their families.”).

43. See FARIÑA ET AL., *supra* note 16, at 50–51.

44. See WOLA Resource Guide, *supra* note 41.

45. *Id.* In discussing the formation of MS-13 and M-18, the Washington Office on Latin America includes this caveat: “While the origin of the Central American gangs is linked to confrontations with Chicano gangs in Los Angeles, . . . no single factor is likely to cause gangs to develop in a given community. It is likely that Chicano gangs were one influence among many that led young people to associate with gangs, along with the lack of parental supervision, poor policing in communities, immigrants’ feelings of alienation, lack of opportunity, and social exclusion.” *Id.*

In 1992, riots erupted in Los Angeles after the acquittal of the four police officers who fatally beat Rodney King.<sup>46</sup> During the riots, between fifty and sixty people were killed, more than 2,000 people were injured, and hundreds of millions of dollars worth of property was destroyed.<sup>47</sup> In the wake of the destruction, the police determined that the gangs caused most of the violence and property damage.<sup>48</sup> Consequently, local, state, and federal officials started a new anti-gang offensive.<sup>49</sup> As part of this effort, prosecutors started charging youth gang members as adults, and California enacted a series of strict anti-gang laws.<sup>50</sup> These efforts greatly increased the number of incarcerated young Central Americans.<sup>51</sup>

Then, in 1996, Congress tightened the federal immigration laws by passing two pieces of legislation—the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>52</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>53</sup> These laws did two things that resulted in the deportation of thousands of people, including many gang members, back to the Northern Triangle.

First, the laws expanded the grounds of removability for non-citizens, including lawful permanent residents.<sup>54</sup> Most notably, the laws vastly increased the list of crimes that qualified as an “aggravated felony” under the Immigration and Nationality Act (INA).<sup>55</sup> Thus,

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46. See TOM DIAZ, *NO BOUNDARIES: TRANSNATIONAL LATINO GANGS AND AMERICAN LAW ENFORCEMENT* 94–98 (2009) (discussing the case and riots).

47. See *id.* at 98.

48. See Ana Arana, *How the Street Gangs Took Central America*, FOREIGN AFFAIRS, May/June 2005, <https://www.foreignaffairs.com/articles/central-america-caribbean/2005-05-01/how-street-gangs-took-central-america>.

49. See DIAZ, *supra* note 46, at 99 (discussing these efforts).

50. See Arana, *supra* note 48.

51. See Margot Kniffin, Note, *Balancing National Security and International Responsibility: The Immigration System’s Legal Duty to Asylees Fleeing Gang Violence in Central America*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 314, 317 (2011) (recognizing that California’s “‘get tough’ approach to gangs,” including its passage of “the ‘three strikes’ law in 1996 . . . resulted in . . . [a] dramatic increase in the number of incarcerated Latino immigrants.”). Margot Kniffin notes that “MS-13 and M-18 gang members were then centrally located within the California prison system, providing an opportunity for the gangs to organize and gain power.” *Id.*

52. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA] (codified in various sections of the U.S.C.).

53. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA] (codified in various sections of the U.S.C.). For a more detailed discussion of AEDPA and IIRIRA, see Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

54. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1844 (2007).

55. See *id.* (citing 8 U.S.C. § 1101(a)(43)(A) (2012)). Under the law, “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

after AEDPA and IIRIRA, aggravated felonies included more than just crimes like “murder, rape, or sexual abuse of a minor;”<sup>56</sup> indeed, the phrase was broadened to capture lower-level offenses, such as “a crime of violence . . . for which the term of imprisonment [is] at least one year.”<sup>57</sup> Congress also applied these changes retroactively, which meant that “even if an offense would not have rendered a non-citizen removable at the time of its commission, the non-citizen [was] subject to removal if the offense [was] a removable offense under the new law.”<sup>58</sup>

Second, the laws restricted the availability of discretionary forms of relief from removal that had been available to deportable non-citizens.<sup>59</sup> Prior to IIRIRA, immigration judges and the BIA had the legal authority, pursuant to INA § 212(c), to balance equities in individual cases and decide whether to waive deportation.<sup>60</sup> However, IIRIRA eliminated this form of relief<sup>61</sup> and replaced it with a much more limited form of relief known as cancellation of removal.<sup>62</sup>

Taken together, these two legislative changes—expanding the grounds of removability and limiting the available forms of relief from removal—led to the deportation of tens of thousands of people back to the Northern Triangle.<sup>63</sup> Estimates are that “[b]etween 1998 and 2005, the United States deported nearly 46,000 convicted felons to Central America, in addition to another 160,000 illegal immigrants. El Salvador, Guatemala, and Honduras received more

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56. 8 U.S.C. § 1101(a)(43)(A) (2012).

57. *Id.* at § 1101(a)(43)(F). Professor Chacón made this precise point, writing, “‘Aggravated felonies’ now include not only things like ‘murder, rape, or sexual abuse of a minor,’ but also a crime of violence or a theft offense ‘for which the term of imprisonment is at least a year.’” Chacón, *supra* note 54, at 1844 (quoting 8 U.S.C. §§ 1101(a)(43)(A), (F), (G)).

58. Chacón, *supra* note 54, at 1844 (citing AEDPA § 440(f); IIRIRA § 321(b)).

59. *See id.* at 1845 (“The new laws also eliminated many avenues of relief from removal that formerly would have been available to non-citizens removable for criminal offenses.”).

60. 8 U.S.C. § 1182(c) (1988). Before 1996, this provision was found at INA § 212(c).

61. *See* Chacón, *supra* note 54, at 1845 (“[T]he 1996 law eliminated relief under the former section 212(c).”).

62. The provisions regarding cancellation of removal can be found at 8 U.S.C. § 1229(a)–(b) (2008). As Jennifer Chacón points out, “cancellation of removal requires longer periods of physical presence in the United States and . . . it has so many more disqualifying provisions.” *Id.* at 1845. As a result, “it is [a] much more difficult [form of relief] to obtain than 212(c) relief.” *Id.*

63. *See* FARINA ET AL., *supra* note 16, at 51–52 (“These legislative changes . . . resulted in the deportation of thousands of Salvadorans who had lived in the United States for many years.”); Kniffin, *supra* note 51, at 317–18 (noting that AEDPA and IIRIRA “resulted in the mass deportation of young Central American criminals and their families between 2000 and 2004”).

than 90 percent of the deportees.”<sup>64</sup> Many of those deported were members of the MS-13 and M-18 gangs.<sup>65</sup>

Deporting these gang members had devastating consequences for the Northern Triangle. As an initial matter, many of the gang members had come to the United States as children and, thus, had little or no ties to Central America.<sup>66</sup> In fact, many did not even speak Spanish or know much about their home country’s culture.<sup>67</sup> Many had no family ties or employment prospects in the region.<sup>68</sup> They had “no resources, homes, or connections, other than their gang ties.”<sup>69</sup> As a result, these former gang members “reproduced the structures and behaviors that had given them support and security in the United States.”<sup>70</sup> In other words, they redeveloped their old gangs,<sup>71</sup> and, while doing so, found ready recruits among many of the Northern Triangle’s impoverished and disillusioned youth.<sup>72</sup> Ultimately, as Daniel Kanstroom writes, the gangs “reorganized, re-armed, and brought with them a hard-edged, violent gang culture they had learned in the United States.”<sup>73</sup>

The governments in El Salvador, Guatemala, and Honduras were not prepared to confront the gangs. After all, these countries were

64. WORLD BANK, *WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY, AND DEVELOPMENT* 78 (2011).

65. *See id.* (recognizing that many of the deportees were “members of the maras”); DIAZ, *supra* note 46, at 163 (“With passage of [HIRIRA], thousands of MS-13 and 18th Street gangsters became instantly eligible to be frog-marched out of the country, without any of the procedural delays that had slowed things down in the previous decade.”).

66. DIAZ, *supra* note 46, at 163.

67. *Id.*; *see also* Arana, *supra* note 48 (noting that “[m]any of the deportees were native English speakers”).

68. DIAZ, *supra* note 46, at 163.

69. Kniffin, *supra* note 50, at 318; *see also* Arana, *supra* note 48 (“The deportees arrived in Central America with few prospects other than their gang connections; many were members of MS-13 and another vicious Los Angeles group, the 18th Street Gang.”).

70. WORLD BANK, *supra* note 64, at 78.

71. *See* DIAZ, *supra* note 46, at 163 (quoting FBI agent Leo Navarette, the Bureau’s legal attaché in San Salvador, El Salvador, as saying, “These guys had no jobs and no money. They looked around and realized that there was one thing they knew how to do and there was no competition. So they formed gangs.”).

72. *See* DIAZ, *supra* note 46, at 163 (“Recruiting among the poor and marginalized youth of Central America was easy.”); WORLD BANK, *supra* note 64, at 78 (noting that the gangs “quickly attracted local youth”); Arana, *supra* note 48 (“[T]he Central American maras grew, finding ready recruits among the region’s large population of disenfranchised youth.”).

73. KANSTROOM, *supra* note 1, at 154; *see also* FARÍÑA ET AL., *supra* note 16, at 52–53 (“The deported Salvadorans brought with them . . . the ‘process of violence’ that they had been living in the United States—particularly the practice of staking out territory to defend against encroachment by the rival gangs.”); SEELKE, *supra* note 14, at 3 (“Many contend that gang-deportees ‘exported’ a Los Angeles gang culture to Central America.”); WOLA Resource Guide, *supra* note 41 (“These deportee gang members, with U.S. gang experience, are believed to have been a key catalyst for the evolution of *Mara Salvatrucha* and 18th Street gang into the dominant gangs that they are today in El Salvador, Guatemala, and Honduras.”).

already battling local inner-city gangs<sup>74</sup> while trying to rebuild from the civil wars and economic challenges of the 1980s.<sup>75</sup> To make matters worse, U.S. immigration officials did not provide the Central American governments with the deportees' complete criminal history.<sup>76</sup> Thus, law enforcement officials in the Northern Triangle were unable to identify those new arrivals that posed the greatest threat to their societies.<sup>77</sup>

With the Central American governments caught off guard, MS-13 and M-18 quickly seized control of entire neighborhoods and cities.<sup>78</sup> The gangs then battled each other for more territory,<sup>79</sup> sparking small wars between the rival groups.<sup>80</sup> When the gangs were not fighting each other, they were battling the police in hopes of gaining even more ground.<sup>81</sup>

Meanwhile, the United States kept deporting more and more gang members, who then joined their counterparts in the Northern Triangle.<sup>82</sup> As a result, MS-13 and M-18 rapidly increased their ranks and evolved into much stronger, more complex groups.<sup>83</sup>

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74. See FARINA ET AL., *supra* note 16, at 51 (noting that “youth gangs already existed in Central American cities,” but that “they tended to be smaller, more diverse and tied to particular neighborhoods”); WOLA Resource Guide, *supra* note 41 (“The deportation of gang-involved Central Americans from the United States complicated an existing local gang phenomenon in Central America.”).

75. See DIAZ, *supra* note 46, at 163 (“The explosion of the violent Los Angeles gang culture immediately overloaded the fragile economies, social structures, and law enforcement resources of poor countries barely climbing out of decades of civil war and brutal internal conflict.”); Kniffin, *supra* note 51, at 318 (“Local governments were not stable at this time as they were still working to rebuild following the bloody civil war that had recently plagued the country.”).

76. See DIAZ, *supra* note 46, at 164 (“U.S. immigration authorities failed to tell the receiving governments that the deportees were gangsters. In fact, to this day, the United States only informs the destination country of the deportee’s latest conviction, which is often a vanilla immigration violation that masks more violent criminal behavior. ‘You could have spent the last five years in jail on a murder charge, then get deported as a criminal alien,’ says [FBI agent Leo] Navarette. ‘But the papers on you will only list the last charge, which is just being an alien in the country illegally.’ A personal status as vaguely defined as ‘gang membership’ is shared only in special cases.”). It is worth noting that, “in January 2014, the State Department and DHS signed an agreement to expand a Criminal History Information Sharing (CHIS) program that has been used to share more information on certain criminal deportees with Mexican law enforcement officials to Guatemala, Honduras, and El Salvador.” SEELKE, *supra* note 14, at 8.

77. Kniffin, *supra* note 51, at 318.

78. See DIAZ, *supra* note 46, at 164.

79. Arana, *supra* note 48.

80. DIAZ, *supra* note 46, at 164.

81. Arana, *supra* note 48.

82. *Id.* (“As more and more hard-core gang members were expelled from Los Angeles, the Central American maras grew.”).

83. See FARINA ET AL., *supra* note 16, at 53 (“[T]he U.S. government’s continued deportation of Salvadoran gang members has served to strengthen the transnational presence of these gangs.”); Kniffin, *supra* note 51, at 318 (“As MS-13 grew in power, it evolved from a

The gangs also became much more violent,<sup>84</sup> perpetrating a wide variety of crimes including murder, kidnapping, robbery, extortion, and drug trafficking.<sup>85</sup> In Honduras, the gangs preferred to decapitate their victims and would either leave them lying in public ways or would “string their disemboweled intestines along fences.”<sup>86</sup>

In response to the rising violence, the Central American governments adopted a series of authoritarian policies that focused on incarcerating large numbers of suspected gang members.<sup>87</sup> These hardline policies, however, ultimately proved ineffective.<sup>88</sup> The massive number of arrests led to extreme overcrowding in Central America’s prisons.<sup>89</sup> There, the gangs organized<sup>90</sup> and recruited more members,<sup>91</sup> including youth who were wrongfully imprisoned for gang activity in the first place.<sup>92</sup> The gangs even killed dozens of people in prison massacres across the region.<sup>93</sup>

Meanwhile, outside the prison walls, the gangs “retaliated against the [government] crackdown by launching a wave of random violence.”<sup>94</sup> Ultimately, despite the Central American governments’ strong-handed approach to fighting the gangs, homicide rates actually rose throughout the region.<sup>95</sup> In El Salvador, the murder rate jumped from 36.4 people per 100,000 in 2003 to 69.9 people per

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territorial organization, focused on small ‘cliques’ (neighborhood groups), to a more complex vertical system that allowed for communication between groups.”).

84. See DIAZ, *supra* note 46, at 164–65 (“The Salvadoran versions of MS-13 and the 18th Street gang erupted like volcanoes of criminal violence. . . . The gang virus spread to Guatemala and Honduras.”).

85. See U.S. AGENCY FOR INT’L DEV., *CENTRAL AMERICA AND MEXICO GANG ASSESSMENT* 43, 45 (2006) (discussing these crimes in the context of El Salvador).

86. DIAZ, *supra* note 46, at 165.

87. See DIAZ, *supra* note 46, at 164 (“Gangsters and suspected gangsters were rounded up, often on the basis of a tattoo alone, and stuffed into the country’s abysmal prisons.”); SEELKE, *supra* note 14, at 9 (discussing these authoritarian measures, including the so-called “Mano Dura,” or “iron fist,” anti-gang policies adopted in El Salvador and Honduras).

88. See SEELKE, *supra* note 14, at 9 (“Despite the early apparent benefits of *Mano Dura* policies, effects on gangs and crime proved to be largely disappointing.”).

89. See FARÍÑA ET AL., *supra* note 16, at 148 (“The massive number of arrests under the anti-gang crackdown since 2003 has placed a severe burden on El Salvador’s prison system, exacerbating the conditions of overcrowding.”).

90. DIAZ, *supra* note 46, at 164–65.

91. See SHIFTER, *supra* note 7, at 9 (“The mass incarceration of suspected gang youth has transformed prisons into recruiting centers for criminal groups.”).

92. See SEELKE, *supra* note 14, at 9 (“Some youth who were wrongly arrested for gang involvement joined the gang life while in prison.”).

93. See FARÍÑA ET AL., *supra* note 16, at 148–50 (discussing prison massacres in Aug. 2004, Mar. 2006, and Jan. 2007).

94. Arana, *supra* note 48.

95. See U.N. HOMICIDE REPORT, *supra* note 8, at 126.



100,000 in 2011.<sup>96</sup> Likewise, in Honduras, the murder rate increased from 61.4 in 2003 to 91.4 in 2011.<sup>97</sup> And in Guatemala, the homicide rate rose from 35.1 in 2003 to 38.6 in 2011.<sup>98</sup> In light of these statistics, many law enforcement officers in Central America concede that their governments' iron fist policies failed, leaving the gangs emboldened and the Northern Triangle in chaos.<sup>99</sup> In 2011, a senior U.S. military official declared the region "the deadliest zone in the world outside active war zones."<sup>100</sup>

### B. The Modern Situation

After more than a decade of rising violence, there was a brief breakthrough. In early 2012, El Salvador's Minister of Justice and Public Safety worked with a former lawmaker and a Catholic bishop to help organize peace talks between the MS-13 and M-18 gangs.<sup>101</sup> Following several meetings, the gangs' top leaders "shook hands on a pact to put an end to the killings."<sup>102</sup>

Although the pact led to a brief drop in violence in El Salvador,<sup>103</sup> the hope did not last. By mid-2013, the Salvadoran government "withdrew its support for the truce mediators,"<sup>104</sup> and

96. See *id.*; see also FARIÑA ET AL., *supra* note 16, at 117 ("In the years following the implementation of the *Super Mano Dura* Plan [in El Salvador], homicide rates continued to rise sharply.")

97. See U.N. HOMICIDE REPORT, *supra* note 8, at 126.

98. See *id.* By comparison, the United States' homicide rate fell from 5.6 in 2003 to 4.7 in 2011. See *id.*

99. See FARIÑA ET AL., *supra* note 16, at 131 ("There is a growing consensus among many observers, including law enforcement officials, that the *Mano Dura* policies and legislative reforms . . . have been ineffective or even counterproductive. . . . A police official . . . told our researchers that *Mano Dura* policies were widely recognized as a failure."); WOLA Resource Guide, *supra* note 41 ("Even the director of the Salvadoran National Civilian Police has stated publicly that *mano dura* has failed.")

100. See Anna Mulrine, *Pentagon: Central America 'Deadliest' Non-War Zone in the World*, CHRISTIAN SCI. MONITOR (Apr. 11, 2011), <http://www.csmonitor.com/USA/Military/2011/0411/Pentagon-Central-America-deadliest-non-war-zone-in-the-world>.

101. See SEELKE, *supra* note 14, at 11; Randal C. Archibold, *Gangs' Truce Buys El Salvador a Tenuous Peace*, N.Y. TIMES, Aug. 27, 2012, at A1.

102. See Archibold, *supra* note 101.

103. See SEELKE, *supra* note 14, at 11 ("[Organization of American States] Secretary General Jose Miguel Insulza . . . praised the truce for reducing the homicide rate in El Salvador and effectively saving the lives of thousands of young people."); Archibold, *supra* note 101 ("[T]he two gangs are virtual armies that have the power to affect the security of the entire region—and they have used it to terrorize populations still weary from years of civil war and instability. Now the truce is moving this country in the opposite direction, the authorities contend, leading a precipitous drop in violence.")

104. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R43616, EL SALVADOR: BACKGROUND AND U.S. RELATIONS 12 (2014). The exact reason for the Salvadoran government's actions is unclear. However, the truce's mediators and negotiators allege that Salvadoran President



the agreement fell apart.<sup>105</sup> The gangs quickly regrouped into stronger, more sophisticated organizations,<sup>106</sup> and they committed many more acts of violence.<sup>107</sup> Since mid-2013, El Salvador's "homicide rate has been rising,"<sup>108</sup> and a recent report indicates that the murder rate is reaching record levels.<sup>109</sup>

The situation is also dire in both Honduras and Guatemala, where the gang truce never really had an impact. In Honduras, the homicide rate remains extremely high,<sup>110</sup> and the country now has the highest murder rate in the world.<sup>111</sup> In Guatemala, which has the fifth highest homicide rate on earth, murders are also on the rise.<sup>112</sup>

In addition to murdering thousands of people, the gangs are responsible for numerous other crimes, including drug-trafficking, violent street crime, weapons smuggling, robbery, extortion, human trafficking, and sexual assault.<sup>113</sup> The gangs also commit

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Mauricio Funes withdrew support for the truce "when it became politically untenable for his political party . . . leading up to the presidential election." Michael Lohmuller, COUNCIL ON HEMISPHERIC AFFAIRS, *Salvadoran President Rejects Gang Truce, Security Policy Remains Unclear* (June 13, 2014), <http://www.coha.org/salvadoran-president-rejects-gang-truce-security-policy-remains-unclear/> [hereinafter COHA Article]. President Funes, on the other hand, blames the truce's failure on escalating violence between competing factions of the M-18 gang. *See id.*

105. SEELKE, *supra* note 104, at 12.

106. A U.S. Congressional report warned that, "should the truce collapse, the gangs could emerge even more powerful and organized after taking advantage of less restrictive prison conditions." SEELKE, *supra* note 104, at 12. This appears to have happened, as a Salvadoran law enforcement official recently said, "We are dealing with a reorganization of the gangs. . . . During the truce, conditions were created for the gangs' evolution and transformation into more sophisticated, stronger and more dangerous criminal organizations." Lorena Baires, *El Salvador: Gang Violence Increases*, INFOSURHOY.COM (May 1, 2014), [https://web.archive.org/web/20140708160542/http://infosurhoy.com/en\\_GB/articles/saii/features/main/2014/05/01/feature-01](https://web.archive.org/web/20140708160542/http://infosurhoy.com/en_GB/articles/saii/features/main/2014/05/01/feature-01).

107. SEELKE, *supra* note 104, at 12.

108. *El Salvador Travel Warning*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE (Apr. 25, 2014), <http://travel.state.gov/content/passports/english/alertswarnings/el-salvador-travel-warning.html> (last visited July 1, 2014) [hereinafter April 2014 El Salvador Travel Warning].

109. *See* Malkin, *supra* note 10.

110. *See* U.N. HOMICIDE REPORT, *supra* note 8, at 126. Although the homicide rate decreased marginally from 91.4 people per 100,000 in 2011 to 90.4 people per 100,000 in 2012, the actual number of homicides rose from 7,104 in 2011 to 7,172 in 2012. *See id.*

111. *See id.* The homicide rate in Honduras is over forty percent higher than Venezuela, the country with the second highest homicide rate in the world. *See id.* at 126–27.

112. *See id.* at 126. The U.N.'s report shows that Guatemala's homicide rate increased from 38.6 homicides per 100,000 people in 2011 to 39.9 homicides per 100,000 people in 2012. These are the latest statistics from the U.N.

113. *See* SEELKE, *supra* note 104, at 4–5; SHIFTER, *supra* note 7, at 6; April 2014 El Salvador Travel Warning, *supra* note 108.

numerous kidnappings throughout the region.<sup>114</sup> This violence affects all portions of the Northern Triangle's population.<sup>115</sup> Indeed, ordinary individuals are regularly victims of the gang violence simply because they live in a region controlled by gangs.<sup>116</sup> The gangs also specifically target various parts of society, such as the police, business owners, women, and girls.<sup>117</sup> In short, "victims of gang violence come from all segments of society."<sup>118</sup>

That said, the chief victims of gang violence are young people.<sup>119</sup> As an initial matter, the MS-13 and M-18 gangs "rely heavily on forced recruitment to expand and maintain their membership."<sup>120</sup> The gangs usually target impoverished and marginalized young people, including children as young as eight years old.<sup>121</sup> In fact, the gangs start recruiting children at schools and youth centers.<sup>122</sup> By using aggressive recruitment tactics,<sup>123</sup> the MS-13 and M-18 gangs now have between 54,000 and 85,000 members in the Northern Triangle.<sup>124</sup>

The gangs then retaliate against young people who refuse to join their ranks. Indeed, the United Nations High Commissioner for Refugees (UNHCR) has recognized that "[t]he primary victims of youth gang-related violence are other young people," especially those who oppose recruitment.<sup>125</sup>

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114. See SEELKE, *supra* note 104, at 4–5; SHIFTER, *supra* note 7, at 6. In fact, the State Department recently said, "In 2013, the number of people reported as missing in El Salvador increased by 93 percent, [and] [a]uthorities believe a significant number of disappearances are related to gang activity." See April 2014 El Salvador Travel Warning, *supra* note 108.

115. See *supra* note 15 and accompanying text.

116. See *In re M-E-V-G*, 26 I. & N. Dec. 227, 251 (BIA 2014) (stating that, in the context of Central America, "the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area."); UNHCR GUIDANCE NOTE, *supra* note 16, at 4 ("Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs.").

117. See UNHCR GUIDANCE NOTE, *supra* note 16, at 4–5 (describing a so-called "typology of victims of organized gangs").

118. *M-E-V-G*, 26 I. & N. Dec. at 250 (quotation marks and citation omitted).

119. See *supra* note 16 and accompanying text.

120. UNHCR GUIDANCE NOTE, *supra* note 16, at 2.

121. See *id.*; FARINA ET AL., *supra* note 16, at 74.

122. JESSICA JONES & JENNIFER PODKUL, WOMEN'S REFUGEE COMM'N, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 10 (2012) ("Gangs have increasingly begun targeting children at their schools, resulting in El Salvador having one of the lowest school attendance rates in Latin America."); see also P.J. Tobia, *No Country for Lost Kids*, PBS NEWSHOUR (June 20, 2014), <http://www.pbs.org/newshour/updates/country-lost-kids/>.

123. See FARINA ET AL., *supra* note 16, at 72–73.

124. See SEELKE, *supra* note 104, at 3 (citations omitted).

125. UNHCR GUIDANCE NOTE, *supra* note 16, at 4; see also FARINA ET AL., *supra* note 16, at 88–92 (discussing how young people who refuse to join the gangs are among the most vulnerable people in Central America).

Northern Triangle community leaders, gang members, and victims all attest to the gangs' violence against young people who oppose recruitment. For example, a judge in San Salvador's juvenile courts told researchers at Harvard Law School, "A youth who refuses to join a gang will likely be killed. This is what I have observed in most of the cases I have dealt with."<sup>126</sup> One former gang member echoed this point, saying, "We killed several [people in the neighborhood] for not wanting to join us. . . . We killed about six guys around thirteen or fourteen years old."<sup>127</sup> Likewise, a seventeen-year-old victim recently told the UNHCR:

I left [El Salvador] because I had problems with the gangs. They hung out by a field that I had to pass to get to school. They said if I didn't join them, they would kill me. I have many friends who were killed or disappeared because they refused to join the gang. I told the gang I didn't want to. . . . The more they saw me refusing to join, the more they started threatening me and telling me they would kill me if I didn't. They beat me up five times for refusing to help them. The pain from the beatings was so bad, I couldn't even stand up. They killed a friend of mine in March because he didn't want to join, and his body wasn't found until May. I went to the police twice to report the threats. They told me that they would do something; but when I saw that they weren't doing anything to help, I knew I had to leave.<sup>128</sup>

Every day, more and more young people reach the same conclusion and, therefore, they flee the Northern Triangle.<sup>129</sup> Many of these youth travel to nearby countries like Nicaragua, Costa Rica, Panama, Mexico, and Belize; in fact, over the past few years, these countries have seen a dramatic increase in the number of asylum applications brought by individuals from El Salvador, Guatemala, and Honduras.<sup>130</sup>

That said, many other young people travel to the United States. Although some parents make the journey with their children,<sup>131</sup> others desperately pay "coyotes," or human smugglers, thousands of

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126. FARIÑA ET AL., *supra* note 16, at 70, 72.

127. *Id.* at 90.

128. UNHCR CHILDREN ON THE RUN REPORT, *supra* note 19.

129. *See infra* notes 139–141 and accompanying text.

130. UNHCR CHILDREN ON THE RUN REPORT, *supra* note 19, at 4, 15.

131. *See* Carrie Kahn, *The Surge in Single Women with Children at the U.S.-Mexican Border*, NPR NEWS (June 20, 2014), <http://www.npr.org/2014/06/20/323844514/single-women-with-young-children-inundate-u-s-mexico-border> ("[I]t's not just minor children rushing to the border. Large numbers of single women with kids are coming as well.").

dollars to take their children to the United States.<sup>132</sup> Those children whose families cannot afford to hire a coyote must walk, hitchhike, and ride on top of freight trains heading north.<sup>133</sup> Some even cross the dangerous Rio Grande river in order to make it to the United States.<sup>134</sup>

This long journey can be deadly. During the trip, criminals sometimes kidnap children and hold them for ransom or subject them to sexual assault.<sup>135</sup> Several children have been maimed or killed after falling off trains.<sup>136</sup> Other children risk their lives wandering across deserts with no food or water.<sup>137</sup> And still others drown trying to swim across rivers.<sup>138</sup>

Despite the treacherous journey, many children continue to arrive at the United States' southern border.<sup>139</sup> In fact, the number of unaccompanied children from El Salvador, Guatemala, and Honduras who have been apprehended by U.S. Customs and Border Protection increased from 3,933 in FY 2011 to 10,146 in FY 2012 to 20,805 in FY 2013.<sup>140</sup> And in FY 2014, U.S. Customs and Border Protection apprehended 51,705 unaccompanied children from the Northern Triangle.<sup>141</sup>

Several studies confirm that these children come to the United States mainly because of societal violence in the Northern Triangle. The UNHCR recently interviewed hundreds of unaccompanied children about why they left their home countries, and a large number specifically discussed the gang violence.<sup>142</sup> In a similar study, the

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132. See Tobia, *supra* note 122.

133. See *id.* (“Those too poor to hire a coyote to arrange transport are forced to walk and hitchhike much of the way. In Mexico they ride atop trains.”).

134. See *id.* (“Crossing the Rio Grande river is also dangerous, especially for a child. [An eleven-year-old boy from Honduras named] Nodwin forded the river in an inflatable raft that sunk when it was punctured on a sharp rock. ‘I went under the water,’ he recalls, ‘but I managed to grab onto a piece of wood, and that’s how I saved myself.’ Nodwin was clinging to that piece of wood when he finally entered the United States.”).

135. See *id.*; Lisa Riordan Seville & Hannah Rappleye, *Border Children Tell Their Stories: Why We Came to the U.S.*, NBC NEWS (June 12, 2014), <http://www.nbcnews.com/news/investigations/border-children-tell-their-stories-why-we-came-us-n129646>.

136. See Tobia, *supra* note 122. For more information about the dangerous journey north via freight train, see Wilson Sayre, *Riding ‘The Beast’ Across Mexico to the U.S. Border*, NPR NEWS (June 5, 2014), <http://www.npr.org/blogs/parallels/2014/06/05/318905712/riding-the-beast-across-mexico-to-the-u-s-border>.

137. See JONES & PODKUL, *supra* note 122, at 8.

138. See *id.*

139. See U.S. Customs and Border Protection Statistics, *supra* note 20.

140. *Id.*

141. *Id.* Notably, this statistic does not capture the large number of single women with children who have recently arrived at the border. See Kahn, *supra* note 131.

142. See UNHCR CHILDREN ON THE RUN REPORT, *supra* note 19. Notably, the report states that “[t]he threat of serious harm at the hands of armed criminal actors was pervasive throughout the [Salvadoran] children’s interviews. The children from El Salvador who had

Women's Refugee Commission found that "[c]hildren from Guatemala, Honduras, and El Salvador cited the growing influence of youth gangs and drug cartels as their primary reason for leaving."<sup>143</sup> And in July 2014, the American Immigration Council issued a report recognizing that "[t]he most common cause of [unaccompanied alien children's] exodus from Central America has been and continues to be increasing gang and cartel violence that disproportionately affects them as young people."<sup>144</sup>

In response to the large number of unaccompanied children arriving at the southern border, some government officials and members of the media acknowledge that these children are fleeing a humanitarian crisis in the Northern Triangle.<sup>145</sup> But what is being overlooked is that many of these children now face their own legal crisis here in the United States. Indeed, the children are put in removal proceedings where they face significant barriers to obtaining relief from removal.

## II. THE LEGAL CRISIS: BARRIERS TO OBTAINING RELIEF FROM REMOVAL

This Part analyzes the hurdles that unaccompanied children from the Northern Triangle must confront while trying to obtain relief from removal. This Part first puts the discussion in context by explaining what these children experience when they arrive at the border. Then, it briefly highlights some of the procedural challenges children face in removal proceedings. Finally, it examines the main forms of relief available to individuals fleeing humanitarian crises and shows that many of the children from the Northern Triangle will face significant substantive challenges while trying to gain these protections. Therefore, this Part concludes that, under our current immigration laws, many of the children are at risk of being deported and facing the same fate as Benito Zaldívar.

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not yet been victims of the violence spoke of their and their families' fear with the same inevitability." *Id.* at 33.

143. JONES & PODKUL, *supra* note 122, at 1.

144. ELIZABETH KENNEDY, AM. IMMIGRATION COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 5 (2014).

145. See, e.g., Haeyoun Park, *Q. and A. Children at the Border*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html>.

*A. Arriving at the Border*

In 2008, President George W. Bush signed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).<sup>146</sup> This law established standards for how federal officials should treat an apprehended “unaccompanied alien child,”<sup>147</sup> which is defined as “a child who has no lawful immigration status in the United States, has not attained 18 years of age, and with respect to whom there is no parent or legal guardian in the United States or . . . [one who] is available to provide care and physical custody.”<sup>148</sup>

With respect to an unaccompanied child from El Salvador, Guatemala, or Honduras, the DHS first processes the child by gathering biographic and biometric information, confirming the child’s unaccompanied status, conducting an initial health screening, and running a criminal background check.<sup>149</sup> The TVPRA then dictates that, within seventy-two hours of determining that the child meets the definition of an “unaccompanied alien child,” the DHS must transfer custody of the child to an office within the Department of Health and Human Services (HHS) known as the Office of Refugee Resettlement (ORR).<sup>150</sup>

The ORR then completes a thorough intake process and initially places the child in a state-licensed shelter or other facility.<sup>151</sup> That facility must provide the child with a classroom education, recreational activities, and basic health care, including mental health

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146. 8 U.S.C. § 1232 (2012). This measure, aimed at combating sex trafficking, “breez[ed] through Congress . . . with bipartisan backing [and] without so much as a recorded vote in the Senate.” Carl Hulse, *Migrant Surge Traced to Law on Trafficking*, N.Y. TIMES, July 8, 2014, at A1.

147. See 8 U.S.C. § 1232.

148. 6 U.S.C. § 279(g)(2) (2012). Notably, “[a] juvenile is classified as *unaccompanied* if neither a parent nor a legal guardian is with the juvenile alien at the time of apprehension, or within a geographic proximity to quickly provide care for the juvenile.” LISA SEGHETTI ET AL., CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 n.9 (2014) (citing 8 C.F.R. § 236.3(b)(1) (2012)).

149. See SEGHETTI, *supra* note 148, at 5, 5 n.20; *Unaccompanied Children at the Southwest Border*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/unaccompanied-children-southwest-border> (last visited Oct. 2, 2015).

150. 8 U.S.C. § 1232(b)(3); see also SEGHETTI, *supra* note 148, at 5 n.21 (“The 72-hour time period was established in statute by the TVPRA.”). For more information on the ORR, see *Office of Refugee Resettlement*, U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.acf.hhs.gov/programs/orr>.

151. See OLGA BYRNE & ELISE MILLER, VERA INST. FOR JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS 14–15 (2012); see also 8 U.S.C. § 1232(c) (noting that, ultimately, HHS is responsible for “[p]roviding safe and secure placements for [the unaccompanied] children”).

services.<sup>152</sup> Most children remain in the shelter between one week and four months.<sup>153</sup>

During this time, and in accordance with the TVPRA, the ORR works on promptly placing the child “in the least restrictive setting that is in the best interest of the child.”<sup>154</sup> The ORR usually places the child with a relative, family friend, or other sponsor in the United States.<sup>155</sup> Finally, while all of this is happening, the DHS initiates removal proceedings against the child.<sup>156</sup> During removal proceedings, the child runs into both procedural and substantive hurdles.<sup>157</sup>

### *B. Procedural Hurdles*

The DHS initiates removal proceedings against the child by serving him or her with a Notice to Appear (NTA) and filing that NTA at one of the many immigration courts across the country.<sup>158</sup> An immigration judge then conducts the removal proceedings, which are administrative hearings.<sup>159</sup> A DHS trial attorney represents the

152. See BYRNE & MILLER, *supra* note 151, at 14.

153. *Id.* at 4. The average stay is sixty-one days. *Id.*

154. 8 U.S.C. § 1232(c)(2).

155. See BYRNE & MILLER, *supra* note 151, at 17–19. Notably, “[i]n making these placement determinations, ORR conducts a background investigation . . . of the adult assuming legal guardianship for the UAC.” SEGHEITI, *supra* note 148, at 5; see also 8 U.S.C. § 1232(c) (establishing the procedures HHS must follow to ensure it is “[p]roviding safe and secure placements for children”).

156. See 8 U.S.C. § 1232(a)(5)(D) (“Any unaccompanied alien child sought to be removed by the Department of Homeland Security . . . shall be placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a).”).

157. See generally LISA FRYDMAN ET AL., *A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* (2014). In this incredibly comprehensive report, Frydman and her colleagues first discussed the “procedural challenges” and “substantive challenges” facing unaccompanied children in removal proceedings. See *id.* at 8–60 (examining the substantive challenges in great detail); *id.* at 61–74 (examining the procedural challenges at length). This rich resource, which is repeatedly cited *infra*, focuses on the lack of child-sensitive standards when it comes to both the substantive forms of relief from removal and the procedures in immigration courts. The report then offers a series of specific recommendations, including calling on Congress to “enact legislation mandating the provision of legal counsel for unaccompanied children in deportation proceedings.” See *id.* at vii. This is just one of the report’s many thoughtful recommendations. See generally *id.*

158. See 8 U.S.C. § 1229 (2012); see also THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1148 (7th ed. 2012) (“Proceedings formally commence when the government files the NTA with the clerk of the immigration court.”). The immigration courts are housed within the United States Department of Justice’s Executive Office for Immigration Review. See *id.* at 1159. For an interesting discussing of the possible flaws in this structure, as well as a novel solution, see Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER’S IMMIGR. BULL. 3 (2008).

159. See 8 U.S.C. § 1229a(a)(1), (b)(1).



government at these hearings, and, assuming that the child has no lawful immigration status in the United States, the child bears the burden of proving that he or she is entitled to some form of relief from removal.<sup>160</sup> Ultimately, the immigration judge formally adjudicates the child's case by granting or denying his or her application for relief.<sup>161</sup>

As an initial matter, these removal proceedings can be very intimidating to a child.<sup>162</sup> The child recently fled his or her home country and may be far away from family. Moreover, the child must now face a government lawyer in an adversarial proceeding before an immigration judge in a formal courtroom.<sup>163</sup> The University of California Hastings College of the Law Center for Gender and Refugee Studies recently represented one child in removal proceedings whose experience is illustrative:

A Honduran boy fled brutal violence at the hands of gang members. He was apprehended at the border, placed in ORR custody, and put in removal proceedings. The boy was terrified of being deported, because he was convinced that gang members would kill him on sight. . . . He could not sleep the nights before each court appearance. He also vomited before each court appearance and shook uncontrollably every time he entered the courtroom.<sup>164</sup>

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160. See 8 U.S.C. § 1229a(c)(4).

161. See 8 U.S.C. § 1229a(c)(1)(A). Once the immigration judge issues a decision, either the non-citizen child or DHS may appeal that decision to the BIA. See 8 C.F.R. § 1003.1(b)(3) (2015). The BIA is the appellate body within the Executive Office for Immigration Review. See *id.* at § 1003.1(a)(1). If the non-citizen child loses before the BIA, he or she may “file a petition for review in the United States Court of Appeals for the circuit in which the removal hearing was held.” See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 684 (6th ed., Foundation Press 2015) (citing 8 U.S.C. § 1252(b)(2) (2012)).

There is, however, an important exception to this basic process in which the litigation begins in an immigration court. According to the TVPRA, an unaccompanied child who applies for asylum will first have his or her application considered by a United States Citizenship and Immigration Services asylum officer in a non-adversarial setting. See William Wilberforce Trafficking Victims Reauthorization Act, Pub. L. No. 110-457, § 235(d)(7)(B), 112 Stat. 5044, 5081 (2008). But if the asylum officer does not grant the child's application, the officer will refer the child's asylum case to an immigration court. See *Types of Asylum Decisions*, U.S. CITIZENSHIP & IMMIGRATION SERV., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> (last visited Oct. 2, 2015) (“If we are unable to approve your asylum application and you are in the United States illegally, we will forward (or refer) your asylum case to the Immigration Court.”).

162. See FRYDMAN ET AL., *supra* note 157, at 62–63 (discussing the intimidating nature of removal proceedings).

163. See *id.*

164. *Id.* at 63.

The Executive Office for Immigration Review (EOIR) has taken steps to reduce the intimidating nature of removal proceedings for unaccompanied children.<sup>165</sup> In fact, EOIR even adopted “Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children.”<sup>166</sup> These guidelines provide, among other things, that “[e]very immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom.”<sup>167</sup> Nevertheless, these guidelines are mere “suggestions,”<sup>168</sup> and they cannot change the fact that “[r]emoval proceedings remain inherently adversarial in nature.”<sup>169</sup>

These proceedings are also complex.<sup>170</sup> Indeed, for a child to establish that he or she is eligible for relief from removal, that child must present evidence on his or her own behalf and, ideally, should be prepared to challenge the government’s evidence and cross-examine its witnesses.<sup>171</sup> Beyond these evidentiary hurdles, “the proceedings are governed by a complicated substantive legal scheme, which includes international law, federal statutes and regulations, and case law that varies by jurisdiction.”<sup>172</sup>

Moreover, most unaccompanied children are not represented by a lawyer in their removal proceedings.<sup>173</sup> The INA contains a section entitled “right to counsel,” which provides that an individual in removal proceedings “shall have the privilege of being represented

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165. *See id.* at 61 (“EOIR should be commended for having taken several positive steps to address the way immigration judges handle children’s cases.”).

166. Memorandum from David L. Neal, Chief Immigration Judge, to All Immigration Judges, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), *available at* <http://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf> [hereinafter EOIR Guidelines]; *see also* FRYDMAN ET AL., *supra* note 157, at 61 (discussing these guidelines in detail).

167. EOIR Guidelines, *supra* note 166, at 3; *see also* FRYDMAN ET AL., *supra* note 157, at 61 (discussing this very provision).

168. EOIR Guidelines, *supra* note 166, at 3; *see also* FRYDMAN ET AL., *supra* note 157, at 61 (“The EOIR Guidelines are not binding on all judges, nor do judges follow them consistently.”).

169. FRYDMAN ET AL., *supra* note 157, at 62; *see also id.* at 84 (“Children further experience difficulties in the immigration system due to the adversarial nature of removal proceedings designed for adults.”).

170. *See id.* at 3 (calling removal proceedings “undeniably complicated”); *id.* at 84 (characterizing the proceedings as “highly complex”); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 338 (2013) (discussing the evidentiary and legal complexity of removal proceedings).

171. *See* King, *supra* note 170, at 338 (“The proceedings allow for the examination of evidence against the child, the child’s presentation of evidence on her own behalf, and the opportunity for the child to cross-examine government’s witnesses.”) (citing 8 U.S.C. § 1229a(b)(4)(B)).

172. King, *supra* note 170, at 338 (footnotes omitted).

173. *See id.* (“Despite this complexity and the high stakes for unaccompanied minors, at least half of these children face removal proceedings without an attorney.”); FRYDMAN ET AL.,

by . . . counsel.”<sup>174</sup> But this section explicitly states that the privilege comes “at no expense to the Government.”<sup>175</sup> And since removal proceedings are considered civil in nature,<sup>176</sup> the Sixth Amendment’s right to appointed counsel in criminal proceedings does not apply.<sup>177</sup> As a result, most unaccompanied children attend their removal proceedings without a lawyer.<sup>178</sup>

It is true that the TVPRA requires HHS to “make every effort to utilize the services of pro bono counsel who agree to provide representation to [unaccompanied] children without charge.”<sup>179</sup> It is also true that many lawyers and law school clinics provide pro bono representation to unaccompanied children in removal proceedings.<sup>180</sup> Nevertheless, as Professor Shani King points out, these “pro bono attorneys . . . reach only a fraction of the children who need representation.”<sup>181</sup> According to a 2014 joint report issued by the Center for Gender and Refugee Studies and Kids in Need of Defense, “most children appearing before immigration judges are still unrepresented.”<sup>182</sup>

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*supra* note 157, at 3 (“[M]ore than half [of the children in removal proceedings] must navigate this undeniably complicated adversarial system without an attorney while using an unfamiliar language.” (footnote omitted)).

174. 8 U.S.C. § 1362 (2012).

175. *Id.*

176. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country.”).

177. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIENS’ RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2014) (“[T]he Sixth Amendment explicitly refers to ‘the Assistance of Counsel’ in ‘criminal proceedings,’ and removal proceedings are civil in nature. Thus, courts have deemed it appropriate that aliens subject to removal receive a different degree of protections than criminal defendants because removal proceedings are civil, not criminal.” (footnotes omitted)).

178. FRYDMAN ET AL., *supra* note 157, at iii (“[T]he majority of unaccompanied children facing removal do not have lawyers.”).

179. 8 U.S.C. § 1232(c)(5) (2012); *see also* FRYDMAN ET AL., *supra* note 157, at 75 (quoting this same language).

180. FRYDMAN ET AL., *supra* note 157, at 75 (“This directive [from the TVPRA] has helped support an innovative public-private partnership model in which pro bono attorneys from law firms, corporations, and law schools represent unaccompanied children in immigration proceedings. The model has been increasingly effective, establishing hundreds of partnerships that have resulted in the representation of more than 2,300 children in their removal proceedings, and creating a nationwide pool of thousands of attorneys trained to represent unaccompanied children.”).

181. King, *supra* note 170, at 341.

182. FRYDMAN ET AL., *supra* note 157, at iii. Recently, bills introduced in both the House of Representatives and Senate would require the Government to provide counsel to unaccompanied children in removal proceedings. *See* S. 744, 113th Cong. (2013–14); H.R. 15, 113th Cong. (2013–14); H.R. 4936, 113th Cong. (2013–14). However, to date, Congress has not passed these bills.

In June 2014, the Department of Justice and the Corporation for National and Community Service, the organization that administers the AmeriCorps program, announced a new grant program known as Justice AmeriCorps, “that will enroll approximately 100 lawyers and

Without a lawyer, a child in removal proceedings is at a severe disadvantage. After all, “representation is often considered the most important factor affecting the outcome of immigration proceedings.”<sup>183</sup> Indeed, studies show that unrepresented individuals are much less likely to obtain relief from removal than represented individuals.<sup>184</sup> For example, in one comprehensive study, three scholars reached an important conclusion:

[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analyses confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.<sup>185</sup>

Simply put, without an attorney, a child’s immigration case has little chance of even getting off the ground.

In sum, the unaccompanied children from the Northern Triangle are put in removal proceedings that can be very intimidating and complex. Plus, many of the children will have to face these proceedings without a lawyer, which makes “a positive outcome . . . far less likely.”<sup>186</sup>

### C. *Substantive Hurdles*

Beyond the foregoing procedural challenges, many of the children will also face significant substantive hurdles when trying to

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paralegals as AmeriCorps members to provide legal services to the most vulnerable of the [ ] [unaccompanied] children.” See Press Release, U.S. Dep’t of Justice, Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors (June 6, 2014), <http://www.justice.gov/opa/pr/2014/June/14-ag-609.html>. However, immigrants’ advocates have suggested “that at best it would only touch a fraction of all the unaccompanied minors expected to appear in court in the coming months.” Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES, June 7, 2014, at A11.

183. King, *supra* note 170, at 338.

184. See *id.* (“[S]tudies show a correlation between representation and outcome.”).

185. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007); see also King, *supra* note 170, at 338 n.43 (discussing this data).

186. FRYDMAN ET AL., *supra* note 157, at iii. For a thorough discussion of other “procedural issues in children’s immigration cases,” see *id.* at 61–74.

avoid deportation.<sup>187</sup> This Part examines the main forms of relief available to individuals fleeing humanitarian crises, focusing on asylum.<sup>188</sup> It also briefly considers protection under the Convention Against Torture, visas for victims of human trafficking or other crimes, and special immigrant juvenile status.<sup>189</sup> This Part concludes that many of the children from the Northern Triangle will have a hard time gaining these protections.<sup>190</sup>

## 1. Asylum

Young people fleeing gang recruitment in the Northern Triangle arrive in the United States and often apply for asylum.<sup>191</sup> U.S. asylum law is rooted in the principle of international refugee protection established in the 1951 Convention Relating to the Status of Refugees<sup>192</sup> and reaffirmed in the 1967 Protocol Relating to the Status of Refugees.<sup>193</sup> In 1968, the United States signed the Protocol and thus became bound by its provisions and those of the Convention.<sup>194</sup> Then, twelve years later, Congress passed the Refugee Act of 1980, which amended the INA, and in many ways, brought federal immigration law into agreement with the Convention and Protocol.<sup>195</sup>

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187. Lisa Frydman and her colleagues first discussed the “substantive challenges” that unaccompanied children confront in removal proceedings in their 2014 report. *See id.* at 8–60 (examining these challenges).

188. *See also id.* at 8-24 (discussing the many “substantive issues in children’s asylum claims” and, ultimately, recommending that immigration officials adopt child-sensitive standards in asylum cases).

189. *See also id.* at 24-25, 37-53 (examining the substantive challenges surrounding these other forms of relief from removal).

190. *See id.* at v. (“[T]he current forms of relief do not provide adequate protection, especially for unaccompanied children, from return to situations where they face . . . circumstances harmful to their well-being.”); *id.* at 54 (“Current law does not provide sufficient immigration options for children. Existing humanitarian relief . . . benefit[s] only a small percentage of children.”); *id.* (“[C]hild applicants face significant barriers to being granted the primary forms of humanitarian relief . . . that are available to children.”).

191. *See* Emily Bazelon, *Who Gets to Stay?*, SLATE (Sept. 12, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/immigrants\\_seeking\\_asylum\\_courts\\_say\\_yes\\_for\\_domestic\\_violence\\_no\\_for\\_gang.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/immigrants_seeking_asylum_courts_say_yes_for_domestic_violence_no_for_gang.html) (discussing the asylum claims made by unaccompanied children).

192. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

193. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

194. *See* DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 90 (2d ed., 2013).

195. *See id.* at 91; Kniffin, *supra* note 51, at 320 (“In 1980, Congress passed the 1980 Refugee Act, conveying its intent to bring the United States into compliance with both the *Convention* and the *Protocol*.”).

Now, under the INA, a person may qualify for asylum if he or she meets the definition of a refugee.<sup>196</sup> A refugee is defined as,

any person who is outside any country of such person's nationality . . . 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.<sup>197</sup>

Thus, in order to be eligible for asylum, an individual must establish that (1) he or she suffered past persecution or has a well-founded fear of future persecution (2) on account of (3) a statutorily protected ground—race, religion, nationality, membership in a particular social group, or political opinion, and (4) the government in his or her home country is either unable or unwilling to protect him or her from that persecution.<sup>198</sup> The asylum applicant must also demonstrate that he or she warrants a favorable exercise of discretion.<sup>199</sup>

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196. 8 U.S.C. § 1158(b)(1)(A) (2012).

197. 8 U.S.C. § 1101(a)(42)(A) (2012).

198. *Id.* If the asylum applicant establishes past persecution, then he or she is “presumed to have a well-founded fear of [future] persecution on the basis of the original claim.” 8 C.F.R. § 208.13(b)(1) (2015). The burden then switches to the DHS to rebut that presumption by showing, by a preponderance of the evidence, that either (1) “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion;” or (2) “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . , and under all the circumstances, it would be reasonable to expect the applicant to do so.” *Id.* § 208.13(b)(1)(i)(A)–(B).

That said, even if the asylum applicant cannot prove that he or she suffered persecution in the past, the applicant may still qualify for asylum by showing that he or she has a well-founded fear of future persecution that is both objectively and subjectively reasonable. *See id.* § 208.13(b); *see also* Jin Chen v. Holder, 526 F. App’x 85, 87 (2d Cir. 2013) (“An alien applying for asylum based on a well-founded fear of future persecution must establish both an objectively and subjectively reasonable fear of future persecution.”).

199. *See* 8 U.S.C. § 1158(b)(1)(A) (2012); 8 U.S.C. § 1229a(c)(4)(A) (2012) (“An alien applying for relief or protection from removal has the burden of proof to establish that the alien—(i) satisfies the applicable eligibility requirements; *and* (ii) with respect to any form or relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.” (emphasis added)). Ultimately, if the applicant receives asylum, he or she “may remain in the United States and eventually obtain permanent residency and citizenship.” Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 385 (2014) (citing 8 U.S.C. § 1158).

In addition to asylum, an individual can apply for withholding of removal under 8 U.S.C. § 1231(b)(3). This provision captures the international legal principle of “nonrefoulement.” *See* MARTIN ET AL., *supra* note 194, at 91. It states that the Government “may not remove an alien to a country if . . . the alien’s life or freedom would be threatened . . . because of the



Many children fleeing gang recruitment in the Northern Triangle should be able to prove both the first and fourth elements of an asylum case. After all, with respect to the first element, numerous children have been threatened, beaten, and raped for refusing to join the gangs,<sup>200</sup> and courts have determined that each of these can constitute “persecution.”<sup>201</sup> With respect to the fourth element, there appears to be ample evidence that the governments in the Northern Triangle are at least unable, if not unwilling, to control the gangs.<sup>202</sup>

That said, the children will have a much harder time establishing that the persecution they are fleeing is on account of a statutorily protected ground.<sup>203</sup> For starters, many children fleeing gang recruitment are unable to show that they have been or would be persecuted because of their race, religion, or nationality.<sup>204</sup> Therefore, most allege persecution on account of their membership in a particular social group or, to a lesser extent, their political opinion.<sup>205</sup> In fact, the most common arguments made by children refusing to join gangs are that they have been or will be targeted

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alien’s race, religion, nationality, membership in a particular social group, or political opinion.” See 8 U.S.C. § 1231(b)(3) (2012). While there are some differences “between asylum and withholding of removal, each protection requires a claimant to demonstrate his fear of persecution is on account of [a statutorily protected ground].” Linda Kelly Hill, *The Gangs of Asylum*, 46 GA. L. REV. 639, 640–41 (2012). Thus, these two forms of relief are effectively considered together in this section on asylum.

200. See *supra* notes 113–128 and accompanying text.

201. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* §§ 4:13, 4:19 (2014). Although neither the INA nor federal regulations define “persecution,” courts have described the term as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” *Id.* § 4:4 (quotation marks and citations omitted). These courts have also explicitly determined that threats, beatings, and rapes can all meet this definition. See *id.* §§ 4:13, 4:19.

202. See KATE M. MANUEL, *CONG. RESEARCH SERV.*, R43716, *ASYLUM AND GANG VIOLENCE: LEGAL OVERVIEW 1* (2014) (“Gang activity is wide-spread in El Salvador, Guatemala, and Honduras, and attempts by these governments to control such activity have been seen as ineffective, at best.” (footnote omitted)).

203. See 2 *Immigration Law Service* 2d § 10:164 (2014) (“Gang-related asylum claims have been filed by applicants who . . . oppose recruitment and gang-related activity. These applicants face difficulties in their claims in defining the ground for asylum and the nexus between that ground and the persecution that they have faced or will face in the future as a result of recruitment efforts made against them.”).

204. See Kniffin, *supra* note 51, at 322 (“[M]any individuals fleeing MS-13 cannot demonstrate that they suffered persecution due to their race, religion, [or] nationality.”).

205. See KATE M. MANUEL & MICHAEL JOHN GARCIA, *CONG. RESEARCH SERV.*, R43623, *UNACCOMPANIED ALIEN CHILDREN—LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS 16* (2014) (“Those seeking asylum based on gang-related violence have often asserted persecution on account of membership in a particular social group or, less commonly, political opinion.”); ANKER, *supra* note 201, § 5:56 (“[I]ncreasing numbers of claims have been brought by Central Americans fleeing warfare involving ‘gangs’ in that region. Some claims have been raised under the political opinion ground, but many have been conceptualized under the particular social group (PSG) ground.”); UNHCR GUIDANCE NOTE, *supra* note 16,



back home (1) because of their membership in the particular social group of youth who have been recruited by gangs but refused to join,<sup>206</sup> and/or (2) because of their anti-gang political opinion.<sup>207</sup> However, as the following discussion shows, the case law on membership in a particular social group and political opinion developed in such a way that it now serves as a major roadblock to these asylum claims.<sup>208</sup>

*a. Membership in a Particular Social Group*

Many young people fleeing gang recruitment contend that they are eligible for asylum based on their membership in a particular social group.<sup>209</sup> As an initial matter, “Congress did not directly speak on the issue of what constitutes a ‘particular social group.’”<sup>210</sup> Indeed, the statute does not define the phrase,<sup>211</sup> and the legislative history is likewise unhelpful.<sup>212</sup> Therefore, the BIA, federal circuit

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at 10 (“Jurisprudential developments suggest that gang-related asylum claims have most frequently been analysed within the 1951 Convention ground of ‘membership of a particular social group’ and/or ‘political opinion.’”).

206. See, e.g., *In re M-E-V-G-*, 26 I. & N. Dec. 227, 228 (BIA 2014) (defining the social group as “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 593 (BIA 2008) (“[P]ersons resistant to gang membership (refusing to join when recruited).”); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 581 (BIA 2008) (“Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang.”).

207. See, e.g., *In re E-A-G-*, 24 I. & N. Dec. at 596; *In re S-E-G-*, 24 I. & N. Dec. at 588; *INS v. Elias-Zacarias*, 502 U.S. 478, 480 (1992).

208. See Hill, *supra* note 199, at 641 (“[V]irtually all permutations of gang-based claims are being denied.”); Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 *YALE J. INT’L L. ONLINE* 31, 36 (2012) (recognizing that the BIA’s case law regarding social group “appears to be a serious impediment to gang-based asylum,” and adding that “the BIA has yet to make a favorable ruling on [political opinion gang-based asylum] claims.”).

209. See Galya Ruffer, *Gang-Based Asylum Claims*, RIGHTS IN EXILE PROGRAMME, <http://www.refugeelegalaidinformation.org/gang-based-asylum-claims> (last visited July 18, 2014) (“Most of the gang-related asylum cases are made under the ground of ‘particular social group’ which is generally a contested and evolving area of asylum law.”); Kniffin, *supra* note 51, at 322 (“[M]ost [individuals fleeing MS-13] base their asylum claim on their membership in a *particular social group*.” (emphasis in original)).

210. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006).

211. See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1095 (9th Cir. 2013) (Kozinski, C.J., dissenting) (“The asylum statute uses the term ‘particular social group’ but gives no clue as to what it means.”); *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (“Virtually any set including more than one person could be described as a ‘particular social group.’ . . . [T]he statutory language standing alone is not very instructive.”).

212. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 *CORNELL INT’L L.J.* 505, 514 (1993) (“The legislative history of the 1980 Refugee Act sheds little light on the social group aspect of the refugee definition.”).

courts, and scholars all recognize that “particular social group” is an ambiguous phrase in the INA.<sup>213</sup> Moreover, Congress delegated law-making power to the Attorney General to interpret ambiguous provisions of the INA, and the Attorney General, in turn, delegated this power to the BIA.<sup>214</sup> Thus, federal circuit courts generally give *Chevron* deference to the BIA’s interpretation of “particular social group.”<sup>215</sup> Ultimately, the BIA defined that phrase through a case-by-case process,<sup>216</sup> and, in doing so, began to close the doors to asylum for young people fleeing gang recruitment.<sup>217</sup>

i. The Starting Point: “A Common, Immutable Characteristic”

The BIA first defined “particular social group” in 1985 in *Matter of Acosta*.<sup>218</sup> There, the BIA said that the other statutorily protected grounds—race, religion, nationality, and political opinion—each involve “an immutable characteristic: a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>219</sup> The BIA likewise interpreted “particular social

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213. See, e.g., *In re M-E-V-G*, 26 I. & N. Dec. 227, 230 (BIA 2014) (“The phrase ‘membership in a particular social group’ . . . is ambiguous and difficult to define.”); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir. 2008) (“‘Particular social group’ is an ambiguous phrase.”); Brian Edstrom, *Assessing Asylum Claims from Children Born in Violation of China’s One-Child Policy: What the United States Can Learn from Australia*, 27 WIS. INT’L L.J. 139, 148 (2009) (noting that “one of the most ambiguous, problematic, and discussed portions of the definition of the term ‘refugee’ is the phrase ‘membership in a particular social group.’”).

214. See *Negusie v. Holder*, 555 U.S. 511, 516–17 (2009) (“Congress has charged the Attorney General with administering the INA, and a ruling by the Attorney General with respect to all questions of law shall be controlling. . . . The Attorney General, in turn, has delegated to the BIA the discretion and authority conferred upon the Attorney General by law in the course of considering and determining cases before it.” (internal citations and quotation marks omitted)).

215. See, e.g., *Cervantes v. Holder*, 597 F.3d 229, 232 (4th Cir. 2010) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). According to *Chevron* deference to the BIA, of course, means that the court “must uphold the [agency’s] interpretation as long as it is reasonable.” *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 89 (2007) (citing *Chevron*, 467 U.S. at 842–43; see also *Chevron*, 467 U.S. at 844 (saying that a reviewing court must not disturb “a reasonable interpretation made by the administrator of an agency.” (footnote omitted))).

216. See *M-E-V-G*, 26 I. & N. at 231 (“Given the ambiguity and the potential breadth of the phrase ‘particular social group,’ we favored a case-by-case determination of the particular kind of group characteristics that would qualify under the Act.”).

217. See Kniffin, *supra* note 51, at 327 (saying that the BIA’s adjudication of social group claims “has effectively shut the doors of the courthouse to . . . [those] fleeing the violence of MS-13 in El Salvador, and other Central American countries.”).

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

219. *Id.*

group” as “a group of persons all of whom share a common, immutable characteristic . . . one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>220</sup>

For two decades, the BIA’s decision in *Acosta* served as the framework for analyzing particular social group claims.<sup>221</sup> However, it was not clear whether young people who flee gang recruitment could be seen as sharing “a common, immutable characteristic.”<sup>222</sup> Before this question could be answered definitively, the BIA expanded its definition of “particular social group” to include the concepts of “social visibility” and “particularity.”<sup>223</sup>

## ii. Bringing in “Social Visibility” and “Particularity”

The BIA first introduced the concept of “social visibility” in 2006 in *Matter of C-A*.<sup>224</sup> That case involved an asylum applicant who argued that he had suffered past persecution in Colombia on account of his membership in the particular social group of “noncriminal drug informants working against the Cali drug cartel.”<sup>225</sup>

The BIA began its analysis by stating and applying the *Acosta* formulation.<sup>226</sup> But the BIA did not base its decision solely on whether members of the proposed social group shared “a common, immutable characteristic.” Rather, it also “considered as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group.”<sup>227</sup>

With this in mind, the BIA turned to the proposed social group and held that it was not “socially visible.”<sup>228</sup> It explained that “the conduct at issue . . . is generally out of the public view. In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered.”<sup>229</sup> Thus, the BIA denied the

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220. *Id.* at 233.

221. See ANKER, *supra* note 201, § 5:43 (“*Acosta* has provided the accepted framework for analyzing [particular social group].”).

222. See *Acosta*, 19 I. & N. Dec. at 233.

223. *In re M-E-V-G*, 26 I. & N. Dec. 227, 232 (BIA 2014) (discussing the BIA’s evolving definition of “particular social group”).

224. *In re C-A*, 23 I. & N. Dec. 951, 951 (BIA 2006).

225. *Id.* at 957.

226. *Id.* at 955–59.

227. *Id.* at 957.

228. See *id.* at 960–61.

229. *Id.* at 960.

asylum claim in part because it determined that members of Colombian society did not recognize noncriminal informants as a distinct group.<sup>230</sup>

Six months later, in *Matter of A-M-E- & J-G-U*, the BIA included the concept of “particularity” in its analysis of a social group claim.<sup>231</sup> That case involved asylum applicants who claimed that they had a well-founded fear of future persecution in Guatemala on account of their membership in the particular social group of “affluent Guatemalans.”<sup>232</sup>

The BIA, however, held that this proposed group was not cognizable in part because it was not defined with sufficient “particularity.”<sup>233</sup> The BIA explained that “[t]he terms ‘wealthy’ and ‘affluent’ standing alone are too amorphous to provide an adequate benchmark for determining group membership.”<sup>234</sup> Thus, the BIA concluded “that the proposed group of wealthy Guatemalans is not . . . sufficiently defined as to meet the requirements of a *particular* social group within the meaning of the refugee definition.”<sup>235</sup> Accordingly, the BIA denied the asylum applications.<sup>236</sup>

Ultimately, in the foregoing cases, the BIA expanded its definition of “particular social group” to include the concepts of “social visibility” and “particularity.” However, the BIA did not make it clear whether these concepts *must* be met in order for an individual to establish a legally cognizable social group. And, more importantly, the BIA had not decided whether young people fleeing gang recruitment constituted a valid social group under its changing definition. These issues were resolved in 2008 in *Matter of S-E-G*.<sup>237</sup>

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230. *Id.* at 960–61.

231. *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69 (BIA 2007). It is true that, in *Matter of C-A*, the BIA briefly mentioned “the requirement of particularity.” *In re C-A*, 23 I. & N. Dec. at 957. But it was not until *In re A-M-E- & J-G-U* that the BIA focused more directly on “particularity” as a separate consideration in the social group analysis. *See* 24 I. & N. Dec. at 76.

232. 24 I. & N. Dec. at 73.

233. *Id.* at 76.

234. *Id.* at 76. The BIA reasoned that, “[d]epending upon one’s perspective, the wealthy may be limited to the very top echelon; but a more expansive view might include small business owners and others living a relatively comfortable existence in a generally impoverished country. Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.” *Id.* (footnote omitted).

235. *Id.* at 74.

236. *Id.* at 77.

237. *In re S-E-G*, 24 I. & N. Dec. 579 (BIA 2008).

iii. Establishing and Maintaining Three Distinct Requirements  
and Repeatedly Rejecting Claims by Youth  
Fleeing Gang Recruitment

In *S-E-G*, the BIA put together its evolving definition of “particular social group,” and, in doing so, rejected the asylum claims of youth who had been recruited by gangs in the Northern Triangle but refused to join.<sup>238</sup> The case involved sixteen-year-old brothers and all too familiar facts:

[T]he MS-13 stole money from the brothers, harassed and beat them for refusing to join their gang, and threatened to rape or harm [their teenage sister]. . . . [A]rmed MS-13 gang members warned the respondents that the brothers must join the gang or else their bodies might end up in a dumpster or in the street someday. . . . Eventually, the MS-13 warned the respondents that they had been given sufficient time to make a decision about whether to join the gang, and they advised the respondents to take the gang seriously because the threats were not a game. . . . [T]he respondents also learned that the MS-13 shot and killed a young boy in the neighborhood after he refused to join the gang.<sup>239</sup>

Fearing for their lives, the brothers fled El Salvador with their sister, came to the United States, and applied for asylum.<sup>240</sup> They argued that they suffered past persecution on account of their membership in the particular social group of “Salvadoran youths who have resisted gang recruitment.”<sup>241</sup>

The BIA began by articulating the requirements of a legally cognizable social group.<sup>242</sup> The BIA first recognized that, pursuant to *Acosta*, a proposed group’s members must “‘share a common, immutable characteristic . . . that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.’”<sup>243</sup> The BIA then added that “membership in a purported social group [also] *requires* that the group have particular and well-defined boundaries,

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238. *See id.*

239. *Id.* at 579–80.

240. *Id.*

241. *Id.* at 582. The sister applied for asylum on account of her membership in the proposed social group of “family members of such Salvadoran youth.” *Id.*

242. *See id.* at 582–83.

243. 24 I. & N. Dec. at 582–83 (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

and that it possesses a recognized level of social visibility.”<sup>244</sup> The BIA explained that it was elevating the concepts of “particularity” and “social visibility” to separate requirements in order to provide “greater specificity to the definition of a social group.”<sup>245</sup> Thus, the BIA established that an individual seeking asylum based on his membership in a particular social group must prove that his group is (1) made up of members who share a common, immutable characteristic, (2) defined with sufficient particularity, and (3) socially visible.<sup>246</sup>

The BIA then applied these requirements to the facts in the case.<sup>247</sup> The BIA did not clearly decide whether members of the proposed social group first shared “a common, immutable characteristic.”<sup>248</sup> Instead, it quickly turned to the second and third requirements and held that the purported group did not satisfy either the “particularity” or “social visibility” standards.<sup>249</sup>

With respect to “particularity,” the BIA said, “the key question is whether the proposed description is sufficiently ‘particular’ or is ‘too amorphous . . . to create a benchmark for determining group membership.’”<sup>250</sup> The BIA decided that the purported social group, “Salvadoran youths who have resisted gang recruitment,” lacked particularity because it “ma[de] up a potentially large and diffuse segment of society.”<sup>251</sup> It noted that the brothers tried “to limit or define their proposed group by claiming that it [was] comprised of male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment.”<sup>252</sup> But the BIA said “these characteristics remain amorphous because ‘people’s ideas of what those terms mean can vary.’”<sup>253</sup>

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244. 24 I. & N. Dec. at 582 (emphasis added) (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007) and *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006)).

245. 24 I. & N. Dec. at 582; see also *In re M-E-V-G-*, 26 I. & N. Dec. 227, 232–33 (BIA 2014) (explaining its decision in *Matter of S-E-G-*).

246. 24 I. & N. Dec. at 582–83.

247. See *id.* at 583–88.

248. See *id.* at 583–84.

249. *Id.* at 583 (“[W]e find that neither of the social groups proposed by the respondents satisfies the standards of ‘particularity’ or ‘social visibility’ that we have recently explicated.”).

250. *Id.* at 584 (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)); see also *id.* at 584 (saying that the relevant test “is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”).

251. *Id.* at 585.

252. *Id.*

253. *Id.* (quoting *Davila-Mejia*, 531 F.3d at 629).

Thus, the BIA concluded that the proposed social group was not defined with sufficient particularity.<sup>254</sup>

With respect to “social visibility,” the BIA explained “that the shared characteristic of the group should generally be recognizable by others in the community.”<sup>255</sup> Although the BIA acknowledged that the brothers had been threatened and beaten by MS-13 gang members, it said there was “little in the background evidence of record to indicate that Salvadoran youth who are recruited by gangs but refuse to join . . . would be ‘perceived as a group’ by society.”<sup>256</sup> The BIA emphasized that “gang violence and crime in El Salvador appear to be widespread, and the risk of harm is not limited to young males who have resisted recruitment . . . but affects all segments of the population.”<sup>257</sup> For that reason, the BIA said, “it is difficult to conclude that any ‘group,’ as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador.”<sup>258</sup> The BIA then added that “[t]he respondents have provided no persuasive evidence, and we have no reason to believe, that the general societal perception would be otherwise.”<sup>259</sup> Therefore, the BIA concluded that the proposed social group was not socially visible.<sup>260</sup>

Lastly, the BIA indicated that, even if “Salvadoran youths who have resisted gang recruitment” were a cognizable social group, the brothers still would not have been eligible for asylum because they failed to show they were persecuted *on account of* their membership in that group.<sup>261</sup> The BIA conceded that “gangs such as the MS-13 retaliate against those who refuse to join their ranks.”<sup>262</sup> But it quickly added that “such gangs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.”<sup>263</sup> The BIA then stressed that the brothers had “not submitted evidence that persuades us that gangs commit violent acts for reasons other than gaining more influence and power, and recruiting

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254. *Id.*

255. *Id.* at 586. The BIA noted that it based this requirement, in part, on recent United Nations Guidelines. *See id.* (citing *In re C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006), in turn citing UNHCR, Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1 A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc HCR/GIP/02/02 (May 7, 2002)).

256. *S-E-G-*, 24 I. & N. Dec. at 587.

257. *Id.*

258. *Id.* at 588.

259. *Id.*

260. *Id.*

261. *See id.* at 587–88.

262. *Id.* at 587.

263. *Id.*



young males to fill their ranks.”<sup>264</sup> In other words, according to the BIA, the brothers failed to show they were persecuted *because of* their membership in a particular social group.<sup>265</sup>

In sum, *Matter of S-E-G* established the modern definition of a “particular social group”<sup>266</sup> and rejected the notion that “Salvadoran youths who have resisted gang recruitment” constituted such a group.<sup>267</sup> The BIA also suggested that, even if the proposed group were cognizable, there was no evidence that the respondents were persecuted *on account of* their membership in that group.<sup>268</sup> As a result, *Matter of S-E-G* started closing the doors to gang-related social group claims.<sup>269</sup>

The BIA continued to close those doors in *Matter of E-A-G*.<sup>270</sup> That case involved a young male who fled the MS-13 gang in Honduras, came to the United States, and applied for asylum.<sup>271</sup> He claimed that he had a well-founded fear of future persecution on account of his membership in the particular social group of “persons resistant to gang membership.”<sup>272</sup>

The BIA quickly repeated the three requirements for a “particular social group”<sup>273</sup> and rejected the notion that “persons resistant to gang membership” constituted such a group.<sup>274</sup> Plus, the BIA again suggested that, even if the proposed group were cognizable, there was no evidence that the respondent was persecuted *on account of* his membership in that group.<sup>275</sup> Simply put, the BIA continued to block gang-related social group claims.

264. *Id.* at 588.

265. *See id.* at 588; *See also In re M-E-V-G*, 26 I. & N. Dec. 227, 250 (BIA 2014) (explaining that, in *Matter of S-E-G*, “[a]lthough . . . evidence of indiscriminate gang violence and strife was largely dispositive of the applicant’s ability to establish the proposed group’s existence in the society in question, it also undermined his attempt to establish a *nexus* between any past or feared harm and a protected ground under the Act.”); Gupta, *supra* note 199, at 417–18 (discussing *Matter of S-E-G* and recognizing that the BIA rejected the brothers’ asylum claim, in part, “on nexus grounds”).

266. *See supra* note 246 and accompanying text.

267. *See supra* note 249 and accompanying text.

268. *See supra* notes 261–265 and accompanying text.

269. *See* Kniffin, *supra* note 51, at 327 (“[T]he BIA’s holding in *Matter of S-E-G* has effectively shut the doors of the courthouse to all of the others fleeing the violence of MS-13 in El Salvador, and other Central American countries.”).

270. 24 I. & N. Dec. at 591.

271. *See id.* at 591–93.

272. *Id.* at 593.

273. *See id.* at 594; *see also In re M-E-V-G*, I. & N. Dec. 227, 233 (BIA 2014) (recognizing that, in *In re E-A-G*, the BIA “reaffirm[ed] the requirements of *Acosta* and the additional requirements of ‘particularity’ and ‘social visibility.’”).

274. *See In re E-A-G*, 24 I. & N. Dec. at 594.

275. *See id.* at 595.

After the BIA decided these cases, federal circuit courts generally “deferred to the BIA’s interpretation of ‘particular social group,’”<sup>276</sup> and thus rejected proposed social groups involving young people who had been recruited by gangs in the Northern Triangle but refused to join.<sup>277</sup>

That said, a few circuits struck down the BIA’s social group requirements.<sup>278</sup> Most notably, in an opinion written by Judge Posner, the Seventh Circuit rejected the “social visibility” criterion.<sup>279</sup> As part of his analysis, Judge Posner said the “social visibility” requirement “makes no sense” because “[i]f you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible.”<sup>280</sup> For example, Judge Posner said, “A homosexual in a homophobic society will pass as heterosexual.”<sup>281</sup> Judge Posner then said, “to the extent that the members of the target group are successful in remaining invisible, they will not be seen by other people in the society as a segment of the population.”<sup>282</sup> In short, Judge Posner equated “social visibility” with “on-sight visibility,”<sup>283</sup> and said that when a person understandably tries to avoid persecution, the “social visibility” criterion will unreasonably prevent him or her from gaining asylum.<sup>284</sup> For this and other reasons, Judge Posner held that the BIA’s interpretation of “particular social group” was not entitled to *Chevron* deference.<sup>285</sup>

Finally, in February 2014, in *Matter of M-E-V-G*, the BIA responded to Judge Posner’s criticism by clarifying the meaning of “social visibility.”<sup>286</sup> While doing so, the BIA largely reaffirmed the

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276. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1099 (9th Cir. 2013) (Kozinski, C.J., dissenting) (collecting cases).

277. *See, e.g., Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012).

278. *See Valdiviezo-Galdamez v. Att’y Gen. of the U.S.*, 663 F.3d 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

279. *See Gatimi*, 578 F.3d at 615–16.

280. *Id.* at 615.

281. *Id.*

282. *Id.*

283. *Id.*

284. *See id.*; *see also* Kniffin, *supra* note 51, at 329 (recognizing that, according to Posner, “the BIA’s ‘social visibility’ standard places an unreasonable and unrealistic burden on the asylum applicant; it demands that the applicant place himself in increased danger by making himself more visible to the general society in order to be eligible for asylum in the United States.”).

285. *See Gatimi*, 578 F.3d at 616. The Third Circuit also held that the BIA’s requirements for a “particular social group” were not worthy of *Chevron* deference. *See Valdiviezo-Galdamez v. Att’y Gen. of the U.S.*, 663 F.3d 582, 603–09 (3d Cir. 2011). In *Valdiviezo-Galdamez*, however, the Third Circuit largely relied on the Seventh Circuit’s reasoning in *Gatimi*. *See id.* at 603–07 (repeatedly citing *Gatimi*).

286. *In re M-E-V-G*, 26 I. & N. Dec. 227, 240 (BIA 2014).

three requirements for a “particular social group.”<sup>287</sup> As a result, the BIA’s decisions continue to serve as a major roadblock to asylum for young people fleeing gang recruitment in the Northern Triangle.

#### iv. Reaffirming the Three Requirements

*Matter of M-E-V-G* involved a young Honduran male who fled MS-13 because its members beat, kidnapped, and threatened him for refusing to join the gang.<sup>288</sup> Once the respondent arrived in the United States, he applied for asylum, claiming he suffered past persecution on account of his membership in the particular social group of “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”<sup>289</sup>

The BIA began its discussion by reviewing how its definition of “particular social group” had evolved over time.<sup>290</sup> While the BIA said it wanted to “take this opportunity to clarify our interpretation of the phrase ‘membership in a particular social group,’”<sup>291</sup> it stressed that it was “adher[ing] to the social group requirements announced in *Matter of S-E-G* and *Matter of E-A-G*.”<sup>292</sup> The BIA restated those requirements, saying, “[A]n applicant for asylum . . . seeking relief based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”<sup>293</sup>

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287. *See id.* at 228 (“We adhere to our prior interpretations of the phrase.”).

288. *See id.*

289. *Id.*

290. *See id.* at 231–33.

291. *Id.* at 234.

292. *Id.* The BIA reiterated this point in a footnote, saying: “The Supreme Court has stated that administrative agencies may adopt a new or changed interpretation as long as it is based on a ‘reasoned explanation.’ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). Our decision in this case is not a new interpretation, but it further explains the importance of particularity and social distinction as part of the statutory definition of the phrase ‘particular social group.’” *In re M-E-V-G*, 26 I. & N. Dec. at 234 n.9 (emphasis added).

293. *Id.* at 237.

The BIA then described the first and second requirements as it had in the past.<sup>294</sup> That said, the BIA renamed the third requirement “social distinction.”<sup>295</sup> It explained:

The primary source of disagreement with, or confusion about, our prior interpretation of the term ‘particular social group’ relates to the social visibility requirement. Contrary to our intent, the term ‘social visibility’ has led some to believe that literal, that is, ‘ocular’ or ‘on-sight,’ visibility is required to make a particular social group cognizable under the Act. Because of that misconception, we now rename the ‘social visibility’ requirement as ‘social distinction.’ This new name more accurately describes the function of the requirement.<sup>296</sup>

Then, in an almost direct response to Judge Posner, the BIA elaborated on the “social distinction” requirement, saying, “To be socially distinct, a group need not be *seen* by society; rather, it must be *perceived* by society. Society can consider persons to comprise a group without being able to identify the group’s members on sight.”<sup>297</sup> The BIA explained, for example, that while “[i]t may not be easy or possible to identify . . . who is homosexual, . . . a society could still perceive . . . homosexuals . . . [as] a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country.”<sup>298</sup> Therefore, according to the BIA, “the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does *not* deprive the group of its protected status as a particular social group.”<sup>299</sup>

Having addressed Judge Posner’s argument about on-sight visibility, the BIA emphasized that the “transition to the term ‘social distinction’ . . . does *not* mark a departure from established principles.”<sup>300</sup> The BIA summarized both *Matter of S-E-G* and *Matter of E-A-*

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294. Indeed, with respect to the first requirement, the BIA said it was simply “incorporat[ing] the common immutable characteristic standard set forth in *Matter of Acosta*.” *Id.* (citation omitted). And with respect to the second requirement, the BIA reiterated that the “particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.” *Id.* at 239 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (BIA 2007)).

295. 26 I. & N. Dec. at 236.

296. *Id.* at 236 (citations and footnote omitted).

297. *Id.* at 240 (citations omitted).

298. *Id.*

299. *Id.* (emphasis added).

300. *Id.* at 247 (emphasis added).

G-<sup>301</sup> and, in an obvious blow to the respondent's case, said it "would reach the same result in [those cases] if we were to apply the term 'social distinction' rather than 'social visibility.'"<sup>302</sup> The BIA seemed to further tip its hand by adding that "[a] national community may struggle with significant societal problems resulting from gangs, *but not all societal problems are bases for asylum.*"<sup>303</sup>

In the end, however, the BIA acknowledged that its past decisions were not blanket rejections of all gang-based asylum claims, and it conceded that "[s]ocial group determinations are made on a case-by-case basis."<sup>304</sup> Therefore, since the respondent asked for a remand, and DHS said it did not oppose that request, the BIA remanded the case to the immigration court for further fact-finding.<sup>305</sup>

In sum, although the BIA did not categorically reject the respondent's asylum application, it embraced *Matter of S-E-G* and *Matter of E-A-G* and reaffirmed the three requirements for a "particular social group." As a result, young people fleeing gang recruitment in the Northern Triangle will continue to have a difficult time gaining asylum on a social group theory.<sup>306</sup>

### b. Political Opinion

Although most gang-related asylum cases center on social group claims, some also involve political opinion claims.<sup>307</sup> Indeed, young people who refused to join gangs sometimes allege persecution in their home countries on account of an anti-gang political opinion.<sup>308</sup> In order to qualify for asylum on account of a political opinion, a person must establish two key elements.<sup>309</sup> First, he must show that he holds, or his persecutors at least believe he holds, a political opinion.<sup>310</sup> Second, he must show that he was or will be

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301. See *id.*, at 249–51.

302. *Id.* at 247.

303. *Id.* at 251 (emphasis added).

304. *Id.*

305. *Id.* at 252.

306. See also ANKER, *supra* note 201, § 5:25 ("[Particular social groups] based on resistance or opposition [to the maras] have met with limited success especially given the Board's imposition of social visibility (now 'social distinction'. . . .) and particularity criteria onto the established [particular social group] framework.")

307. See Blake, *supra* note 208, at 36 ("A lesser-discussed ground for making gang-related asylum claims . . . is the 'political opinion' ground.")

308. See *supra* note 207 and accompanying text.

309. See ANKER, *supra* note 201, § 5:25.

310. See *id.*

persecuted because of that opinion.<sup>311</sup> This latter requirement is known as the “nexus” requirement.<sup>312</sup> Ultimately, individuals who resisted gang recruitment have trouble establishing these elements.<sup>313</sup>

The Supreme Court’s decision in *INS v. Elias-Zacarias* is illustrative.<sup>314</sup> In that case, eighteen-year-old Elias-Zacarias refused to join an armed guerilla group in Guatemala.<sup>315</sup> Instead, he fled to the United States and applied for asylum.<sup>316</sup> Eventually, the Ninth Circuit held that Elias-Zacarias had a well-founded fear of future persecution on account of a political opinion and, therefore, was eligible for asylum.<sup>317</sup>

The Supreme Court granted certiorari<sup>318</sup> and reversed.<sup>319</sup> The Court first recognized that a person might resist recruitment in a guerilla movement “for a variety of reasons—fear of combat, a desire to remain with one’s family and friends, a desire to earn a better living in civilian life, to mention only a few.”<sup>320</sup> The Court then emphasized that there was no evidence that Elias-Zacarias’s refusal to join the guerillas was based on a political opinion he held.<sup>321</sup> In fact, the Court said that the evidence “showed the opposite” since Elias-Zacarias “testified that he refused to join the guerillas because he was afraid the government would retaliate against him and his family if he did so.”<sup>322</sup> The Court also said there was no “indication . . . that the guerrillas erroneously *believed* that Elias-Zacarias’ refusal was politically based.”<sup>323</sup> Simply put, Elias-Zacarias failed to establish either an actual or imputed political opinion.<sup>324</sup>

The Court then added that even if Elias-Zacarias had shown he held an anti-gang political opinion, he still failed to put forth any

311. *See id.*

312. *See id.* § 5:1 (noting that “‘nexus’ . . . [refers to] the requirement of a link between the persecution suffered or feared and the particular ground of persecution.”).

313. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481–84 (1992); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 596–97 (BIA July 30, 2008); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 588–90 (BIA 2008).

314. *Elias-Zacarias*, 502 U.S. 478 (1992).

315. *Id.* at 479.

316. *Id.* at 480.

317. *See id.* (citing *Elias-Zacarias*, 502 U.S. at 850–52).

318. *Elias-Zacarias*, 502 U.S. 915 (1991).

319. *Id.* at 478, 484 (1992) (“The BIA’s determination should . . . have been upheld in all respects, and we reverse the Court of Appeals’ judgment to the contrary.”).

320. *Id.* at 482.

321. *Id.* (“The record in the present case . . . failed to show a political motive on Elias-Zacarias’ part.”).

322. *Id.*

323. *Id.*

324. *See id.*

evidence “that the guerillas [were going to] persecute him *because of* that political opinion, rather than because of his refusal to fight with them.”<sup>325</sup> In short, Elias-Zacarias also failed to meet the nexus requirement.<sup>326</sup> Therefore, the Court held that Elias-Zacarias was not eligible for asylum.<sup>327</sup>

Although the Court decided *Elias-Zacarias* more than two decades ago, the BIA still applies the Court’s analysis to deny political asylum claims made by youth fleeing gang recruitment in the Northern Triangle.<sup>328</sup> For example, in *Matter of S-E-G*, the case involving the sixteen-year-old brothers who fled MS-13’s forced recruitment efforts in El Salvador, the BIA cited *Elias-Zacarias*<sup>329</sup> and rejected the brothers’ argument that MS-13 persecuted them “on account of their anti-gang political opinion.”<sup>330</sup>

Drawing on the Court’s analysis in *Elias-Zacarias*,<sup>331</sup> the BIA first said that the brothers “failed to show a political motive in resisting gang recruitment. . . . Indeed, there is no evidence in the record that the respondents were politically active or made any anti-gang political statements.”<sup>332</sup> In other words, the brothers “did not establish what political opinion, if any, they held.”<sup>333</sup> The BIA also noted that the brothers “provided no evidence, direct or circumstantial, that the MS-13 gang in El Salvador imputed, or would impute to them, an anti-gang political opinion.”<sup>334</sup> Thus, like the respondent in *Elias-Zacarias*, the brothers failed to establish either an actual or imputed political opinion.<sup>335</sup>

The BIA then added that even if the brothers had shown they held an anti-gang political opinion, they still failed to put forth any evidence “that the gang persecuted or would persecute them on the

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325. *Id.* at 483.

326. *See id.* at 483–84.

327. *See id.* at 484 (reversing the Ninth Circuit’s grant of asylum).

328. *See* *Matter of E-A-G*, 24 I. & N. Dec. 591, 596–97 (BIA 2008); *Matter of S-E-G*, 24 I. & N. Dec. 579, 588–90 (BIA 2008).

329. *S-E-G*, 24 I. & N. Dec. at 588 (“Given the circumstances of this case, we find that the respondents’ argument is foreclosed by *INS v. Elias-Zacarias*.”).

330. *Id.*

331. *Id.* at 589 (“We conclude that the Court’s analysis in *Elias-Zacarias* is applicable to this case.”).

332. *Id.*

333. *Id.* These statements indicate that simply refusing to join a gang, without more, is not enough to establish a political opinion. Other commentators have recognized this point. *See, e.g.*, Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5, 9 (2010) (“[The BIA’s] reasoning suggests that only those who put themselves in more danger, by openly criticizing dangerous gangs, will be eligible for asylum based on their political opinion.”).

334. *S-E-G*, 24 I. & N. Dec. at 589.

335. *See id.*



basis of such opinion.”<sup>336</sup> The BIA stressed that there was “no indication that the MS-13 gang members who pursued the respondents had any motives other than increasing the size and influence of their gang.”<sup>337</sup> In short, the brothers also failed to meet the nexus requirement.<sup>338</sup> Therefore, the BIA held that they were not eligible for asylum.<sup>339</sup>

Similarly, in *Matter of E-A-G*, the case involving the young male who fled MS-13 in Honduras, the BIA again relied on *Elias-Zacarias*<sup>340</sup> to reject a respondent’s political opinion asylum claim.<sup>341</sup> Once more, the BIA held that the respondent failed to establish either an actual or imputed political opinion,<sup>342</sup> and failed to show that he was or would be persecuted because of that opinion.<sup>343</sup> Thus, the BIA held that the respondent was not eligible for asylum.<sup>344</sup>

In short, *Elias-Zacarias*, *Matter of S-E-G*, and *Matter of E-A-G* all reaffirm the rule that, in order to make out a political opinion asylum claim, a person must establish that he holds, or his persecutors at least believe he holds, a political opinion,<sup>345</sup> and that he was or will be persecuted because of that opinion.<sup>346</sup> More importantly, all three cases show that individuals who have resisted gang recruitment struggle to meet these elements.<sup>347</sup>

It is true that, despite the foregoing cases, a person’s refusal to join a gang could still give rise to a political opinion asylum claim.<sup>348</sup> After all, the case law “does *not* stand for the proposition that opposition to forced recruitment *cannot* constitute a political opinion.”<sup>349</sup> Rather, it simply provides “that refusal to join does not

336. *Id.*

337. *Id.*

338. *See id.*

339. *See id.* at 590 (“[T]he respondents failed to demonstrate that they were persecuted or fear persecution on account of their political opinion and . . . they therefore did not establish eligibility for asylum.”).

340. *Id.* at 597 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

341. *Id.* at 596 (“We . . . disagree with the Immigration Judge’s determination that the respondent faces persecution in Honduras on account of his political opinion.”).

342. *See id.* at 596–97.

343. *See id.*

344. *See id.* at 597 (“[W]e disagree with the Immigration Judge . . . that the respondent would be subject to persecution on account of his political opinion by gangs in Honduras.”).

345. *See also supra* notes 321–324, 332–335, 342 and accompanying text.

346. *See also supra* notes 325–326, 336–338, 343 and accompanying text.

347. *See also supra* notes 319–344 and accompanying text.

348. *See ANKER, supra* note 201, § 5:25 (“The [*Elias-Zacarias*] Court only stated that refusal to join does not necessarily constitute a political opinion. . . . [T]he Court did not hold that in all cases such refusal to take a stance was apolitical.” (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481–83 (1992))).

349. *Id.* (emphasis added).

necessarily constitute a political opinion.”<sup>350</sup> Nevertheless, for an individual to be eligible for political asylum based on his or her refusal to join a gang, that person still must show that his or her “resistance flows from [a] political conviction or one that the applicant is assumed to have,”<sup>351</sup> and also that he or she has been or will be persecuted because of that actual or imputed opinion.<sup>352</sup> In many cases, asylum applicants lack such evidence.<sup>353</sup> Thus, many young people fleeing gang recruitment in the Northern Triangle will have a difficult time gaining asylum on a political opinion theory.

### c. Conclusions Regarding Asylum Claims

In sum, the most common asylum claims made by children refusing to join gangs are that they have been or will be persecuted back home (1) because of their membership in the particular social group of youth who have been recruited by gangs but refused to join, and/or (2) because of their anti-gang political opinion.<sup>354</sup> However, the BIA and federal courts have largely rejected these claims. Ultimately, as Stephen Yale-Loehr put it, there is “armor against granting asylum to those who resist induction into gangs.”<sup>355</sup>

## 2. Other Forms of Relief from Removal

Although asylum is the main form of relief available to individuals fleeing humanitarian crises, the children from the Northern Triangle may also apply for other forms of relief from removal. These include protection under the Convention Against Torture, visas for victims of human trafficking or other crimes, and special immigrant juvenile status.<sup>356</sup> However, each of these forms of relief

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350. *Id.* (emphasis added).

351. *Id.*

352. *Id.*

353. See Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109, 149 (2013) (“Applicants in gang-based asylum cases who allege persecution on account of political opinion have generally been denied asylum for lack of supporting evidence.”).

354. See *supra* notes 206–207 and accompanying text.

355. Miriam Jordan, *Family Seeks U.S. Asylum After Fleeing Gang*, WALL ST. J., Aug. 21, 2009, at A3 (quoting Professor Yale-Loehr).

356. Lisa Frydman and her colleagues first analyzed each of these forms of relief in great detail in their 2014 report. See FRYDMAN ET AL., *supra* note 157, at 24–25, 37–53. In doing so, they emphasized the numerous challenges that unaccompanied children face in trying to gain these protections. See *id.* at 24–25, 38–45, 48–53. Since Frydman and her colleagues

is relatively narrow and appears unlikely to protect large numbers of children.<sup>357</sup>

To begin, many children will likely struggle to gain protection under the Convention Against Torture.<sup>358</sup> A person applying for such protection bears the heavy burden of proving “that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”<sup>359</sup> The person must also show that this torture will be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>360</sup> Thus, as the Center for Gender and Refugee Studies and Kids in Need of Defense recognize in their joint report, the burden of proof in these cases is especially high with respect to “the likelihood [of harm], type of harm, and State action required to establish eligibility.”<sup>361</sup> As a result, it is unlikely that large numbers of children will receive relief under the Convention Against Torture.<sup>362</sup>

Many children may also have a challenging time obtaining visas for victims of human trafficking or other crimes.<sup>363</sup> As an initial matter, many children may be unable to obtain T visas.<sup>364</sup> This is because the 5,000 T visas available each year<sup>365</sup> are specifically reserved for victims of sex or labor trafficking,<sup>366</sup> and many of the children from the Northern Triangle do not fall into either of these

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released their groundbreaking report, other prominent scholars have built upon their work. *See, e.g.*, Stinchcomb & Hershberg, *supra* note 35, at 35 (examining special immigrant juvenile status and T and U nonimmigrant status).

357. *See* FRYDMAN ET AL., *supra* note 157, at 54 (“Existing humanitarian relief . . . benefit[s] only a small percentage of children. . . . [C]hild applicants face significant barriers to being granted the primary forms of humanitarian relief,” including asylum, protection under the Convention Against Torture, special immigrant juvenile status, and visas for victims of human trafficking or other crimes.).

358. *See id.* at 24 (“[W]inning [Convention Against Torture] protection [is] especially difficult for children.”).

359. 8 C.F.R. § 208.16(c)(2) (2015).

360. *Id.* at § 208.18(a)(1).

361. FRYDMAN ET AL., *supra* note 157, at 24. Frydman and her colleagues also argue that “the absence of guidance regarding how to analyze [Convention Against Torture] claims for children” is part of the reason why “winning [Convention Against Torture] protection [is] especially difficult for children.” *Id.*

362. *See id.* at 54 (“Of the 28 [Convention Against Torture] determinations reviewed for this study at the [Immigration Judge] and [Board of Immigration Appeals] levels, only three resulted in [Convention Against Torture] grants.”).

363. *See* FRYDMAN ET AL., *supra* note 157, at 48 (“Despite the major advance represented by these new forms of protection, challenges to obtaining T and U visas still remain in children’s cases . . . .”). That said, if a child is granted one of these visas, he or she could potentially become a lawful permanent resident within a small number of years. *See* MARTIN ET AL., *supra* note 194, at 983–84.

364. *See* 8 U.S.C. § 1101(a)(15)(T) (2012).

365. MARTIN ET AL., *supra* note 194, at 983.

366. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(I) (citing 22 U.S.C. § 7102).

categories despite fleeing horrific gang violence.<sup>367</sup> And while a number of children from the Northern Triangle are victims of trafficking,<sup>368</sup> it can be difficult for law enforcement officials to identify these individuals.<sup>369</sup> Therefore, some children may not obtain T visas even if they are otherwise eligible.

Many children will also be unable to obtain U visas.<sup>370</sup> 10,000 U visas are available each year “for individuals who ‘have suffered substantial physical or mental abuse’ as victims of a broad list of crimes.”<sup>371</sup> However, the crime at issue must have “violated the laws of the United States or occurred in the United States.”<sup>372</sup> Moreover, the applicant must obtain a certificate<sup>373</sup> confirming that he or she “has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official . . . investigating or prosecuting [the] criminal activity.”<sup>374</sup> Since most of the unaccompanied children are fleeing widespread gang violence in areas more than 1,000 miles from the U.S.-Mexico border, it is unlikely that many of them will obtain this form of relief.

Finally, many children may have a difficult time gaining special immigrant juvenile status (SIJS),<sup>375</sup> a form of relief that would allow them to become a lawful permanent resident of the United States.<sup>376</sup> In order to qualify for SIJS under federal law, a child must follow “a two-step process.”<sup>377</sup> First, the child “must obtain an order from a state court declaring (1) that they are dependent on the court; (2) that they have been abused, abandoned, or neglected; and (3) that it is not in their best interest to return to their home country.”<sup>378</sup> Second, once the state court issues the order, “the child

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367. See UNHCR CHILDREN ON THE RUN REPORT, *supra* note 19, at 27 (showing that the children are fleeing many different types of gang violence).

368. See Stinchcomb & Hershberg, *supra* note 35, at 35 (“The increasing involvement of organized crime groups and some street gangs in forms of human trafficking suggests that many newly arrived [unaccompanied alien children] could be eligible for T visas.”).

369. See FRYDMAN ET AL., *supra* note 157, at 48 (arguing that there are “[i]nadequacies in screening for trafficking victims”); see *id.* at 50 (claiming that there is a “need for better training of community actors to identify victims of trafficking.”).

370. See 8 U.S.C. § 1101(a)(15)(U).

371. MARTIN ET AL., *supra* note 194, at 984 (quoting 8 U.S.C. § 1101(a)(15)(U)(i)(I)).

372. 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

373. See MARTIN ET AL., *supra* note 194, at 984.

374. 8 U.S.C. § 1101(a)(15)(U)(i)(III); see also FRYDMAN ET AL., *supra* note 157, at 51 (discussing the “[d]ifficulties in obtaining law enforcement certification in U cases.”).

375. See FRYDMAN ET AL., *supra* note 157, at 38 (“While the number of children seeking SIJS has increased . . . the overall number of children likely to be eligible for SIJS and identified to pursue it remains low.”).

376. See *id.* at 37 (recognizing that SIJS “confers a visa status that leads to immediate permanent residency”).

377. BYRNE & MILLER, *supra* note 151, at 26.

378. *Id.*; see also 8 U.S.C. § 1101(a)(27)(J) (providing these requirements).

may petition [DHS] for special immigrant juvenile status and, simultaneously, for adjustment of status to legal permanent residency.”<sup>379</sup>

At first glance, SIJS appears to be a promising form of relief for which unaccompanied children fleeing gang violence could apply. To be sure, numerous children from the Northern Triangle appear eligible for this lasting type of relief.<sup>380</sup> However, as Lisa Frydman and her colleagues point out, “there remain challenges for children attempting to obtain this form of protection.”<sup>381</sup>

As an initial matter, many children are simply unaware that they may qualify for SIJS because they lack legal representation.<sup>382</sup> Moreover, children often face multiple hurdles when trying to complete step one of the SIJS process—obtaining the required state court order.<sup>383</sup> First, state court judges are often unfamiliar with SIJS,<sup>384</sup> confused about their role in the process,<sup>385</sup> or concerned that they lack the legal authority to issue an order an individual can use to obtain an immigration benefit from the federal government.<sup>386</sup> Second, the state court judge simply may not agree with the child that

379. BYRNE & MILLER, *supra* note 151, at 26; *see also* 8 U.S.C. § 1101(a)(27)(J)(iii) (stating that “the Secretary of Homeland Security” must “consent[ ] to the grant of special immigrant juvenile status”).

380. *See* Stinchcomb & Hershberg, *supra* note 35, at 35 (“Data . . . suggest that a large number of recent child arrivals could be eligible for classification as special immigrant juveniles. In recent years, between 15 and 30 percent of [unaccompanied alien children] referrals applied for [special immigrant juvenile] status, with high approval rates.”). Several nonprofit organizations, including the highly-regarded Safe Passage Project, help unaccompanied children obtain special immigrant juvenile status, among other forms of relief. *See* SAFE PASSAGE PROJECT, <http://www.safepassageproject.org> (last visited Oct. 2, 2015).

381. FRYDMAN ET AL., *supra* note 157, at 38.

382. *See id.* (“Children in removal proceedings who have legal counsel to represent them stand a good chance of being identified and obtaining SIJS if eligible; however, the majority of children still lack legal counsel.”); *see also supra* notes 173–185 and accompanying text (recognizing that most unaccompanied children are not represented by a lawyer and discussing how the lack of counsel reduces a child’s chances of obtaining relief from removal).

383. *See* FRYDMAN ET AL., *supra* note 157, at 40 (“SIJS petitioners also encounter hesitancy in some state courts to grant a ‘predicate order’ with the findings required for a grant of SIJS status.”).

384. *See id.* at 140 (“SIJS is still new to some state courts. Even with courts that are familiar with SIJS, there are often new judges who do not have experience with this status.”).

385. *See id.* (“Some state court judges are confused by the federal immigration laws related to SIJS. . . . Specifically, some state court judges do not understand that granting the special findings does not mean the judge is granting an immigration benefit.”); *id.* at 40 n.204 (“Some judges . . . have been hesitant to grant SIJS findings because they feel they are circumventing the immigration laws or that these findings are an issue for the immigration authorities.”).

386. *See id.* at 40 (“Some state court judges . . . are unaware that they have the authority to grant the special findings. . . . Some of these judges express concern that they are stepping outside of their prescribed role in making the required findings.”); *id.* at 40 n.203 (“Judges in one county have indicated that they do not believe they have the authority to issue SIJS findings and want to hear from an Immigration Judge on this question. Some judges in other

he or she has been abused, abandoned, or neglected as the relevant term is defined under that state's law.<sup>387</sup> Finally, the state court judge may also disagree with the child's claim that it is not in his or her best interest to be returned to the Northern Triangle; after all, this is a subjective determination that requires the balancing of several different factors.<sup>388</sup> In short, these challenges and others<sup>389</sup> will make it difficult for many children to obtain SIJS.

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In conclusion, this Part examined the main forms of relief from removal available to individuals fleeing humanitarian crises. It focused on asylum, but also briefly considered protection under the Convention Against Torture, visas for victims of human trafficking or other crimes, and special immigrant juvenile status. Ultimately, many of the children from the Northern Triangle will have a difficult time gaining these protections.<sup>390</sup> Therefore, these children are at serious risk of being deported and facing the same fate as Benito Zaldívar.

### III. AN ADMINISTRATIVE SOLUTION TO THE INTERSECTING CRISES

This problem demands an immediate solution because children are being deported to the Northern Triangle and subsequently murdered.<sup>391</sup> Indeed, the *Los Angeles Times* reported that gangs in Honduras recently killed children who were deported from the United States.<sup>392</sup> In the report, Hector Hernandez, a morgue operator in San Pedro Sula, Honduras, said, "There are many youngsters

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counties have at least initially refused to make the special findings due to their belief that they do not have the authority to do so.")

387. See ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH § 3.2, 3-7 (4th ed., Immigrant Legal Resource Center 2014) (recognizing that the terms "[a]buse, neglect, and abandonment are defined under the relevant state law").

388. See *id.* § 3.2, 3-8 (discussing the various factors relevant to this determination).

389. See FRYDMAN ET AL., *supra* note 157, at 38–45 (discussing other challenges that children face in trying to obtain SIJS and offering a series of recommendations in response to these challenges).

390. See *supra* note 157 and accompanying text.

391. See Cindy Carcamo, *In Honduras, U.S. Deportees Seek to Journey North Again*, L.A. TIMES, Aug. 16, 2014, <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deported-youths-20140816-story.html>.

392. See *id.*

who only three days after they've been deported are killed, shot by a firearm. . . . They return just to die.”<sup>393</sup>

Given this situation, the Obama administration should provide temporary humanitarian protection to these migrants by exercising its congressionally delegated power to designate El Salvador, Guatemala, and Honduras as new “temporary protected status” (TPS) countries.<sup>394</sup> Under this proposal, the United States would provide a temporary safe haven to nationals of these three countries until the horrific gang violence in the Northern Triangle subsides.

This Part makes the case for that administrative action.<sup>395</sup> It begins by reviewing the law regarding TPS and the history of TPS designations.<sup>396</sup> It then argues that the Secretary of the Department of Homeland Security should designate El Salvador, Guatemala, and Honduras as new TPS countries due to the humanitarian crisis involving MS-13 and M-18.<sup>397</sup> After all, the violence between these gangs constitutes an “ongoing armed conflict,” one of the criteria for designating foreign states TPS countries.<sup>398</sup> At the very least, the violence perpetrated by MS-13 and M-18 represents other “extraordinary and temporary conditions” in El Salvador, Guatemala, and Honduras that prevent nationals of these countries from returning in safety, and that also justifies fresh TPS designations.<sup>399</sup> Moreover, designating the Northern Triangle countries for TPS would be in line with prior designations.<sup>400</sup> It would also be consistent with the purpose of the TPS statute, which is to temporarily protect individuals who have fled humanitarian crises in their home countries and are now in the United States facing the legal crisis of being ineligible for relief from removal.<sup>401</sup> This Part concludes that the United States should provide a temporary safe haven to nationals of El Salvador, Guatemala, and Honduras until the violence subsides in these countries.

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393. *Id.* The report adds that, according to Hernandez, “[a]t least five, perhaps as many as 10, of the 42 children slain [in San Pedro Sula, Honduras] since February [2014] had been recently deported from the U.S.” *Id.*

394. See 8 U.S.C. § 1254a(b) (2012) (regarding TPS designations).

395. As the Introduction recognizes, other scholars and commentators have also recently called on the U.S. government to issue new TPS designations for the Northern Triangle countries. See *supra* note 35 and accompanying text. This piece builds on that previous work, and it is the first law review article to make the comprehensive case for TPS as the right response to the intersecting humanitarian and legal crises confronting so many migrants from El Salvador, Guatemala, and Honduras.

396. See *infra* Part III.A.

397. See *infra* Part III.B.

398. See 8 U.S.C. § 1254a(b)(1)(A).

399. See 8 U.S.C. § 1254a(b)(1)(C).

400. See *infra* notes 463–69 and accompanying text.

401. See *infra* notes 456–459 and accompanying text.



*A. Temporary Protected Status*

In 1990, Congress added provisions to the INA regarding TPS.<sup>402</sup> Today, INA § 244(b)(1) provides that the Secretary of the Department of Homeland Security may designate a foreign state as a TPS country for a variety of reasons.<sup>403</sup> Indeed, a TPS designation is appropriate if the Secretary finds that (A) there is an “ongoing armed conflict” in the foreign country that would pose a serious threat to returning nationals;<sup>404</sup> (B) there has been an environmental disaster in the foreign state and, as a result, the country is temporarily unable to adequately handle the return of its nationals;<sup>405</sup> or (C) there exists other “extraordinary and temporary conditions” in the foreign state that would prevent its nationals from returning safely.<sup>406</sup>

The TPS process involves two main steps.<sup>407</sup> First, the Secretary of the Department of Homeland Security designates a foreign state as a TPS country pursuant to the foregoing statutory criteria.<sup>408</sup> The Secretary may issue this initial designation for any period of time between six and eighteen months.<sup>409</sup> The Secretary is then permitted to extend the TPS designation if the foreign state continues to meet the conditions for designation.<sup>410</sup> Notably, the Secretary’s

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402. See 8 U.S.C. § 1254a. For a succinct discussion of the historical precursors to TPS, see MARTIN ET AL., *supra* note 194, at 949–51.

403. See 8 U.S.C. § 1254a(b)(1)(A)–(C). Congress initially delegated this power to the Attorney General. See Pub. L. No. 101-649 (1990). But in 2002, Congress transferred this authority to the Secretary of the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

404. See 8 U.S.C. § 1254a(b)(1)(A).

405. See 8 U.S.C. § 1254a(b)(1)(B).

406. See 8 U.S.C. § 1254a(b)(1)(C).

407. See MARTIN ET AL., *supra* note 194, at 951 (describing TPS as “a two-step process” and then articulating both steps).

408. *Id.* (“First, the Secretary of Homeland Security designates a country . . . whose citizens are eligible to receive temporary protection in the United States.”).

409. See 8 U.S.C. § 1254a(b)(2)(B) (“For purposes of this section, the initial period of designation of a foreign state . . . is the period, specified by the [Secretary], of not less than 6 months and not more than 18 months.”).

410. 8 U.S.C. § 1254(b)(3)(A) (“At least 60 days before end of the initial period of designation . . . of a foreign state . . . the [Secretary], after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state . . . and shall determine whether the conditions for such designation . . . continue to be met.”); see also 8 U.S.C. § 1254a(b)(3)(C) (“If the [Secretary] does not determine . . . that a foreign state . . . no longer meets the conditions for designation . . . , the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the [Secretary], a period of 12 or 18 months).”).

decisions to issue an initial designation, extend a designation, or terminate a designation are not subject to judicial review.<sup>411</sup>

Second, as a general matter, nationals of a designated country who have been continuously physically present and residing in the United States since the date of the designation may seek TPS by filing an application with the Department of Homeland Security.<sup>412</sup> That said, certain individuals are not eligible for TPS.<sup>413</sup> This includes, but is not limited to, non-citizens who have “been convicted of any felony or 2 or more misdemeanors committed in the United States,”<sup>414</sup> persecuted others,<sup>415</sup> or engaged in terrorist activity.<sup>416</sup>

Ultimately, if the Secretary of the Department of Homeland Security designates a foreign state as a TPS country, and an eligible individual applies for and receives temporary protection, then that person is not removable from the United States while the designation is in place.<sup>417</sup> The individual may also obtain authorization to work in the United States,<sup>418</sup> which will “be effective throughout the period that the [person] is in temporary protected status.”<sup>419</sup> Finally, the TPS beneficiary may be permitted to travel abroad without losing his or her status.<sup>420</sup>

Over the past twenty-five years, the executive branch issued numerous TPS designations “in situations ranging from civil war to environmental disaster to disruptions to the home country.”<sup>421</sup> For

411. See 8 U.S.C. § 1254a(b)(5)(A) (“There is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.”).

412. See MARTIN ET AL., *supra* note 194, at 951 (“Second, individuals within the designated group who are in the United States may apply for protection, according to statutorily prescribed procedures.”). For the precise eligibility requirements for TPS, see 8 U.S.C. § 1254a(c) (discussing which “aliens [are] eligible for temporary protected status”). For a discussion of the TPS application process, see *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (last visited Oct. 2, 2015) [hereinafter USCIS Information Regarding TPS].

413. For a complete list of those individuals who are and are not eligible for TPS, see 8 U.S.C. § 1254a(c)(2) and USCIS Information Regarding TPS, *supra* note 412.

414. 8 U.S.C. § 1254a(c)(2)(B)(i).

415. See 8 U.S.C. § 1254a(c)(2)(B)(ii) (citing 8 U.S.C. § 1158(b)(2)(A)).

416. See *id.*

417. See 8 U.S.C. § 1254a(a)(1)(A) (“In the case of an alien who is a national of a foreign state designated [for TPS] . . . , the [Secretary] . . . may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect.”).

418. See 8 U.S.C. § 1254a(a)(1)(B) (“[T]he [Secretary] . . . shall authorize the alien to engage in employment in the United States and provide the alien with an ‘employment authorized’ endorsement or other appropriate work permit.”).

419. 8 U.S.C. § 1254a(a)(2).

420. 8 U.S.C. § 1254a(f)(3) (“During a period in which an alien is granted temporary protected status . . . the alien may travel abroad with the prior consent of the [Secretary].”).

421. MARTIN ET AL., *supra* note 194, at 952.

example, the government issued TPS designations to Kuwait, Rwanda, and Sudan because of armed conflicts in those countries; Haiti, Montserrat, and Nicaragua because of environmental disasters; and even Guinea, Liberia, and Sierra Leone because of the extraordinary and temporary conditions in those countries related to the rapid spread of Ebola.<sup>422</sup> These are just a few of the countries that have been designated for TPS.<sup>423</sup> In total, since 1990, the United States has granted TPS to hundreds of thousands of foreign nationals who have fled humanitarian crises across the globe.<sup>424</sup>

### B. Designating the Northern Triangle Countries

The Secretary of the Department of Homeland Security should now issue new TPS designations for El Salvador, Guatemala, and Honduras due to the humanitarian crisis caused by the MS-13 and M-18 gangs.

As an initial matter, it is important to recognize that El Salvador and Honduras are already on the current list of TPS-designated countries.<sup>425</sup> The government first designated Honduras for TPS in January 1999 after “Hurricane Mitch swept through Central America causing severe flooding and associated damage.”<sup>426</sup> The government then designated El Salvador for TPS in March 2001 after that country suffered a series of devastating earthquakes.<sup>427</sup>

Since making these initial designations, the government has repeatedly extended TPS for both countries up through the present day.<sup>428</sup> In fact, the government has extended TPS for Honduras at least twelve times and El Salvador at least ten times.<sup>429</sup> The Secretary of the Department of Homeland Security insists that “the conditions in Honduras that prompted the [initial] TPS designation”

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422. See *Temporary Protected Status*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/temporary-protected-status#top> (last visited Oct. 12, 2015).

423. For a complete list of the countries that have been designated for TPS since Congress added section 244 to the INA, see *id.*

424. See *id.*

425. See *id.*; see also Hershberg & Rathod, *supra* note 35 (“Honduras and El Salvador are on the list of current TPS designees, from when natural disasters affected the countries in 1999 and 2001, respectively.”)

426. Designation of Honduras Under Temporary Protected Status Program, 64 Fed. Reg. 524 (Jan. 5, 1999).

427. See Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214 (March 9, 2001).

428. See *Temporary Protected Status*, *supra* note 422.

429. See *id.*

more than sixteen years ago “continue to be met.”<sup>430</sup> Similarly, the Secretary claims that “the disruption in living conditions in affected areas of El Salvador resulting from the environmental disaster that prompted the [initial] designation” more than fourteen years ago persists in 2015.<sup>431</sup>

Although the government extended TPS for both Honduras and El Salvador many times, these extensions only benefit those “persons already in the United States as of the date of [the initial] designation”<sup>432</sup>—that is, as of January 1999 in the case of Honduras and March 2001 in the case of El Salvador. This is because, under the law, “[a]n extension of TPS . . . at the expiration of an initial designation period merely allows the original group of beneficiaries, already present in the United States as of the original cutoff date, to stay for the added period.”<sup>433</sup> Thus, the TPS extensions for Honduras and El Salvador do not help the numerous young migrants who recently fled the gang violence in the Northern Triangle and traveled to the southern border.<sup>434</sup> In order for these individuals to be protected, the Secretary of the Department of Homeland Security would have to “redesignate” Honduras and El Salvador as TPS countries, advancing “the cut-off date . . . [and] shielding all nationals of [these countries] who are present [in the United States] as of the redesignation.”<sup>435</sup> The Secretary would also have to designate Guatemala as a TPS country for the first time.

The Secretary should issue these new designations promptly. The violence between MS-13 and M-18 certainly constitutes an “ongoing armed conflict,” one of the statutory criteria for designating foreign states TPS countries.<sup>436</sup> The modern evidence makes this clear<sup>437</sup>—especially the latest reporting on the Northern Triangle. For example, a recent *Time* magazine article about El Salvador stressed that “[w]arring gangs have turned the country into one of the world’s deadliest places.”<sup>438</sup> The article explained that MS-13 and M-18

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430. Extension of the Designation of Honduras for Temporary Protected Status, 79 Fed. Reg. 62,170 (Oct. 16, 2014).

431. Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 894 (Jan. 7, 2015).

432. MARTIN ET AL., *supra* note 194, at 952.

433. *Id.* at 955–56 (discussing the Immigration and Nationality Act).

434. See Hershberg & Rathod, *supra* note 35 (“Since TPS applies only to those foreign nationals in the U.S. as of the date of designation, migrants who arrived subsequently cannot apply.”)

435. MARTIN ET AL., *supra* note 194, at 956.

436. See 8 U.S.C. § 1254a(b)(1)(A) (2012).

437. See *supra* Part I.B (discussing the modern situation involving MS-13 and M-18 in the Northern Triangle).

438. See Ioan Grillo, *El Salvador’s Kill Zone*, TIME, July 23, 2015, <http://time.com/3969232/el-salvadors-kill-zone/>.

“fight each other for control of territory so that they can expand their extortion rackets, trade in drugs and engage in other forms of organized crime. But gang members also murder their rivals simply to raise their status within their own gang, which helps perpetuate the conflict.”<sup>439</sup> Similarly, a *New York Times* piece emphasized that, in Honduras, the gangs continue to “battle for turf, with the borderlines of their territory the most lethal.”<sup>440</sup> Finally, a report issued for the U.S. Department of Justice attributes Guatemala’s extremely high levels of violence to MS-13 and M-18, which are engaged in “turf wars” and “use lethal violence against” each other.<sup>441</sup>

The U.S. Department of State’s latest descriptions of conditions in the Northern Triangle also support the claim that the region is overrun by violent gangs involved in an “ongoing armed conflict.” Indeed, the State Department recently emphasized that there are “thousands of known gang members” in the Northern Triangle who are armed and “quick to engage in violence or use deadly force if resisted.”<sup>442</sup> The State Department also said that, in addition to controlling territory,<sup>443</sup> the gangs “are known to commit crimes such as murder, kidnapping, extortion, carjacking, armed robbery, rape, and other aggravated assaults.”<sup>444</sup> As Harvard Law Professor Deborah Anker recently put it, “Central America is a war zone more violent than the days of the civil wars.”<sup>445</sup> In short, the situation in the Northern Triangle constitutes an “ongoing armed conflict,” and therefore it justifies fresh TPS designations.

It is true that the executive branch has historically designated countries for TPS on the basis of an “ongoing armed conflict” when those countries were experiencing a civil war. For example, in 2004,

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439. *Id.*

440. Randal C. Archibold, *Hope Dwindles for Hondurans Living in Peril*, N.Y. TIMES, Aug. 2, 2014, at A1.

441. GLOB. LEGAL RESEARCH CTR., GUATEMALA GANG VIOLENCE, LL No. 2012-008434, 1–2 (2013), [http://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/gang\\_violence\\_2013\\_0.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/gang_violence_2013_0.pdf) (internal citations and quotations omitted).

442. *El Salvador Travel Warning*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE (June 22, 2015), <http://travel.state.gov/content/passports/english/alertswarnings/el-salvador-travel-warning.html> [hereinafter June 2015 El Salvador Travel Warning]; *see also id.* (noting that “[t]hese ‘maras’ concentrate on . . . arms trafficking, murder for hire, . . . and violent street crime,” among other things).

443. *See id.* (pointing out that victims of crime sometimes “unwittingly wander into *gang-controlled territory*.” (emphasis added)).

444. *Honduras Travel Warning*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE (Mar. 2, 2015), <http://travel.state.gov/content/passports/english/alertswarnings/honduras-travel-warning.html> [hereinafter March 2015 Honduras Travel Warning].

445. *See* Cindy Chang & Kate Linthicum, *U.S. Seeing a Surge in Central American Asylum Seekers*, L.A. TIMES, Dec. 15, 2013, <http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215>.

the Secretary of the Department of Homeland Security said he was redesignating Sudan for TPS because “the North-South civil war continues without a comprehensive peace agreement to end the civil war,” and thus “[t]he armed conflict in Sudan continues.”<sup>446</sup> Similarly, in 2013, when the Secretary redesignated Syria for TPS on account of “the ongoing armed conflict” in that country, she emphasized the fact that “the International Committee of the Red Cross labeled the Syrian conflict a civil war.”<sup>447</sup> Since the conflict between the MS-13 and M-18 gangs is not obviously a civil war, it might seem inappropriate to designate the Northern Triangle states for TPS because of an “ongoing armed conflict” in those countries.

However, the TPS statute does not define “ongoing armed conflict” as a civil war,<sup>448</sup> and the legislative history actually suggests that the phrase should be interpreted broadly. In fact, when the TPS statute was first proposed in the House of Representatives, the accompanying report said that the legislation created a framework for providing temporary protection to individuals fleeing a variety of situations, including “*generalized violence . . . in their home country.*”<sup>449</sup> The report later echoed this point by indicating that the TPS statute would allow the executive branch to provide temporary protection to individuals fleeing, among other things, “a *generalized state of violence.*”<sup>450</sup> Then, shortly before the statute was enacted, one of the drafters in the Senate explained that, under the new law, “[a] clear policy is established for granting temporary safe haven to foreign nationals unable to return safely to their native countries because of *violence.*”<sup>451</sup> These statements show that Congress meant for the phrase “ongoing armed conflict” to include situations like the unprecedented gang violence in El Salvador, Guatemala, and Honduras.<sup>452</sup>

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446. Extension and Re-designation of Temporary Protected Status for Sudan, 69 Fed. Reg. 60,168-01 (Oct. 7, 2004).

447. Extension and Redesignation of Syria for Temporary Protected Status, 78 Fed. Reg. 36,223 (June 17, 2013).

448. See 8 U.S.C. § 1254a (2012).

449. H.R. REP. NO. 101-245, at 6 (1989) (emphasis added). As the BIA has explained, “[t]he general TPS statutory scheme set forth in H.R. 2929, the Chinese Temporary Protected Status Act of 1989, was later enacted with similar language as part of the Immigration Act of 1990.” Matter of Ventura, 25 I. & N. Dec. 391, 394 n.6 (BIA 2010).

450. See H.R. REP. NO. 101-245, at 8–9 (1989) (emphasis added).

451. 136 CONG. REC. S17,106-01 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy) (emphasis added).

452. Professors Hershberg and Rathod point out in their commentary in *Roll Call* that some “international law experts have analogized the situation in the northern triangle to a *conventional* armed conflict.” See Hershberg & Rathod, *supra* note 35 (emphasis added). However, such an analogy is not needed to support new TPS designations because the phrase



Even if the humanitarian crisis in the Northern Triangle does not constitute an “ongoing armed conflict,” the violence perpetrated by MS-13 and M-18 represents other “extraordinary and temporary conditions” preventing nationals of El Salvador, Guatemala, and Honduras from safely returning to their countries.<sup>453</sup> This also justifies fresh TPS designations.<sup>454</sup> Although the TPS statute does not define “extraordinary and temporary conditions,”<sup>455</sup> the legislative history appears to equate the phrase with “unsettled conditions”<sup>456</sup> and “upheaval.”<sup>457</sup> The situation in the Northern Triangle clearly meets these standards.<sup>458</sup> After all, the State Department has recognized that the region is awash in gang violence and the police in the Northern Triangle are largely unable to control the gangs.<sup>459</sup> In fact, the State Department has repeatedly said that most serious crimes committed in the region are never solved.<sup>460</sup> Thus, conditions in the Northern Triangle are obviously unsettled, as the gangs have created extraordinary turmoil and prevented nationals of the region from returning safely. This is precisely why the Secretary of the Department of Homeland Security should issue new TPS designations for El Salvador, Guatemala, and Honduras.

Designating these countries for TPS would also be in line with prior designations. With the highest murder rates in the world,<sup>461</sup>

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“ongoing armed conflict” should be interpreted broadly to encompass even an *unconventional* ongoing armed conflict, like the current situation in the Northern Triangle.

453. See *also id.* (“The unique mix of debilitating conditions, framed by ineffective governance and ubiquitous violence surely constitute the type of ‘extraordinary’ conditions contemplated by the statute.”).

454. See 8 U.S.C. § 1254a(b)(1)(C).

455. See 8 U.S.C. § 1254a.

456. See H.R. REP. NO. 101-245, at 6 (1989) (“The bill . . . establishes a statutory framework governing the identification, processing, rights, and responsibilities of aliens who, because of generalized violence, natural disasters, or other *unsettled conditions* in their home country, should be allowed to remain temporarily in the United States.” (emphasis added)).

457. 136 CONG. REC. S17,106-01 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy) (“A clear policy is established for granting temporary safe haven to foreign nationals unable to return safely to their native countries because of . . . *upheaval*.” (emphasis added)).

458. See *supra* Part I.B (discussing the modern situation involving MS-13 and M-18 in the Northern Triangle).

459. See March 2015 Honduras Travel Warning, *supra* note 444; June 2015 El Salvador Travel Warning, *supra* note 442.

460. See March 2015 Honduras Travel Warning, *supra* note 444 (“The vast majority of serious crimes in Honduras . . . are never solved.”); June 2015 El Salvador Travel Warning, *supra* note 442 (“A majority of serious crimes are never solved.”). With respect to Guatemala, the State Department has said, “[h]igh murder rates identify Guatemala as one of the most dangerous countries in the Western Hemisphere. . . . [L]ocal officials find it difficult to cope with the caseload and many homicides never result in a prosecution or conviction.” *Guatemala Country Information*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE (Jan. 21, 2015), <http://travel.state.gov/content/passports/english/country/guatemala.html>.

461. See *supra* notes 109–112 and accompanying text.



the situation in the Northern Triangle seems to be as harrowing as conditions in other countries previously designated for TPS. To be sure, every country is unique, and it is difficult to compare humanitarian crises across the globe. But with more than 140,000 people killed in the Northern Triangle over the past decade,<sup>462</sup> and the violence continuing, the situation in the region appears to be as dire as the current conditions in Yemen<sup>463</sup> or the post-earthquake conditions in El Salvador in 2001<sup>464</sup>—both of which prompted TPS designations.<sup>465</sup> At the very least, recent reporting on the Northern Triangle suggests that conditions in the region are as violent as they were in the early 1990s,<sup>466</sup> when El Salvador was first designated for TPS because of civil war.<sup>467</sup> In short, designating the Northern Triangle countries for TPS would be appropriate.

Finally, designating El Salvador, Guatemala, and Honduras for TPS would also be consistent with the purpose of TPS. Congress developed the TPS framework in order to give the executive branch the authority to temporarily protect specific groups of people—those who have fled humanitarian crises in their home countries and now face the legal crisis of removal from the United States.<sup>468</sup> Indeed, a House of Representatives report noted that the point of TPS was to protect those individuals who fell into “this gap in existing law.”<sup>469</sup> In other words, as the Congressional Research Service put it, “Temporary Protected Status . . . is the statutory embodiment of safe haven for those . . . who may not meet the legal definition of

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462. See *supra* note 6 and accompanying text.

463. Designation of the Republic of Yemen for Temporary Protected Status Program, 80 Fed. Reg. 53,319 (Sept. 3, 2015). When designating Yemen for TPS due to “an ongoing armed conflict,” the Secretary of the Department of Homeland Security noted, among other things, that “as of July 2015, there have been approximately 3,700 registered deaths and over 18,000 registered injuries attributed to the conflict.” *Id.* at 53,320.

464. Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14,214 (March 9, 2001). These earthquakes “resulted in at least 1,100 deaths, 7,859 injuries, and over 2,500 missing.” *Id.*

465. See *supra* notes 463–64.

466. See *El Salvador Violence Up to Civil War-Era Levels*, BBC News (Sept. 2, 2015), <http://www.bbc.com/news/world-latin-america-34124090>; see also *infra* note 445 and accompanying text.

467. See LISA SEGHETTI, ET AL., CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2015) (discussing this designation).

468. See 136 CONG. REC. S17,106-01 (daily ed. Oct. 26, 1990) (statement of Sen. DeConcini); H.R. REP. NO. 101-245, at 8–9 (1989).

469. H.R. REP. NO. 101-245, at 9 (1989); see also *id.* at 8–12 (discussing the need for the TPS framework and quoting testimony from an Assistant Secretary of State).

refugee but are nonetheless fleeing—or reluctant to return to—potentially dangerous situations.”<sup>470</sup>

This, of course, is the exact situation that so many young people from El Salvador, Guatemala, and Honduras face here in the United States. As this Article has discussed, many of the migrants who have recently arrived at the southern border are fleeing a genuine humanitarian crisis in the Northern Triangle,<sup>471</sup> and they now face hurdles that will likely prevent them from obtaining relief from removal.<sup>472</sup> Accordingly, the Secretary of the Department of Homeland Security should exercise his delegated power and issue new TPS designations for El Salvador, Guatemala, and Honduras.<sup>473</sup>

Ultimately, this is a modest solution. Individuals who are granted TPS are not removable from the United States while the designation remains in place.<sup>474</sup> But these individuals have no lasting immigration status.<sup>475</sup> Indeed, those “who receive TPS are not on an immigration track that leads to permanent residence or citizenship.”<sup>476</sup> Moreover, “even if an individual has been granted TPS, the Government can still move forward with removal proceedings and even secure a removal order; the Government just cannot execute that order until the individual’s TPS expires.”<sup>477</sup> In other words, designating El Salvador, Guatemala, and Honduras for TPS would simply constitute an administrative stopgap, preventing the U.S. government from deporting individuals back to the Northern Triangle until the horrific gang violence subsides. Given the unprecedented humanitarian crisis engulfing the region, this is the right solution.

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470. SEGHETTI ET AL., *supra* note 467, at 2; *see also* Hershberg & Rathod, *supra* note 35 (recognizing that TPS “will protect migrants who cannot satisfy the eligibility requirements for asylum”).

471. *See supra* Part I.

472. *See supra* Part II.

473. Professors Hershberg and Rathod also persuasively argue that “[s]ince TPS is explicitly authorized by Congress, a conferral is likely to dull some of the [recent] criticism around unfettered executive authority.” Hershberg & Rathod, *supra* note 35.

474. *See supra* note 417 and accompanying text. Eligible individuals could also obtain authorization to work in the United States and permission to travel abroad without losing his or her status. *See supra* notes 418–420 and accompanying text.

475. *See* 8 U.S.C. § 1254a(f)(1) (“During a period in which an alien is granted temporary protected status . . . the alien shall not be considered to be permanently residing in the United States under color of law.”).

476. SEGHETTI ET AL., *supra* note 467, at 2.

477. *Iraheta v. Holder*, 503 F. App’x 362, 365 (6th Cir. 2012).

## CONCLUSION

This Article examined the intersecting humanitarian and legal crises facing so many unaccompanied children from the Northern Triangle. The Article began by acknowledging that these migrants are fleeing a genuine humanitarian crisis—a region overrun by violent gangs that regularly target young people for recruitment. Unfortunately, as this Article also explained, these children are now facing a legal crisis here in the United States. Indeed, the children must confront numerous procedural and substantive hurdles in trying to avoid deportation. As a result, many of the children are at serious risk of being deported and subsequently killed—the same tragic fate suffered by young Benito Zaldívar. Given this reality, the Obama administration should exercise its congressionally delegated power and issue new TPS designations for El Salvador, Guatemala, and Honduras. This administrative stopgap would save an untold number of lives by temporarily preventing the U.S. government from deporting migrants back to the Northern Triangle until the violence subsides.

