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The United States Is Unwilling to Protect Gang-Based Asylum Applicants

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TIMOTHY GREENBERG

The United States Is Unwilling to Protect Gang-Based Asylum Applicants

61 N.Y.L. SCH. L. REV. 473 (2016–2017)

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I. INTRODUCTION

There is a noticeable difference between how courts treat asylum applicants from Central America with gang-based asylum claims and how they treat asylum applicants from Colombia with Revolutionary Armed Forces of Colombia (FARC)¹ based asylum claims. Typically, courts view applicants with gang-based asylum claims less favorably than applicants with FARC-based asylum claims. As a result, applicants from Central America with gang-based asylum claims are more often denied asylum and compelled to return to their home countries.

This is noteworthy because the circumstances under which FARC-based asylum applicants are granted asylum—that they are unable or unwilling to return to their home countries because of past persecution or a well-founded fear of persecution on account of political opinion—are shared by gang-based asylum applicants. Central American asylum applicants fear persecution on account of political opinion, as their home countries have increasingly come under the control of violent gangs that their governments are unable or unwilling to control.²

In recent years, there has been a massive increase in violence in El Salvador, Guatemala, and Honduras.³ In 2015, Honduras, El Salvador, and Guatemala ranked first, fifth, and sixth, respectively, in global homicide rates.⁴ This extreme violence has forced many to flee from Central America to the United States.⁵ Recently, it has been so dangerous for residents to remain in these countries that nearly ten per cent of El Salvador, Guatemala, and Honduras's thirty million residents have left.⁶ This mass exodus made headlines when approximately 100,000 unaccompanied minors arrived at the United States' southern border between October 2013 and July 2015.⁷

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1. The FARC is Colombia's largest rebel group. *Who Are the Farc?*, BBC NEWS (Nov. 24, 2016), <http://www.bbc.com/news/world-latin-america-36605769>. It was "founded in 1964 as the armed wing of the Communist Party and follow[s] a Marxist-Leninist ideology." *Id.* FARC is an acronym, which stands for Fuerzas Armadas Revolucionarias de Colombia. *FARC*, INSIGHT CRIME, <http://www.insightcrime.org/colombia-organized-crime-news/farc-profile> (last updated Mar. 3, 2017).
 2. See UNHCR, *WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 2* (2015), <http://www.unhcr.org/5630f24c6.pdf>.
 3. *Id.* at 16.
 4. Ashley Kirk, *Mapped: Which Countries Have the Highest Murder Rates?*, TELEGRAPH (Dec. 11, 2015, 10:07 AM GMT), <http://www.telegraph.co.uk/news/uknews/crime/12037479/Mapped-Which-countries-have-the-highest-murder-rates.html>. In addition, a 2015 report by the UNHCR found, "El Salvador, Guatemala, and Honduras rank first, third, and seventh, respectively, for rates of female homicides globally." UNHCR, *supra* note 2, at 16.
 5. Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN REL. (Jan. 19, 2016), <http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286>.
 6. *Id.*
 7. *Id.*

Central American gangs are not only extremely violent, but they are also de facto governments⁸ with control over large areas of these Central American countries.⁹

Millions are forced to flee their home countries every year because they face persecution.¹⁰ The global community created international protection for these individuals after World War II,¹¹ in response to the international failure to protect those fleeing the Holocaust.¹² In 1951 and 1967, governments implemented international treaties that require signatory countries “to offer refuge to individuals who have a well-founded fear of returning to their home countries.”¹³ In 1980, the United States codified these international laws into U.S. domestic law by enacting the Refugee Act of 1980.¹⁴

U.S. asylum law provides that individuals may qualify as refugees if they can show that they are unable or unwilling to return to their country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁵ From these requirements, courts derive several elements that must be satisfied for an applicant to be eligible for asylum.¹⁶

This note examines the disparate treatment between asylum applicants from Central America with gang-based asylum claims and asylum applicants from Colombia with FARC-based asylum claims, and contends that both groups should be treated equally. This is because both groups are fleeing from countries overrun by groups acting as persecutors and from criminal organizations exerting political control.

Part II of this note discusses the history of asylum law, its codification into U.S. domestic law, and the origins and current status of Central American gangs and the FARC.¹⁷ Part III confronts the disparate, and less favorable, treatment received by Central American asylum applicants with gang-based asylum claims. It also analyzes

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8. A de facto government is a term applied to “[a] government that has taken over the regular government and exercises sovereignty over a country” or “[a]n independent government established and exercised by a group of a country’s inhabitants who have separated themselves from the parent state.” *Government: De Facto Government*, BLACK’S LAW DICTIONARY (10th ed. 2014).
 9. MAX G. MANWARING, A CONTEMPORARY CHALLENGE TO STATE SOVEREIGNTY: GANGS AND OTHER ILLICIT TRANSNATIONAL CRIMINAL ORGANIZATIONS IN CENTRAL AMERICA, EL SALVADOR, MEXICO, JAMAICA, AND BRAZIL 21 (2007), <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub837.pdf>.
 10. LENNI B. BENSON ET AL., IMMIGRATION AND NATIONALITY LAW 855 (2013).
 11. *Id.*; IMMIGRATION EQUAL., IMMIGRATION EQUALITY ASYLUM MANUAL 10 (3d. ed. 2014), http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf; see *infra* text accompanying notes 18–23.
 12. BENSON ET AL., *supra* note 10, at 855.
 13. *Id.*
 14. *Id.*
 15. 8 U.S.C. § 1101(a)(42)(A) (2012).
 16. See *infra* text accompanying note 27.
 17. Despite both groups currently acting as criminal organizations that wield political control, the genesis of Central American gangs and the FARC explains courts’ unequal treatment between residents who flee Central American gangs and those who flee the FARC.

how a government's lack of will or ability to control persecutors is determined when adjudicating asylum. Part IV reviews the primary and alternative solutions available to gang-based asylum applicants. Part V concludes that the disparate and less favorable treatment received by asylum applicants with gang-based asylum claims is problematic because there is a humanitarian crisis in Central America, and the United States is failing to protect its victims seeking asylum.

II. HISTORY OF ASYLUM LAW, THE FARC, AND CENTRAL AMERICAN GANGS

A. *The History of Asylum Law in the United States*

The right of a state to grant asylum is well established in international law.¹⁸ The centerpiece of international refugee protection is found in the United Nations 1951 Convention Relating to the Status of Refugees (“Convention”).¹⁹ The Convention was drafted in response to the large migrations from war-torn Europe after World War II.²⁰ It defines who are refugees, their rights, and the states’ legal obligations to them.²¹ The Convention was limited to individuals fleeing events that occurred in Europe after World War II and before January 1951.²² The 1967 Protocol Relating to the Status of Refugees (“Protocol”) removed the Convention’s geographical and temporal restrictions, and provided universal protection for refugees.²³

Asylum law in the United States is based on the Convention and Protocol.²⁴ To comply with the Protocol, the United States passed the Refugee Act of 1980, which includes a similar definition of “refugee” to that in the Convention and Protocol.²⁵ The Refugee Act of 1980 defines refugees as people who are outside their country of nationality and are unable or unwilling to return to that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁶ Therefore, asylum applicants must demonstrate all of the following: (1) they are outside their country of nationality or last habitual residence; (2) they are unable or unwilling to return; (3) they cannot or will not return because of past persecution or a well-founded fear of persecution; and (4) their persecution was on account of a protected

18. Felice Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT’L L. 327, 327 (1949).

19. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Nov. 1, 1968) [hereinafter Convention].

20. IMMIGRATION EQUAL., *supra* note 11, at 10.

21. Convention, *supra* note 19, 189 U.N.T.S. at 152.

22. *Id.* at 152, 154.

23. Protocol Relating to the Status of Refugees art. I, ¶ 3, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

24. IMMIGRATION EQUAL., *supra* note 11, at 10.

25. *Id.*

26. 8 U.S.C. § 1101(a)(42)(A) (2012).

ground.²⁷ Protected grounds are race, religion, nationality, membership in a particular social group, and political opinion.²⁸

B. The History of the FARC

The FARC began as a group of farmers who fled to the mountains to escape political violence that broke out after the death of a Liberal Party presidential contender in 1948.²⁹ It comprised what were essentially self-defense militias who rarely engaged in armed combat with the Colombian government.³⁰ However, change came when the Colombian government began to fear the spread of communism.³¹ In May 1964, the Colombian government attempted to defeat these militias in what is often considered the start of Colombia's modern-day guerrilla war.³² These events convinced the militias to revolutionize, and to embark in efforts to overthrow the sitting government and impose a Marxist government.³³

The FARC originated before the global expansion of Colombia's illegal drug trade.³⁴ For some time, the FARC had refused to participate in the illegal drug trade because it viewed the drug trade as destructive to its revolutionary principles.³⁵ But by the 1980s, the FARC had succumbed to the lure of the money to be had by venturing into the illegal drug trade.³⁶ By the 1990s, a majority of the FARC's resources came from the illegal drug trade and other criminal activities.³⁷ The violence that has resulted from the FARC's criminal activities has forced more than five million Colombians from their homes.³⁸

It is estimated that the FARC generates funds from the illegal drug trade totaling between \$500 million and \$600 million annually.³⁹ In a 2013 report, InSight Crime found, "the FARC is one of the most powerful drug trafficking syndicates in

27. *See id.*

28. *Id.*

29. JOHN OTIS, WILSON CTR., THE FARC AND COLOMBIA'S ILLEGAL DRUG TRADE 3 (2014), https://www.wilsoncenter.org/sites/default/files/Otis_FARCDrugTrade2014.pdf.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*; *Profiles: Colombia's Armed Groups*, BBC NEWS (Aug. 29, 2013), <http://www.bbc.com/news/world-latin-america-11400950>.

35. OTIS, *supra* note 29, at 3.

36. *Id.*

37. *Profiles: Colombia's Armed Groups*, *supra* note 34.

38. OTIS, *supra* note 29, at 1.

39. *The Guerilla Groups in Colombia*, UNRIC, <http://www.unric.org/en/colombia/27013-the-guerrilla-groups-in-colombia> (last visited Apr. 6, 2017).

Colombia, and perhaps the world.”⁴⁰ Álvaro Uribe, the President of Colombia from 2002 to 2010, refused to acknowledge that Colombia was involved in an armed conflict with political rebels, and instead identified the FARC as a narco-terrorist organization.⁴¹

In recent years, the FARC has released statements that it intends to end the armed conflict and become a legal political movement.⁴² Negotiations for peace between the FARC and the Colombian government have been ongoing since 2012.⁴³ The FARC is on the list of terrorist organizations in both the United States and Europe.⁴⁴

C. *The History of Central American Gangs*

The most powerful gangs currently operating in Central America are the 18th Street gang (“M-18”) and the Mara Salvatrucha (“MS-13”).⁴⁵ Both of these gangs also operate within the United States.⁴⁶

In the 1960s, the M-18 originated in the United States by Mexicans who were not accepted into existing Hispanic gangs.⁴⁷ Eventually, the M-18 became known as the gang willing to recruit members from different races and nations of origin.⁴⁸ In the 1980s, the MS-13 originated in Los Angeles by Salvadorans who fled civil war in El Salvador,⁴⁹ in part to protect Salvadorans who recently had immigrated to the United States from existing gangs.⁵⁰

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40. JEREMY McDERMOTT, *INSIGHT CRIME, THE FARC, THE PEACE PROCESS AND THE POTENTIAL CRIMINALISATION OF THE GUERRILLAS* 18 (2013). In 2016, InSight Crime reaffirmed the FARC’s dominance in the world drug trade. Jeremy McDermott, *What Does Colombia Peace Deal Mean for Cocaine Trade?*, *INSIGHT CRIME* (Aug. 24, 2016), <http://www.insightcrime.org/news-analysis/what-does-colombia-peace-deal-mean-for-cocaine-trade> (stating that “the FARC are the single most important organization in the world cocaine trade”).
41. OTIS, *supra* note 29, at 11. Narcoterrorism is “the use of drug trafficking to advance the objectives of certain governments and terrorist organizations.” RACHEL EHRENFELD, *NARCO TERRORISM*, at xiii (1990).
42. *FARC Aims to Become a Political Movement*, *TELESUR* (Feb. 8, 2015), <http://www.telesurtv.net/english/news/FARC-Aims-to-Become-a-Political-Movement-20150208-0013.html>.
43. *Id.*
44. *Profiles: Colombia’s Armed Groups*, *supra* note 34.
45. Bill Grinstead, *Why Haven’t Violent Mara Gangs Spread to Costa Rica?*, *COSTA RICA STAR* (Aug. 23, 2013), <http://news.co.cr/why-havent-violent-mara-gangs-spread-to-costa-rica/25364>.
46. CLARE RIBANDO SEELKE, *CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA* 3 (2016), <https://www.fas.org/sgp/crs/row/RL34112.pdf>. They originated in the United States, but now dominate El Salvador, Guatemala, and Honduras. Leslie Berestein Rojas, *Transnational Gangs: The Central American Migrant Crisis’ LA Connection*, 89.3 *KPCC* (July 16, 2014), <http://www.scpr.org/blogs/multiamerican/2014/07/16/17018/transnational-gangs-how-the-central-american-migra>.
47. SEELKE, *supra* note 46, at 3.
48. *Id.*
49. *Id.*
50. SEBASTIAN AMAR ET AL., *CAIR COAL., SEEKING ASYLUM FROM GANG-BASED VIOLENCE IN CENTRAL AMERICA* 1 (2007), <http://lincolngoldfinch.com/wp-content/uploads/2015/06/CAIR-Gang-Resource-Manual.pdf>.

The expansion of the MS-13 and M-18 accelerated after the United States enacted the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996.⁵¹ The IIRIRA significantly expanded the type of crimes for which undocumented immigrants could be removed from the United States, even including past crimes.⁵² In addition to undocumented immigrants, the IIRIRA also removed protections afforded to legal permanent residents.⁵³ According to Nancy Morawetz⁵⁴:

Overnight, people who had formed their lives here—came here legally or had adjusted to legal status, were working here, building their families, had ordinary lives in which they were on the PTA and everything else—suddenly, because of some conviction, weren't even allowed to go in front of a judge anymore. They were just fast-tracked to deportation.⁵⁵

El Salvador, Guatemala, and Honduras were unprepared to provide the necessary social services needed to support such a mass deportation of individuals, many of whom were gang members.⁵⁶ Therefore the IIRIRA, and the resulting mass deportation of gang members from the United States to Central America, are widely accepted as fundamental parts of the evolution of the MS-13 and M-18.⁵⁷

The history of Central American gangs began during civil wars in El Salvador and Nicaragua.⁵⁸ These wars sent thousands fleeing to the United States for refuge.⁵⁹ While in the United States, some of these immigrants joined gangs in Los Angeles.⁶⁰ Los Angeles County Sheriff's Department's gang specialist, John Sullivan believes that "[t]hese gangs are part of the cultural fabric of the U.S., not Central America."⁶¹ He explains, "[w]e deport them, and they're bigger and badder than any gangs there, and they dominate. And now we have areas [in Central America] that are widely

51. SEELKE, *supra* note 46, at 3; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 and 18 U.S.C.).

52. Rojas, *supra* note 46.

53. It removed protection for *legal residents*, meaning even individuals who were in the United States legally could be removed if they committed an offense included within the IIRIRA. *Id.*

54. Nancy Morawetz is a professor at NYU School of Law and teaches the Immigrant Rights Clinic. *Faculty: Nancy Morawetz*, NYU L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20146> (last visited Apr. 6, 2017).

55. Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today's Immigration Problem*, Vox (Apr. 28, 2016, 8:40 AM), <http://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

56. Rojas, *supra* note 46.

57. *Id.*

58. Scott Johnson, *American-Born Gangs Helping Drive Immigrant Crisis at U.S. Border*, NAT'L GEOGRAPHIC (July 25, 2014), <http://news.nationalgeographic.com/news/2014/07/140723-immigration-minors-honduras-gang-violence-central-america>.

59. *Id.*

60. *Id.*

61. *Id.*

destabilized, with a high degree of violence.⁶² Essentially, these gangs went from being loosely formed street gangs in the United States to dominant criminal organizations that grew into de facto governments in certain areas of Central America.⁶³

These gangs are involved in criminal activities such as drug trafficking, drug smuggling, weapon smuggling, money laundering, alien smuggling, human trafficking, kidnapping, extortion, home invasion, murder, and other violent felonies.⁶⁴ A significant portion of these violent crimes is attributed to the MS-13 and M-18, which operate with impunity.⁶⁵ As a result, El Salvador, Guatemala, and Honduras consistently rank among the highest homicide rates in the world.⁶⁶

The MS-13 and M-18 have increased their control over the citizens of these countries and the governments appear either unable or unwilling to control these gangs.⁶⁷ The MS-13 and M-18 are no longer just groups of street thugs.⁶⁸ A common practice of these gangs is to charge a “tax” on residents and business owners in their territories.⁶⁹ Also, when individuals disobey these gangs’ rules there are systematic consequences, which can be as extreme as murder.⁷⁰ The MS-13 and M-18 continue to threaten security and challenge government authority in Central America.⁷¹

III. DISPARATE TREATMENT OF GANG-BASED ASYLUM APPLICANTS

A. Finding a Political Opinion

Asylum applicants may be eligible for asylum owing to their inability or unwillingness to return to their home country because of past persecution or a well-founded fear of future persecution on account of their political opinion.⁷² A leading

62. *Id.* (alteration in original).

63. See SEELKE, *supra* note 46, at 3, 5.

64. *Id.* at 3, 5, 7.

65. WOLA, CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 2–3 (2008), <https://www.wola.org/wp-content/uploads/2008/05/CA-Gang-Related-Asylum.pdf>.

66. Kirk, *supra* note 4; see also UNODC, GLOBAL STUDY ON HOMICIDE 33 (2013), https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

67. UNHCR, *supra* note 2, at 15–26.

68. AMAR ET AL., *supra* note 50, at 1.

69. *Id.* at 1–2.

70. *Id.* at 1.

71. SEELKE, *supra* note 46, at 3–5.

72. See 8 C.F.R. § 1208.13 (2017); see also *Qualifying for Asylum*, POL. ASYLUM USA, <http://www.politicalasylumusa.com/application-for-asylum> (last visited Apr. 6, 2017). Under U.S. asylum law, political opinion is defined broadly. *Political Opinion*, POL. ASYLUM USA, <http://www.politicalasylumusa.com/application-for-asylum/political-opinion-refugee> (last visited Apr. 6, 2017). Many forms of free speech, including forms that are not “political in nature,” are still worth protecting. *Id.* For example, in some countries, speaking out against corruption can constitute asylum on the ground of political opinion. *Id.*

case in the area of asylum law is *INS v. Elias-Zacarias*.⁷³ In this 1992 case, the Supreme Court held that forced recruitment by a guerilla group was not necessarily persecution on account of political opinion.⁷⁴ This holding left open the possibility that certain instances of gang recruitment could be classified as persecution on account of political opinion.⁷⁵

In 2008, in *Matter of S-E-G-* and *Matter of E-A-G-*, the Board of Immigration Appeals (BIA) stated that the respondents had not established direct or circumstantial evidence that the gangs imputed,⁷⁶ or would impute to the respondents, an anti-gang political opinion.⁷⁷ The BIA concluded that gang members have no motive other than increasing the size and influence of their gang.⁷⁸ Courts relying on *Matter of S-E-G-* and *Matter of E-A-G-* have interpreted *INS v. Elias-Zacarias* to mean forced recruitment alone cannot constitute persecution on account of political opinion.⁷⁹ “These courts have found that resisters of gang recruitment are, instead, targeted because of economic and personal reasons,” not political ones.⁸⁰ This flawed reasoning is the foundation of the disparate treatment between asylum applicants with gang-based asylum claims and those with FARC-based asylum claims.

In *Rivera Barrientos v. Holder*, the Tenth Circuit denied the existence of a political opinion even when there was evidence of the applicant’s direct, vocal opposition to the gang, the gang’s direct and vocal recognition of that opposition, and the gang’s subsequent brutal attack on the applicant, when the gang held her at knife point and gang raped her.⁸¹ The Tenth Circuit relied on *INS v. Elias-Zacarias* and held that the applicant was targeted primarily for recruitment purposes and not because of a

73. 502 U.S. 478 (1992).

74. *Id.* at 481–84.

75. *See id.*; *infra* text accompanying notes 140–42.

76. “[A] person’s imputed political opinion is also a ground for asylum in the U.S.” *Political Opinion*, *supra* note 72. This means that if the state or a non-state actor persecutes an individual because it believes the individual has a political opinion, the individual can qualify for asylum even if she does not have that political opinion. *Id.*

77. *S-E-G-*, 24 I. & N. Dec. 579, 589 (B.I.A. 2008); *E-A-G-*, 24 I. & N. Dec. 591, 596–97 (B.I.A. 2008).

78. *S-E-G-*, 24 I. & N. Dec. at 589; *E-A-G-*, 24 I. & N. Dec. at 597.

79. DREE K. COLLOPY, AILA’S ASYLUM PRIMER 453 (7th ed. 2015); *see* *Mayorga-Vidal v. Holder*, 675 F.3d 9, 18–19 (1st Cir. 2012) (noting that showing one’s refusal to join a gang alone does not constitute political opinion); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578–79 (8th Cir. 2009) (noting that “the mere refusal to join Mara Salvatrucha . . . does not compel a finding that the gang’s threats were on account of an imputed political opinion”); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (similar), *abrogated on other grounds by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Barrios v. Holder*, 581 F.3d 849, 855–56 (9th Cir. 2009) (similar); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008) (similar), *abrogated on other grounds by* *Henriquez-Rivas*, 707 F.3d 1081.

80. COLLOPY, *supra* note 79, at 453.

81. 658 F.3d 1222, 1227–28 (10th Cir. 2011).

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political opinion.⁸² The Tenth Circuit ignored contrary evidence,⁸³ as well as the “socio-political context in which the persecution occurred.”⁸⁴

In contrast, in *Martinez-Buendia v. Holder*, the Seventh Circuit found a political opinion when the asylum applicant demonstrated past persecution by the FARC on account of her actual and imputed political opinion.⁸⁵ The court based its decision on the applicant’s testimony, the direct words of the FARC, and evidence that the FARC viewed members of a social group called the “Health Brigades” as opponents.⁸⁶ The court found that the applicant’s refusal to cooperate with the FARC grew from her political views and that the FARC’s violent responses were motivated by her views.⁸⁷ The court distinguished the case from *INS v. Elias-Zacarias* because of the “post-refusal persecution” that the applicant in *Martinez-Buendia* suffered, which the court interpreted as evidence that the FARC targeted Martinez-Buendia because it believed she had voiced an anti-FARC political opinion.⁸⁸

The disparate treatment between the asylum applicants in these two cases is unfair and troubling. Despite the extremely similar factual setting, the *Martinez-Buendia* court distinguished *Rivera Barrientos v. Holder* from *INS v. Elias-Zacarias*. The Seventh Circuit was able to find a nexus⁸⁹ to political opinion for the applicant fleeing the FARC,⁹⁰ yet the Tenth Circuit denied the existence of a nexus to political opinion for the applicant fleeing the Central American gang.⁹¹

82. *Id.* at 1228.

83. Rivera Barrientos testified to having refused to join the gang several times because of her anti-gang beliefs. *Id.* This testimony was found credible by the Immigration Judge and later ignored by the BIA. *Id.*

84. COLLOPY, *supra* note 79, at 453.

85. 616 F.3d 711, 716 (7th Cir. 2010).

86. *Id.* at 717.

87. *Id.*

88. *Id.*

89. To establish asylum eligibility, an applicant must show a nexus between past or feared future persecution and one of the five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(b)(1)(B)(i) (2012). In addition, an applicant must establish that a protected ground “was or will be at least one central reason for persecuting the applicant.” *Id.*

90. *Martinez-Buendia*, 616 F.3d at 716.

91. *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1228 (10th Cir. 2011). In *Rivera Barrientos*, the Tenth Circuit failed to apply the proper standard when considering the motives of the persecutors. The INS has made clear that persecutors may have several motives to do harm, some of which may be unrelated to any protected ground. 8 U.S.C. § 1158(b)(1)(B)(i). Therefore, there is no requirement that the persecutor be motivated only by a protected belief or characteristic of the applicant. Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988), *superseded by statute on other grounds*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *as recognized in* Gavilano Amado v. U.S. Att’y Gen., 522 Fed. App’x 602 (11th Cir. 2013). All that needs to be established is that a protected ground was at least one central reason for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). Therefore, the Tenth Circuit applied the wrong standard because a protected ground does not need to be the primary reason for the persecution, but rather one central reason for the persecution. A central reason has been construed to mean a reason that is more than “incidental, tangential, superficial, or subordinate to another reason for harm.” *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009).

This disparate treatment is caused by courts' recognition of the FARC's political identity and courts' refusal to characterize the Central American gangs as anything other than criminal organizations, despite country condition reports and expert testimony providing evidence that these gangs are political actors. Analysts from the U.S. Army War College and the Strategic Studies Institute characterize Central American gangs and organized crime groups as non-state actors engaged in efforts to establish political domination.⁹² There is evidence that shows that these gangs are attempting to change the political dynamic of certain countries.⁹³ In particular, these gangs are "infiltrating the country's political structures, financing local elections in order to secure the positions of [their choice of] candidates," and even "sponsoring students in law school who will act on their behalf as attorneys and judges."⁹⁴ The Central American gangs have effectively rendered the states irrelevant in major respects, and act as *de facto* governments.⁹⁵ Therefore, courts' views that Central American gangs are only targeting and persecuting individuals for economic and personal reasons misunderstand the reality of life in Central America.

B. Determining the Government's Ability or Willingness to Control Persecutors

Asylum applicants may be eligible for asylum if the persecution was committed either by the government or a non-state actor that the government is unable or unwilling to control.⁹⁶ Government actors generally include "the police, the military, and government-run schools."⁹⁷ "If the persecutor is not a government actor, [asylum] applicant[s] must show that the government was unable or unwilling to control the persecutor."⁹⁸ Guerrilla groups, paramilitary groups, and gangs are, depending on the situation, accepted as groups that the government is unable or unwilling to control.⁹⁹

92. HOWARD L. GRAY, U.S. ARMY WAR COLL., GANGS AND TRANSNATIONAL CRIMINALS THREATEN CENTRAL AMERICAN STABILITY 1 (2009), <http://www.dtic.mil/dtic/tr/fulltext/u2/a498136.pdf>.

93. Memorandum of Thomas Boerman, Ph. D. & Dir., Thomas Boerman Consulting LLC at 2, *quoted in* Erin Quinn, Staff Att'y, Immigr. Legal Res. Ctr., Eunice Lee, Co-Legal Dir., Ctr. for Gender & Refugee Studies, & Thomas Boerman, Presentation at the Immigration Legal Resource Center: Gang Based Asylum Claims 109 (Nov. 3, 2015), <http://textlab.io/doc/1988871/gang-based-asylum-claims---immigrant-legal-resource-center>. Thomas Boerman is a recognized expert on gangs and other organized criminal groups in El Salvador. *Id.* at 1. He has conducted extensive field research on Central American gang activity both in the Central American region and in the United States. *Id.*

94. *Id.* at 2.

95. *Id.*

96. *See, e.g.*, Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

97. IMMIGRATION EQUAL., *supra* note 11, at 23.

98. COLLOPY, *supra* note 79, at 172–73.

99. *Singh v. INS*, 94 F.3d 1353, 1359–60 (9th Cir. 1996); Villalta, 20 I. & N. Dec. 142, 147 (B.I.A. 1990).

Generally, “unable” means the government attempts to help the victims, but the government’s attempts are futile.¹⁰⁰ Determining whether a government is unable to protect an asylum applicant requires a careful evaluation of the applicant’s own testimony and country condition reports.¹⁰¹ “Unwilling” means that the government does not even attempt to oppose the persecutors.¹⁰² Evidence of unwillingness might be a refusal to investigate acts of violence or harassment, direct statements by the government to the victims expressing unwillingness to protect them, or country condition reports demonstrating that incidents of violence or harassment are regularly uninvestigated.¹⁰³

Yet, there are many Central American gang-based asylum claims in which courts fail to find that the Central American governments are unable or unwilling to control persecutors within their countries,¹⁰⁴ despite the existence of country condition reports that support such a determination.¹⁰⁵

In Honduras, the government has been unable to impose any meaningful control over the activities of the MS-13.¹⁰⁶ The government’s security forces are “unable to prevent MS-13 and other large, gangs’ operations.”¹⁰⁷ “Investigators [in this area] are overwhelmed, and only a tiny fraction of murders, extortions, kidnappings and other gang-related criminal activities are ever fully investigated, much less prosecuted.”¹⁰⁸

In El Salvador, there have been efforts, like the “Mano Dura” and “Ley Anti-Mara,” to control the gangs, but they have been ineffective.¹⁰⁹ These efforts included

100. See *Madrigal v. Holder*, 716 F.3d 499, 506–07 (9th Cir. 2013); *H-*, 21 I. & N. Dec. 337, 345 (B.I.A. 1996); *Villalta*, 20 I. & N. Dec. at 147.

101. See *H-*, 21 I. & N. Dec. at 345; *Villalta*, 20 I. & N. Dec. at 147.

102. See Joseph Hassell, *Persecutor or Common Criminal? Assessing a Government’s Inability or Unwillingness to Control Private Persecution*, IMMIGR. L. ADVISOR, Sept. 2014, at 1, 16.

103. See *Doe v. Holder*, 736 F.3d 871, 878–79 (9th Cir. 2013) (stating that the “Russian police rejected [Doe’s] first complaint . . . and subsequently dismissed his second complaint without doing anything more than interviewing him at the hospital where he was being treated for his injuries,” *id.* at 879); *Gathungu v. Holder*, 725 F.3d 900, 908–09 (8th Cir. 2013) (stating that the Kenyan government “ignor[ed] the attacks altogether or ma[de] a show of arresting the Mungiki members but then releas[ed] them”).

104. See *Castillo-Diaz v. Holder*, 562 F.3d 23, 27 (1st Cir. 2009); *Menjivar v. Gonzales*, 416 F.3d 918, 921–22 (8th Cir. 2005); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005); *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 446 (5th Cir. 2001).

105. See Letter from Steven Dudley, Co-Director, InSight Crime, to Leland Baxter Neal, Immigr. Law Grp. PC (June 25, 2011) (on file with the New York Law School Immigration Law and Litigation Clinic). Steven Dudley is the co-director of InSight Crime, “a joint initiative of American University and the *Fundación Ideas para la Paz* in Colombia, South America.” *Id.* He has “conducted extensive research, including field investigations, into the gangs such as the MS-13 and other, large organized criminal groups in Central and South America.” *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. WOLA, *YOUTH GANGS IN CENTRAL AMERICA: ISSUES IN HUMAN RIGHTS, EFFECTIVE POLICING, AND PREVENTION* 10 (2006); Steven Dudley, *How ‘Mano Dura’ Is Strengthening Gangs*, INSIGHT CRIME (Nov. 21, 2010), <http://www.insightcrime.org/investigations/how-mano-dura-is-strengthening-gangs>.

detaining and arresting thousands of youths on the basis of their appearance, associations, or home address. A majority of these arrests were not legitimate, did not hold up in court, and fueled additional gang recruitment.¹¹⁰ In fact, these unduly simplistic attempts to address the complex sociological, political, and economic problems that these gangs present have been denounced by domestic and international human rights organizations because of the egregious human rights violations that have resulted.¹¹¹ The perception that law enforcement and the government are unable or unwilling to protect the citizens is widespread in El Salvador,¹¹² where seeking the assistance of the police is often perceived as not only futile, but also dangerous.¹¹³

In Guatemala, the MS-13 and M-18 are not controlled by the state.¹¹⁴ “The government[] [is] powerless to control the[se] gangs or protect their citizens from violence and forced gang recruitment”¹¹⁵ The citizens of Guatemala are effectively without help from their police and government.¹¹⁶ El Salvador, Guatemala, and Honduras are “failed states” because they cannot protect their citizens from these gangs.¹¹⁷

The Ninth Circuit’s decision in *Castro-Perez v. Gonzales*¹¹⁸ highlights the disparate treatment between asylum applicants of gang-based asylum claims and those with NARC-based asylum claims. In *Castro-Perez*, a local gang leader raped the asylum applicant twice.¹¹⁹ In support of her claim, the applicant submitted a country condition report stating that rape is classified as a crime in the Honduran Penal Code.¹²⁰ On the basis of that report, the Ninth Circuit held that the applicant did not prove that the government of Honduras was unable or unwilling to control rape in the country because rape is classified as a crime in the Honduran Penal Code.¹²¹

The disparate treatment gang-based asylum applicants receive is further highlighted by the courts’ treatment of asylum applicants in two FARC asylum cases:

110. Dudley, *supra* note 109.

111. Memorandum of Thomas Boerman, *supra* note 93, at 2.

112. *Id.*

113. *Id.* at 4.

114. Memorandum of Victoria Sanford, Ph.D., Dir., Ctr. for Human Rights & Peace Studies, Lehman Coll. (Aug. 6, 2014) (on file with the New York Law School Immigration Law and Litigation Clinic). Victoria Sanford is a professor and Chair of Anthropology at Lehman College. *Id.* She has “conducted extensive field research with Maya communities in Guatemala . . . and Colombian Refugee communities in Ecuador.” *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 409 F.3d 1069 (9th Cir. 2005).

119. *Id.* at 1070–71.

120. *Id.* at 1072.

121. *Id.*

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*Arboleda v. Attorney General*¹²² and *Escobar v. Holder*.¹²³ In *Arboleda*, the Eleventh Circuit granted asylum to a married couple who fled the FARC after being persecuted because of the husband's work with the Conservative Party.¹²⁴ The Eleventh Circuit based its reasoning on two country condition reports and data that proved the FARC was a country-wide guerilla group.¹²⁵ In *Escobar*, the Seventh Circuit concluded that because of "the strength of the FARC in Colombia, . . . its ongoing war with the Colombian government," and the Colombian government's inability to eliminate the FARC, the "state action" element was easily met.¹²⁶

This note does not contend that these FARC cases were wrongly decided, it merely points out the disparate treatment between the two different groups of asylum applicants. Gang-based asylum applicants are being denied asylum because courts are not finding that the governments are unable or unwilling to control persecutors. In FARC cases, numerous country condition reports are being used to grant asylum, while in Central American gang-based cases, at least in certain examples, there is a limited amount of country condition reports being used to deny asylum. Furthermore, in *Escobar*, it was stated that the asylum applicant "easily" met the state action element "[g]iven the strength of FARC in Colombia, its state-like status, its ongoing war with the Colombian government, and the impotence of the government over FARC."¹²⁷ All these descriptions can be used to describe Central American gangs and Central American governments' inability or unwillingness to control them.

IV. POTENTIAL SOLUTIONS

A. Primary Solution

The primary solution is based in practicality: argue asylum claims differently for applicants with gang-based asylum claims. There is an argument to be made that these Central American gangs have taken control of a significant amount of territory in Central America and are serving as de facto governments.¹²⁸ Asylum applicants have submitted varying asylum claims based on political opinion, but these claims have not been widely accepted.¹²⁹ Reasons for seeking asylum in these claims have

122. 434 F.3d 1220 (11th Cir. 2006).

123. 657 F.3d 537 (7th Cir. 2011).

124. *Arboleda*, 434 F.3d at 1222.

125. *Id.* at 1224–25.

126. *Escobar*, 657 F.3d at 543.

127. *Id.*

128. MANWARING, *supra* note 9, at 21; 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, 37 (2012).

129. Blake, *supra* note 128, at 31, 36, 45.

included refusing to join the gangs,¹³⁰ refusing to be extorted,¹³¹ and testifying as a witness or serving as an informant.¹³² However, there have been some successes in these categories, so there is reason to believe that there is a path to arguing more gang-based asylum claims successfully.

First, asylum applicants need to clearly articulate their legal arguments.¹³³ In particular, they should separate the analysis of whether an expression or action is a political opinion from whether the persecutors were motivated to harm the applicant because of that political opinion.¹³⁴ This is because identifying the political opinion and the nexus are separate issues.¹³⁵

Second, asylum applicants should identify the actual or imputed political opinion. Political opinion can be “imputed” to an asylum applicant,¹³⁶ so even if asylum applicants do not actually have that political opinion, they can still be eligible for asylum if they are persecuted for that “imputed” political opinion.¹³⁷ Examples of imputed political opinion in this context could include the persecution of children of anti-gang political activists, family members of gang-resisters, or women who resist being seen as property by a gang.¹³⁸

Third, asylum applicants should demonstrate in the evidentiary record not just their activities and the gang members’ knowledge of and reaction to those activities, but also the gang’s operations as de facto governments.¹³⁹

Fourth, asylum applicants and their counsel will need to address *Elias-Zacarias*. In this case, the Supreme Court held that forced recruitment by a guerilla group was not necessarily persecution on account of political opinion.¹⁴⁰ However, the case has been interpreted to mean that gangs do not persecute individuals on account of

130. *Mayorga-Vidal v. Holder*, 675 F.3d 9, 17–19 (1st Cir. 2012); *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1225 (10th Cir. 2011); *Mendez-Barrera v. Holder*, 602 F.3d 21, 26–27 (1st Cir. 2010); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009).

131. *Marroquin-Ochoma*, 574 F.3d at 578; *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 74 (2d Cir. 2007).

132. *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012); *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010), *overruled by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Soriano v. Holder*, 569 F.3d 1162, 1164 (9th Cir. 2009), *overruled by* *Henriquez-Rivas*, 707 F.3d 1081.

133. 8 U.S.C. § 1101(a)(42)(A) (2012).

134. *See id.*; *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

135. *See Navas*, 217 F.3d at 655–56.

136. *Uwais v. U.S. Att’y Gen.*, 478 F.3d 513, 517 (2d Cir. 2007); *Mulanga v. Ashcroft*, 349 F.3d 123, 133 n.7 (3d Cir. 2003); *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997); *Singh v. Ilchert*, 69 F.3d 375, 379 (9th Cir. 1995); *Canas-Segovia v. INS*, 970 F.2d 599, 601–02 (9th Cir. 1992).

137. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992); *Hamdan v. Mukasey*, 528 F.3d 986, 992–93 (7th Cir. 2008); *Pascual v. Mukasey*, 514 F.3d 483, 488 (6th Cir. 2007); *Ahmed v. Keisler*, 504 F.3d 1183, 1195 (9th Cir. 2007).

138. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004); S-P-, 21 I. & N. Dec. 486, 497 (B.I.A. 1996).

139. *See Elias-Zacarias*, 502 U.S. at 482–83.

140. *Id.* at 482–84.

political opinion.¹⁴¹ Therefore, asylum applicants must be able to distinguish their case from *Elias-Zacarias* by demonstrating (1) clear, direct expression of political opinion, (2) that persecution is on account of political opinion, and (3) that persecution occurred after the political opinions became known.¹⁴²

B. Alternative Legal Solutions

Courts should appreciate that gang-based asylum claims can be difficult, especially in light of conflicting case law. In deciding whether to pursue a gang-based asylum case, advocates should also consider other legal relief that may be available through such avenues as the Convention Against Torture (CAT),¹⁴³ Special Immigrant Juvenile Status (SIJS),¹⁴⁴ the Violence Against Women Act (VAWA),¹⁴⁵ or T¹⁴⁶ nonimmigrant status.

“Relief under the [CAT] is [another] form of relief an individual fearing persecution can seek.”¹⁴⁷ To receive CAT relief, the applicants must establish that more likely than not they will be tortured if they are returned to their country of origin.¹⁴⁸ Torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a

141. See *Mayorga-Vidal v. Holder*, 675 F.3d 9, 18–19 (1st Cir. 2012); *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1227–28 (10th Cir. 2011); *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578–79 (8th Cir. 2009); *Barrios v. Holder*, 581 F.3d 849, 856 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009), *abrogated on other grounds by* *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008), *abrogated on other grounds by* *Henriquez-Rivas*, 707 F.3d 1081.

142. See KATE M. MANUEL, CONG. RESEARCH SERV., R43716, ASYLUM AND GANG VIOLENCE: LEGAL OVERVIEW 11–12 (2014), <https://fas.org/sgp/crs/homesecc/R43716.pdf>.

143. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 112.

144. Congress created SIJS in 1990, and designed it for “children in the United States who do not have permanent residence and have been abused, neglected or abandoned by one or both parents.” *History of SIJ Status*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/green-card/special-immigrant-juveniles/history-sij-status> (last updated July 12, 2011).

145. Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.), *invalidated by* *United States v. Morrison*, 529 U.S. 598, 602 (2000). VAWA was created in 1994 as “a comprehensive legislative package targeting violence against women.” *History of VAWA*, FAITHTRUST INST., <http://www.ncdsv.org/images/HistoryofVawa.pdf> (last visited Apr. 6, 2017).

146. Congress created the T nonimmigrant status in 2000 by passing the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–7110 (2012)); *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (last updated Oct. 3, 2011). The VTVPA enhanced law enforcement agencies’ ability to “investigate” and “offer protection to victims.” *Id.*

147. IMMIGRATION EQUAL., *supra* note 11, at 37.

148. 8 C.F.R. § 208.16(c)(2) (2017).

third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by . . . a public official or other person acting in an official capacity.¹⁴⁹

Further, “an individual who is successful under a CAT claim cannot be removed from the United States to the country from which she fled persecution, but can be removed to a third country if one is available.”¹⁵⁰

SIJS is another form of immigration relief, but it is limited to juveniles.¹⁵¹ It is available to “certain undocumented immigrants under the age of 21 who have been abused, neglected, or abandoned by one or both parents.”¹⁵² To qualify for SIJS, an immigrant juvenile must meet certain criteria. The applicant must be: (1) under twenty-one years old; (2) unmarried; (3) declared dependent in a juvenile court; (4) unable to reunite with one or both of her parents because of abuse, neglect, abandonment, or a similar basis under state law; and (5) in a situation in which it would be against her best interests to return to her country of nationality or last habitual residence.¹⁵³ “Once a minor receives SIJS, [she] will be able to adjust [her] status to that of a lawful permanent resident, obtain work authorization, and eventually apply for U.S. citizenship.”¹⁵⁴

VAWA, which provides another form of immigration relief, seeks to protect women from spousal abuse.¹⁵⁵ It provides immigration status for certain battered noncitizens.¹⁵⁶ Those eligible individuals include the abused spouse of a U.S. citizen or permanent resident, the abused parent of a U.S. citizen, and the abused child of a U.S. citizen or permanent resident.¹⁵⁷ Applicants must provide extensive evidence to

149. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 143, 1465 U.N.T.S. at 113–14.

150. IMMIGRATION EQUAL., *supra* note 11, at 37. Applicants who are denied asylum in one country can apply for asylum in another country under certain conditions, such as: (1) being an unaccompanied minor; (2) having family in the third country; or (3) having a valid visa or not needing a visa to enter the third country. *Id.* at 46.

151. *Special Immigrant Juvenile Status*, SAFE PASSAGE PROJECT, <http://www.safepassageproject.org/what-is-sij-status> (last visited Apr. 6, 2017).

152. *Id.*

153. *Id.*

154. *Id.*

155. Allan Wernick, *Domestic Abuse Victims Who Are Seeking Their Green Cards Can Turn to Law for Help*, N.Y. DAILY NEWS (Mar. 25, 2016, 4:11 AM), <http://www.nydailynews.com/new-york/citizenship-now/abuse-victims-seeking-green-cards-turn-law-article-1.2577265>.

156. *Violence Against Women Act (VAWA)*, ICWC, <http://icwclaw.org/services-available/violence-against-women-act-vawa> (last visited Apr. 6, 2017).

157. *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/battered-spouse-children-parents> (last updated Feb. 16, 2016).

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prove battery, abuse, extreme cruelty, and proof of the qualifying relationship to the abuser.¹⁵⁸ Once relief under VAWA is granted,

immigrants are classified into categories based on a preference system. Self-petitioners who are immediate relatives of U.S. Citizens . . . are eligible to adjust status to a lawful permanent resident status when their VAWA petition is approved. Spouses and children of lawful permanent residents must wait for an immigrant visa to become available for their category. These petitioners will be able to obtain work authorization until they are eligible to apply for permanent residency.¹⁵⁹

One final form of potential relief is the T nonimmigrant visa,¹⁶⁰ created by the Victims of Trafficking and Violence Protection Act (VTVPA).¹⁶¹ The VTVPA is aimed at strengthening the U.S. law enforcement's ability to investigate and prosecute human trafficking.¹⁶² It also protects those who are or have been victims of human trafficking by allowing them to remain in the United States.¹⁶³ To be eligible for a T nonimmigrant visa, applicants must be victims of trafficking, be located in the United States (or certain other specified territories), be able to comply with reasonable requests from a law enforcement agency to assist in the investigation or prosecution of human trafficking, demonstrate that they would suffer extreme hardship involving unusual and severe harm if removed from the United States, and not be inadmissible¹⁶⁴ to the United States.¹⁶⁵

V. CONCLUSION

In conclusion, asylum applicants with gang-based asylum claims receive unfair treatment in their asylum proceedings. In particular, asylum applicants from Central America with gang-based asylum claims receive different, less favorable treatment than asylum applicants from Colombia with FARC-based asylum claims. The genesis of this disparate treatment stems from the political or criminal origins of each group, despite both groups currently acting as criminal organizations with political control. The primary solution is to adjust the legal approach and strategies taken by the legal counsel of gang-based asylum applicants. The alternative solution

158. *Violence Against Women Act (VAWA)*, *supra* note 156.

159. *Id.*

160. 8 U.S.C. § 1101(a)(15)(T) (2012).

161. 22 U.S.C. §§ 7101–7110 (2012); *Victims of Human Trafficking: T Nonimmigrant Status*, *supra* note 146.

162. *Victims of Human Trafficking: T Nonimmigrant Status*, *supra* note 146.

163. *Id.*

164. “In order to gain entry to the U.S., a foreign national must meet all applicable statutory requirements and must demonstrate that [she] is not inadmissible under INA § 212(a).” Sarah E. Murphy, *Grounds of Inadmissibility*, BORDER IMMIGR. LAW., <http://www.borderimmigrationlawyer.com/grounds-of-inadmissibility> (last visited Apr. 6, 2017). For a list of grounds applied for inadmissibility, see 8 U.S.C. § 1182(a).

165. *Victims of Human Trafficking: T Nonimmigrant Status*, *supra* note 146.

is to utilize other legal remedies to provide protection for Central Americans who are fleeing gang-based persecution.

Our courts' treatment of most of the thousands of Central Americans fleeing gang-based persecution is unjust.¹⁶⁶ The United States should no longer subscribe to the fiction that these gangs are mere criminal organizations. The gangs are de facto governments in large areas of Central America and are causing mass migrations of human beings because of their violent and destructive control. Already, there have been many instances in which individuals denied gang-based asylum were immediately murdered upon their return to Central America.¹⁶⁷ It is time for the United States to begin to treat asylum applicants who are fleeing Central American gangs like they do asylum applicants who are fleeing the FARC.

166. See Selena Hill, *Central Americans Denied Asylum in US Killed upon Return*, LATIN POST (Oct. 14, 2015, 4:45 PM), <http://www.latinpost.com/articles/86876/20151014/immigration-news-us-deporting-central-american-asylum-seekers-who-are-then-killed-in-hometowns-report-found.htm>; Laura Tillman, *Meet Luis. He Fled Gangs in Honduras. But the U.S. Probably Won't Protect Him.*, NEW REPUBLIC (June 26, 2014), <https://newrepublic.com/article/118422/why-doesnt-america-protect-latino-migrants-fleeing-violent-gangs>.

167. Sibylla Brodzinsky et al., *US Government Deporting Central American Migrants to Their Deaths*, GUARDIAN (Oct. 12, 2015, 8:57 EDT), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>.

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