

MS-13 AS A TERRORIST ORGANIZATION: RISKS FOR CENTRAL AMERICAN ASYLUM SEEKERS

*Jillian Blake**

INTRODUCTION

In its first year, the Trump Administration has used aggressive rhetoric in a crusade against the transnational gang MS-13. In April, Attorney General Jeff Sessions called MS-13 “one of the most violent gangs in the history of our country” and said that the gang “could qualify” as a terrorist organization.¹ Since then, the administration has put its fight against MS-13 at the front and center of its agenda. In a speech this summer, President Donald Trump called MS-13 gang members “animals” and vowed to “dismantle, decimate and eradicate” their operations.² The president has also used the threat posed by MS-13 to justify his increased use of immigration enforcement generally.³

While the rhetoric coming from the administration against MS-13 is tough, the president has yet to develop a comprehensive plan to combat the gang. Law enforcement officials argue that Trump’s harsh deportation policies will make the fight against MS-13 more difficult by impairing their ability to gather intelligence on the gang within immigrant communities.⁴ Furthermore, hardline approaches against the gang by Central American

* Immigration Attorney, Blake & Wilson Immigration Law, PLLC.

1. Cristiano Lima, *Sessions: MS-13 Gang Could Be Labeled a Terrorist Organization*, POLITICO, (Apr. 18, 2017, 10:34 PM), <http://www.politico.com/story/2017/04/sessions-salvador-gang-terrorists-237345> [<https://perma.cc/2WH8-4AWT>].

2. Maggie Haberman & Liz Robbins, *Trump, on Long Island, Vows an End to Gang Violence*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/us/politics/trump-immigration-gang-violence-long-island.html> [<https://perma.cc/57FN-5QTR>].

3. See Gabby Morrongiello, *Trump Vows to Wipe Out MS-13 Gang in Short Order*, N.Y. POST, (May 15, 2017, 1:43 PM), <http://nypost.com/2017/05/15/trump-vows-to-wipe-out-ms-13-gang-in-short-order/> [<https://perma.cc/QUV7-3D5Z>]; Donald Trump (@realDonaldTrump), TWITTER (Apr. 18, 2017, 5:39 AM), <https://twitter.com/realDonaldTrump/status/854268119774367745> [<https://perma.cc/U6PL-3VBH>]; Donald Trump (@realDonaldTrump), TWITTER (Apr. 23, 2017, 11:42 AM), <https://twitter.com/realDonaldTrump/status/856171332521820165> [<https://perma.cc/EE38-GY4E>].

4. Héctor Silva Ávalos, *Trump Policies Undermine Fight Against MS13: US Police*, INSIGHT CRIME (May 25, 2017), <http://www.insightcrime.org/news-analysis/trump-policies-detrimental-to-fight-against-ms13-us-police> [<https://perma.cc/L6D2-TTQZ>].

governments like El Salvador, to which the administration plans to cut aid, have failed in the past because of the region's weak security and judicial institutions.⁵ In fact, experts warn that the combination of mass deportation and weak institutions in Central America could create the perfect storm for MS-13 to grow and boomerang back into the United States.⁶

Officially designating MS-13 as a terrorist organization could be harmful. Draconian provisions within U.S. asylum law bar those who have given support to terrorist organizations from entering the country, even if they gave the support under duress. These provisions mean labeling MS-13 as a terrorist organization could prevent many of the gang's victims from seeking asylum in the United States. Reforms are necessary to prevent barring victims of persecution from seeking asylum. While the power and brutality of MS-13 must be recognized and effectively combated, MS-13 should not be designated as a terrorist organization because of the damaging effect it would have on the ability of Central American asylum seekers to gain protection in the United States.

I. GANG-BASED ASYLUM IN THE UNITED STATES

MS-13 is a transnational street gang formed in the 1980s in Los Angeles by Salvadoran immigrants fleeing their country's bloody civil war.⁷ After the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the United States began deporting immigrants with criminal convictions en masse back to Central America. The result of these policies was stark:

[B]etween 1998 and 2005 the United States deported nearly 46,000 convicts to Central America, in addition to 160,000 illegal immigrants caught without the requisite permit.

Three countries—El Salvador, Guatemala, and Honduras—received more than 90 per cent of the deportations from the United States. Many of these deportees were members of the 18th Street and [MS-13] gangs who had arrived in the United States as toddlers but had never secured legal residency or citizenship; they had joined the gangs as a way to feel included in a receiving country that often actively impeded their integration. On being sent

5. J. Weston Phippen, *What Can Trump Do About MS-13?*, ATLANTIC (July 28, 2017), <https://www.theatlantic.com/news/archive/2017/07/trump-MS-13/535263/> [<https://perma.cc/9NY6-3FVN>].

6. Daniel Denvir, *Deporting People Made Central America's Gangs. More Deportation Won't Help*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/20/deporting-people-made-central-americas-gangs-more-deportation-wont-help/?utm_term=.a3c2854947c2 [<https://perma.cc/X8XZ-ADFA>]; Tal Kopan, *MS-13 Is Trump's Public Enemy No. 1, but Should It Be?*, CNN (Apr. 29, 2017, 1:47 PM), <http://www.cnn.com/2017/04/28/politics/ms13-explained-immigration-sessions/index.html> [<https://perma.cc/VB2P-JZU9>].

7. CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 3 (2016), <https://fas.org/sgp/crs/row/RL34112.pdf> [<https://perma.cc/36FA-MBE3>].

back to countries of origin that they barely knew, deportees reproduced the structures and behaviour patterns that had provided them with support and security in the United States.⁸

According to the Department of Justice, there are more than 30,000 MS-13 members in the world and at least 6,000 in the United States today.⁹ MS-13 is a hierarchical organization with loose affiliations between leaders who control “cliques” or “cells that operate in specific territories.”¹⁰ Gang activities include robbery, extortion, drug trafficking, rape, and murder.¹¹ The MS-13 gang’s main rival is the 18th Street gang, which was formed in the 1960s by Mexican youth in Los Angeles and which also operates in the United States and Central America today.¹² The Salvadoran government negotiated a truce between MS-13 and the 18th Street gang in 2012.¹³ Although the truce led to a decrease in violence, it fell apart by 2014 and the number of murders in the country soared again.¹⁴

Under the 1951 Refugee Convention and 1967 Protocol, to qualify as a “refugee,” one must have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹⁵ A major obstacle for Central American asylum seekers is showing that the harm they fear from gangs like MS-13 is due to one of the five “grounds” listed in the Convention (race, religion, nationality, membership of a particular social group, or political opinion).¹⁶ Gangs often target

8. Dennis Rodgers, Robert Muggah & Chris Stevenson, *Gangs of Central America: Causes, Costs, and Interventions*, SMALL ARMS SURV., May 2009, at 7–8 (citations omitted).

9. Press Release, U.S. Dep’t of Justice, Two MS-13 Gang Members Convicted of Murder Are Sentenced to Life in Prison (Nov. 1, 2016), <https://www.justice.gov/usao-wdnc/pr/two-ms-13-gang-members-convicted-murder-are-sentenced-life-prison> [https://perma.cc/Q5AA-JE8S]. The Department of Justice has also estimated that the number of MS-13 members living in the United States has reached as many as 10,000. Press Release, U.S. Dep’t of Justice, Members of Columbus Clique of MS-13 Arrested and Charged (Aug. 15, 2017), <https://www.justice.gov/usao-sdoh/pr/members-columbus-clique-ms-13-arrested-and-charged> [https://perma.cc/7T7V-5LPK]; see also U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE FACT SHEET ON MS-13 (2017), <https://www.justice.gov/opa/speech/file/958481/download> [https://perma.cc/94MZ-LRZE].

10. *MS13*, INSIGHT CRIME (Mar. 9, 2017), <http://www.insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile> [https://perma.cc/6AJK-CEAV].

11. SEELKE, *supra* note 7.

12. *Id.*

13. Geoff Thale, Joseph Bateman & Ana Goerd, *One Year into the Truce in El Salvador*, WOLA (Apr. 26, 2013), <https://www.wola.org/analysis/one-year-into-the-gang-truce-in-el-salvador/> [https://perma.cc/ZP9V-WGKF].

14. *The Broken-Truce Theory*, ECONOMIST (Jan. 29, 2015), <https://www.economist.com/news/americas/21641289-end-armistice-between-gangs-has-led-soaring-murders-broken-truce-theory> [https://perma.cc/U3Q2-98UK].

15. Protocol Relating to the Status of Refugees art. I ¶ 2, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

16. Refugee Convention, *supra* note 15.

their victims indiscriminately or to recruit or extort them, which the BIA has found does not satisfy the grounds requirement in the Convention.¹⁷ Asylum seekers have better success in gang-based asylum claims when they can demonstrate that a gang targeted them because of their sexual orientation, religion, gender, or family group (protected characteristics), rather than only for extortion or recruitment.¹⁸ Still, establishing eligibility for asylum based on fear of persecution from MS-13 is often difficult for Central American asylum seekers in the United States.¹⁹

II. MS-13 AS A TERRORIST ORGANIZATION

As MS-13 has grown more powerful, Central American governments and the United States have declared the gang a threat to public security. In 2012, the U.S. Department of the Treasury designated MS-13 as a transnational criminal organization (“TCO”) through Executive Order 13,581, issued by President Obama.²⁰ This was the first time a transnational street gang was designated as a TCO by the United States government.²¹ This designation allows the federal government to “seize assets of gang members found within the United States’ jurisdiction.”²² Since then, the U.S. Treasury has aggressively targeted MS-13 members, including Jose Luis Mendoza Figueroa, a founding member of the gang.²³

In 2015, El Salvador’s supreme court officially designated MS-13 as a terrorist organization.²⁴ The court defined terrorism as “the organized and

17. See, e.g., *M-E-V-G*, 26 I. & N. Dec. 227, 250–51 (B.I.A. Feb. 7, 2014); *W-G-R*, 26 I. & N. Dec. 208, 208 (B.I.A. Feb. 7, 2014); *S-E-G*, 24 I. & N. Dec. 579, 582–83 (B.I.A. July 30, 2008); *E-A-G*, 24 I. & N. Dec. 591, 594 (B.I.A. July 30, 2008); *T-M-B*, 21 I. & N. Dec. 775, 779 (B.I.A. Feb. 20, 1997).

18. *M-E-V-G*, 26 I. & N. Dec. at 252 (“Social-group determinations are made on a case-by-case basis. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground.” (citations omitted)).

19. See KATE M. MANUEL, *ASYLUM AND GANG VIOLENCE: LEGAL OVERVIEW*, CONG. RESEARCH SERV., 9–10 (2014), <https://fas.org/sgp/crs/homesec/R43716.pdf> [<https://perma.cc/9DAW-M78H>].

20. Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions Latin American Criminal Organization (Oct. 11, 2012), <https://www.treasury.gov/press-center/press-releases/Pages/tg1733.aspx> [<https://perma.cc/JR4C-FJ5L>].

21. *In a First, U.S. Labels MS-13 Street Gang ‘Criminal Organization’*, L.A. TIMES (Oct. 11, 2012, 1:52 PM), <http://latimesblogs.latimes.com/lanow/2012/10/in-a-first-us-labels-MS-13-street-gang-criminal-organization.html> [<https://perma.cc/VZ8N-2U9J>].

22. *Id.*

23. Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions Leadership of Central American Gang MS-13 (Apr. 16, 2015), <https://www.treasury.gov/press-center/press-releases/Pages/jl10026.aspx> [<https://perma.cc/A6UA-CLB6>].

24. *El Salvador Supreme Court Designates Street Gangs as ‘Terrorists’*, AL JAZEERA AM. (Aug. 25, 2015, 10:03 AM), <http://america.aljazeera.com/articles/2015/8/25/el-salvador-labels->

systematic exercise of violence . . . [that] seeks to intimidate the general population, control populated territories, to compel the government to negotiate concessions.”²⁵ As a designated terrorist organization, the Salvadoran government can impose stricter prison sentences for MS-13’s members: “[t]errorism charges carry maximum penalties of up to 60 years, compared to up to 20 years for homicide or up to 50 years for aggravated homicide.”²⁶

In the United States, the secretary of state, in consultation with the attorney general and secretary of the treasury, has the authority to designate groups as “Foreign Terrorist Organizations” or “FTOs.”²⁷ A group can be designated as an FTO if (1) it is a foreign organization, (2) it engages in terrorist activity or terrorism, and (3) the terrorist activity or terrorism threatens the security of U.S. nationals or the United States.²⁸ The definition of terrorism referenced in the statute is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”²⁹ Although MS-13 is clearly a foreign organization that threatens U.S. nationals and national security, the “politically motivated” aspect of the terrorism definition would be the largest obstacle to designating the group an FTO. This is because MS-13 has long been regarded a criminal organization motivated by financial gain, rather than a political one with a specific ideology. But the statute only requires that the group engage in “terrorist activity”³⁰ (which is not necessarily political) or “terrorism” (which is defined as political).³¹

The U.S. government has up to this point classified MS-13 as a criminal organization rather than a political or terrorist organization. During a speech in April 2017, then-Secretary of Homeland Security John Kelly stated that groups like MS-13 were “like terrorists” in their brutality and lack of respect for human life, but he clearly distinguished the group as criminal.³² In a poll conducted in April 2017, however, 47 percent of likely U.S. voters supported designating MS-13 a terrorist organization, 17 percent disagreed with

street-gangs-terrorists.html [https://perma.cc/X5HH-PRFR] [hereinafter *El Salvador Supreme Court*].

25. Press Release, Comunicado de Prensa de la Sala de lo Constitucional, Sala Declara Como Grupos Terroristas a Pandillas Denominadas MS y 18 (Aug. 24, 2015) (El Sal.) (translated by the author), http://www.csj.gob.sv/Comunicaciones/2015/AGO_15/COMUNICADOS/42.%20Comunicado%2024-VIII-2015%20terrorismo.pdf [https://perma.cc/LZ49-4LUU].

26. *El Salvador Supreme Court*, *supra* note 24.

27. 8 U.S.C. § 1189(a)(1) (2012).

28. *Id.*

29. 22 U.S.C. § 2656f(d)(2) (2012).

30. 8 U.S.C. § 1182(a)(3)(B) (2012).

31. 22 U.S.C. § 2656f(d)(2).

32. Press Release, U.S. Dep’t of Homeland Security, Home and Away: DHS and the Threats to America, Remarks Delivered by Secretary Kelly at George Washington University Center for Cyber and Homeland Security (Apr. 18, 2017), <https://www.dhs.gov/news/2017/04/18/home-and-away-dhs-and-threats-america> [https://perma.cc/MF39-CR5C].

designating MS-13 as a terrorist organization, and 35 percent were unsure.³³ In July 2017, retired Marine Lieutenant Colonel Oliver North, infamous for his role in the 1980s Iran-Contra scandal, described MS-13 as “the ISIS, the Al Qaeda, the Taliban of the Western Hemisphere.”³⁴

Others have suggested a hybrid classification would be appropriate for “criminal groups that use terrorist tactics” or groups that have criminal and political aspects.³⁵ As the administration continues its aggressive campaign against MS-13, it may decide to change its designation of MS-13 from a transnational criminal organization to a foreign terrorist organization in an effort to appear tough on the gang.

Additionally, Department of Homeland Security (DHS) officials (including asylum officers) and immigration judges have a back-door mechanism to label gangs as terrorist organizations, even without an official designation from the Secretary of State. The 2001 USA PATRIOT Act expanded the terrorist-related grounds of inadmissibility to the United States and created specific “tiers” of terrorist organizations.³⁶ Under the PATRIOT Act, “Tier III” terrorist organizations do not need to be designated by the Secretary of State or another head of a government agency.³⁷ A “terrorist organization” is “two or more individuals, whether organized or not” who engage in terrorist activity.³⁸

“Terrorist activity” is defined broadly and could apply to many MS-13 activities including hijacking, kidnapping or threatening to kill for ransom or concession from a third party, assassinating, using arms for any purpose other than monetary gain, or threatening to commit any of those acts.³⁹ MS-13 could therefore easily be designated as a terrorist organization by adjudicators even now under the broad definition of terrorist activity in U.S. law without an official designation from the secretary of state.

33. Marialuisa Rincon, *Survey Shows Americans Favor Classifying MS-13 Gang a Terrorist Group*, HOUS. CHRON. (Apr. 26, 2017, 11:59 AM), <http://www.chron.com/news/houston-texas/article/Survey-shows-Americans-favor-classifying-MS-13-11100258.php> [https://perma.cc/STX9-RZD4].

34. *Oliver North: MS-13 Gang is ISIS of the Western Hemisphere*, FOX NEWS (July 28, 2017, 3:09 PM), <http://insider.foxnews.com/2017/07/28/MS-13-isis-terrorism-trump-western-hemisphere-oliver-north> [https://perma.cc/8YHZ-ZF3Q].

35. Frank J. Cilluffo & Sharon L. Cardash, *Tackling the MS-13 Problem: A New Designation for a Hybrid Threat?*, WAR ON ROCKS (Apr. 25, 2017), <https://warontherocks.com/2017/04/tackling-the-MS-13-problem-a-new-designation-for-a-hybrid-threat/> [https://perma.cc/P5GA-TZVR].

36. See 8 U.S.C. § 1182(a)(3)(B)(vi) (2012).

37. See *id.*

38. *Id.* § 1182(a)(3)(B)(vi)(III).

39. See *id.* § 1182(a)(3)(B).

III. THE MATERIAL-SUPPORT BAR: RISKS FOR CENTRAL AMERICAN ASYLUM SEEKERS

While counterintuitive, the designation of MS-13 as a terrorist organization would have a harmful effect on the ability of the gang's victims to seek asylum in the United States. This is because U.S. law bars individuals who have provided "material support" to terrorist organizations from gaining asylum and other humanitarian protections.⁴⁰ Although such a provision may seem reasonable on its face, courts and legal authorities have interpreted it in an irrationally expansive manner, even barring those who provide limited support to terrorist organizations under duress.

A non-citizen is barred from seeking asylum and withholding of removal if he or she "engaged in terrorist activity,"⁴¹ which is defined as including the following:

[C]ommit[ting] an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training [to a terrorist organization].⁴²

The Board of Immigration Appeals (BIA) recently found in *In re M-H-Z* that there is no implied duress exception to the material-support bar.⁴³ *M-H-Z* involved the Revolutionary Armed Forces of Colombia ("FARC"), a Marxist guerilla group that has been designated as a foreign terrorist organization (FTO) or "Tier I" terrorist organization by the U.S. government since 1997.⁴⁴ In this case, the asylum applicant provided foodstuffs and other goods to the FARC from the hotel and store she owned after receiving threats from the organization.⁴⁵ Later, after government officials stayed in her hotel, the FARC threatened her and destroyed her hotel.⁴⁶ The immigration judge found that, although she would otherwise qualify for asylum, she was barred because she provided material support to the FARC.⁴⁷ The BIA upheld this decision and found that because the statute is silent regarding duress and there is a limited waiver available to persons subject to the mate-

40. *Id.* § 1182(a)(3)(B)(iv)(VI).

41. *Id.* § 1182(a)(3)(B)(i); *id.* § 1158(b)(2)(v).

42. *Id.* § 1182(a)(3)(B)(iv)(VI).

43. 26 I. & N. Dec. 757, 764 (B.I.A. June 9, 2016).

44. *M-H-Z*, 26 I. & N. Dec. at 757–58; *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/UU86-PE2W>]; *Revolutionary Armed Forces of Colombia—People's Army*, STAN. U.: MAPPING MILITANTS PROJECT, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/89> [<https://perma.cc/WM3Q-TB3G>]; see Courtney Schusheim, Comment, *Cruel Distinctions of the I.N.A.'s Material Support Bar*, 11 N.Y. CITY L. REV 469, 480–81 (2008).

45. *M-H-Z*, 26 I. & N. Dec. at 758.

46. *Id.* at 758–59.

47. *Id.* at 757.

rial-support bar, there is no implied duress exception.⁴⁸ The waiver provision states:

The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may determine in such Secretary's sole unreviewable discretion that [section 212(a)(3)(B) of the Immigration and Nationality Act] shall not apply with respect to an alien within the scope of that subsection [subject to various specified exceptions].⁴⁹

This waiver, however, requires high-level executive consultation and approval. The government has no published procedure or application for seeking such a waiver.⁵⁰ Furthermore, the government will not even consider a waiver for those in removal proceedings without a final order of removal issued against them.⁵¹ Therefore, the waiver is very difficult to seek and can realistically only be offered to a limited number of asylum applicants.

The BIA's precedent in *M-H-Z-* suggests that many Central American asylum claims would be rejected if MS-13 were designated as a terrorist group. The gang practices widespread "micro-extortion" in Central America. According to estimates, gangs extort 70 percent of the businesses in El Salvador⁵² in addition to large segments of the general population.⁵³ These people could be barred from seeking asylum even if they made an extortion payment to MS-13 under duress.

IV. POSSIBLE BENEFITS OF AN MS-13 TERRORIST DESIGNATION

Although designation of MS-13 as a terrorist organization would create significant risks for Central American asylum seekers, there could also be potential benefits if the designation means that the U.S. government formally acknowledges the group as a "political" actor. This is because the common understanding of terrorism, and the definition of a "Tier One" terrorist organization under U.S. law, has a political component. Commentators have previously described the political nature of MS-13 and other Central Ameri-

48. *Id.* at 762.

49. *Id.* (citing 8 U.S.C. § 1182(d)(3)(B)(i) (2012)).

50. *Ay v. Holder*, 743 F.3d 317, 321 (2d Cir. 2014).

51. Press Release, USCIS, Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal (Oct. 23, 2008), https://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf [<https://perma.cc/LK8A-R9DD>].

52. Molly O'Toole, *Micro-Extortion by Gangs Is Costing El Salvador Millions of Dollars a Year, \$10 at a Time*, QUARTZ (June 17, 2017), <https://qz.com/1008580/micro-extortion-by-gangs-is-costing-el-salvador-4-billion-a-year-10-at-a-time/> [<https://perma.cc/UB5P-LSJR>].

53. See *El Salvador 2016 Crime & Safety Report*, U.S. DEP'T OF STATE, <https://www.osac.gov/pages/contentreportdetails.aspx?cid=19257> [<https://perma.cc/MLX8-L52K>].

can street gangs.⁵⁴ Indeed, gangs like MS-13 “control entire neighborhoods, [are] able to exact protection money, hold ad hoc tribunals and decide where residents can live and businesses can operate.”⁵⁵ If MS-13 were accepted as a political actor, asylum seekers who oppose the gang will have a stronger case that they fear persecution because of a “political opinion”—one of the protected grounds for asylum.⁵⁶

The benefits of designating MS-13 as a terrorist organization and subsequently accepting it as a political actor will likely not outweigh the harm of asylum seekers subjected to the material-support bar. Some asylum seekers contend that their refusal to join a gang or other disobedience constitutes an antigang political opinion and therefore fits under that protected ground.⁵⁷ Many gang-based asylum cases, however, involve resisting recruitment, which the U.S. Supreme Court has found would not necessarily equate to expressing a political opinion—even against a clearly political actor like a guerilla insurgency group.⁵⁸ Furthermore, because of the brutality of MS-13 and its deep infiltration into Central American communities, few people publicly express their opposition to the group.⁵⁹ The BIA has suggested that it requires such people to publicly express their opposition to a gang for an antigang political-opinion claim to be successful.⁶⁰

Finally, MS-13 might be designated as a terrorist group without acknowledgement that it is a political actor. While “Tier I” terrorist designated organizations typically have political motives and must be designated by the secretary of state,⁶¹ a “Tier III” designation could be applied much more widely because it does not require official designation.⁶² MS-13 could

54. See, e.g., MAX G. MANWARING, *STREET GANGS: THE NEW URBAN INSURGENCY* 10–11, 14–17 (2005), <http://www.hitechcj.com/sitebuildercontent/sitebuilderfiles/pub597.pdf> [<https://perma.cc/VL8N-KQXC>]; Deborah Anker & Palmer Lawrence, “Third Generation” Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, 14-10 IMMIGR. BRIEFINGS, Oct. 2014, at 1, 2; 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), <https://campuspress.yale.edu/yjil/files/2017/01/o-38-blake-gang-and-cartel-violence-1a23wla.pdf> [<https://perma.cc/GH25-ZXAA>].

55. Tracy Wilkinson, *After Broken Gang Truce, El Salvador Sees Deadliest Month in 10 Years*, L.A. TIMES (Apr. 18, 2015, 5:00 AM), <http://www.latimes.com/world/mexico-americas/la-fg-el-salvador-gangs-20150418-story.html> [<https://perma.cc/9M5E-DK3S>].

56. See Protocol Relating to the Status of Refugees, *supra* note 15; Refugee Convention, *supra* note 15.

57. See, e.g., S-E-G-, 24 I. & N. Dec. 579 (B.I.A. July 30, 2008).

58. E.g., *Immigration & Naturalization Serv. v. Elias-Zacarias*, 502 U.S. 478, 486 (1992).

59. See, e.g., JOHN ANDERSON, ORANGE CTY. DIST. ATTORNEY’S OFFICE, *GANG-RELATED WITNESS INTIMIDATION 1* (2007) (“[G]ang members so frequently engage in witness intimidation that it is considered part of normal gang behavioral dynamics.”).

60. See S-E-G-, 24 I. & N. Dec. at 589 (“The respondents claim to fear retaliation by the MS-13 for their resistance to recruitment efforts, yet they have failed to show . . . a well-founded fear of future persecution on account of their political opinion.”).

61. See 8 U.S.C. § 1182(a)(3)(B)(vi)(I) (2012).

62. See *id.* § 1182(a)(3)(B)(vi)(III).

be accepted as a sort of “criminal-terrorist” group as a Tier III terrorist organization, which would not help those seeking political opinion-based asylum.

V. MITIGATING THE HARMFUL EFFECTS OF THE MATERIAL-SUPPORT BAR

Victims of terrorist organizations should not be barred from seeking asylum simply because they have given limited assistance to a terrorist group under duress. Interpreting the term “material” narrowly could mitigate the harmful effects of the bar if there is no implied duress exception. In some cases, the material-support bar would not apply if the asylum seeker provided a small or trivial amount of support to a terrorist organization.

In a 2006 precedential BIA case, *In re S-K-*, the BIA briefly discussed a possible de minimis exception to the material-support bar.⁶³ In this case an asylum seeker from Burma voluntarily donated S\$1100 (Singapore dollars) to the China National Front (CNF).⁶⁴ She claimed that, although the CNF used violence against the Burmese government, CNF fought in self-defense and for democracy against an illegitimate and repressive military dictatorship, and she therefore should not qualify as a terrorist organization.⁶⁵ Furthermore, she argued that the amount she provided was so small that it was a trivial amount and therefore not “material.”⁶⁶ In this decision, the BIA declined to address whether a small contribution could be found immaterial because it found the amount of money provided was substantial enough to constitute material support.⁶⁷

Several subsequent unpublished BIA decisions offer hope that small contributions will not be considered material support. An unpublished 2014 BIA decision involved an asylum seeker who briefly “joined” the Ugandan Lord’s Resistance Army (LRA) after she was kidnapped, raped, and threatened with death by the group if she did not join.⁶⁸ In this case, the BIA held that insubstantial assistance by a victim was not “material” to supporting a terrorist organization, so the bar would not apply.⁶⁹ In another 2017 unpublished decision, the Board found that the word “material” has meaning

63. 23 I. & N. Dec. 936, 943–44 (B.I.A. June 8, 2006).

64. *S-K-*, 23 I. & N. Dec. at 945.

65. *Id.* at 938–939.

66. *Id.* at 942.

67. *Id.* at 945–46.

68. Unpublished Decision of the BIA Dismissing the Appeal of the Department of Homeland Security, NAT’L IMMIGRANT JUST. CTR. 1–2 (Feb. 10, 2014), http://immigrantjustice.org/sites/immigrantjustice.org/files/Ugandan%20Material%20Support%20BIA%20Decision_2014.pdf [https://perma.cc/9KUV-8K82].

69. *Id.* at 2.

and remanded a case back to the immigration judge to determine if a one-time \$50 contribution to Al-Shabaab was material.⁷⁰

A de minimis exception to the material-support bar could mitigate some of the harmful effects if applied to victims of MS-13. In cases where small extortion payments were made to a gang by the asylum seeker, he or she could claim that it was immaterial to the operations of the gang and therefore the material-support bar should not apply.

CONCLUSION

The rhetoric coming from the Trump Administration suggests MS-13 will be a major target in the coming years. While MS-13 should be treated as a serious threat, it should not formally be designated a terrorist organization because of the harmful effect such a designation would have on Central American asylum seekers. Hopefully, adjudicators or Congress will reconsider a duress exception to the material-support bar beyond the limited waiver now available. Recent unpublished BIA decisions suggest that challenging the “materiality” (or amount) of the support, rather than whether it was given under duress, will be the best defense to the material-support bar if MS-13 is designated as a terrorist organization in the future.

70. Unpublished Decision of the BIA Granting a Motion to Reconsider, IMMIGR. COURTSIDE 2 (May 18, 2017), http://immigrationcourtside.com/wp-content/uploads/2017/05/BIA-Dec.-5-18-17_Redacted.pdf [<https://perma.cc/D98X-4S9T>].