Asylum Policy in Action: The Case of Guatemala’s Kanjobals

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I. INTRODUCTION

Since at least 1954, the political history of Guatemala has been inex- tricably intertwined with policies of the United States government. At present, the stance of the U.S. State Department and the Attorney General, through the Immigration and Naturalization Service (“INS”), toward Guatemalan refugees continues a bitter U.S. rejection of the consequences of its foreign policy objectives in Central America.

This paper focuses on the human effects of two such policies: (1) A U.S.-supported counterinsurgency campaign in the Guatemalan highlands, and (2) the application of U.S. refugee law to Guatemalans fleeing the scourge of this same campaign. As a case study in the effects of these policies, the focus will be further narrowed to concentrate on one ethnic group — the Kanjobal Indians — whose homeland has been the scene of considerable conflict.

The paper begins with a thumbnail sketch of recent history of the counterinsurgency campaign. This is followed by a discussion of social and economic conditions for Kanjobals, both within Guatemala and as refugees, which shows that their centuries-old way of life is rapidly being destroyed. Next, the status of Kanjobals under U.S. refugee law is considered, examining case data on the success of Kanjobals in gaining political asylum. These data show that legal criteria for the determination of refugee status are applied to Kanjobals in an overly narrow way, and alternative remedies are suggested, relying on both domestic and international law.

II. SOCIAL BACKGROUND

Guatemala is a relatively small country, roughly the same size as the state of Ohio.¹ Of its 8.2 million people, more than half are members of

one or another Mayan indigenous group. There are twenty-two distinct indigenous groups, each with its own language or dialect, homeland and manner of dress. While the indigenous population is concentrated in rural areas, the majority of Guatemala's Ladinos (descended from the Spanish, or of mestizo ancestry) live in Guatemala City.

A. Chronology

Table 1 lists some relevant events in the history of Guatemala.

Table 1: Selected Events in Guatemalan History

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD 300-900</td>
<td>Mayans “flourished”</td>
</tr>
<tr>
<td>1524</td>
<td>Spanish conquest</td>
</tr>
<tr>
<td>1821</td>
<td>Guatemala becomes colony of México</td>
</tr>
<tr>
<td>1839</td>
<td>Guatemala gains independence</td>
</tr>
<tr>
<td>1944-1954</td>
<td>Under Presidents Juan José Arévalo and later, Jacobo Arbenz Guzmán, experiment with democracy; ended by United Fruit Company and U.S. overthrow of Arbenz</td>
</tr>
<tr>
<td>1966</td>
<td>Julio César Méndez Montenegro, of the Revolutionary Party, elected President. Shortly thereafter, Army massacres 8,000 peasants in counterinsurgency sweeps</td>
</tr>
<tr>
<td>1970-74</td>
<td>President: Gen. Carlos Arana Osorio</td>
</tr>
<tr>
<td>1972</td>
<td>Ejército Guerrillero de los Pobres (“EGP”) [Guerrilla Army of the Poor], one of currently active guerrilla organizations, formed</td>
</tr>
<tr>
<td>1974-78</td>
<td>President: Gen. Kjell Laugerud García</td>
</tr>
<tr>
<td>1977</td>
<td>U.S. President Carter stops military aid to Guatemala because of Guatemala’s human rights record</td>
</tr>
<tr>
<td>1978</td>
<td>Fuerzas Armadas Rebeldes (“FAR”) [Rebel Armed Forces] reorganized as guerrilla movement; originally active in the 1960’s</td>
</tr>
<tr>
<td>1978-82</td>
<td>President: Gen. Romeo Lucas García</td>
</tr>
</tbody>
</table>

4. Id.
7. Id. at 106.
8. Id.
1979: Organización del Pueblo en Armas ("ORPA") [Organization of the People in Arms] goes public as a revolutionary force

1980: Massacre of Quiché Indian protesters at Spanish Embassy in Guatemala City

1982-3: Gen. Efraín Ríos Montt takes power by coup d'état

1983-5: Gen. Oscar Humberto Mejía Víctores overthrows Ríos Montt and takes power

1986: Vinicio Cerezo Arévalo, civilian president, elected; U.S. military aid restored, under President Reagan

1988: Coup attempted by the military

1989: Another coup attempt, unsuccessful

1990: Guatemalan military opens fire on unarmed Indian villagers protesting murder, killing 14

1990: (December) U.S. President Bush suspends military aid to Guatemala

1991: President: Jorge Serrano Elías, former chief aide to Ríos Montt

As Table 1 shows, Guatemala has rarely had a civilian, democratically elected government. In 1954, the United States acted to overthrow the elected government of President Arbenz, whose liberal policies on land reform and labor organization were vehemently resented by the three U.S. corporations who held a virtual monopoly on Guatemala's electricity and rail transportation, as well as considerable real estate in the country. The U.S. justified its invasion of Guatemala as protecting the country from communist takeover, using inflammatory right-wing propaganda.

In many ways, Guatemala is still suffering from the consequences of the 1954 invasion, which set the Guatemalan armed forces in a position of power which has never been surrendered. During the 1960's and 70's, revolutionary groups surfaced which were met with brutal army repression. This repression was redoubled in a dramatic way in the late 1970's, culminating in the scorched-earth policies of generals who ruled Guatemala between 1978 and 1985. More than 100,000 Guatemalans have been killed in the counterinsurgency war since 1954 and more than 38,000 disappeared.

9. Id.
12. Id. at 67-68.
Vinicio Cerezo Arévalo, the civilian president whose term ended in 1991, was unable to institute meaningful reforms, and his ability to control the Army was nearly nonexistent.\textsuperscript{14} A Guatemalan colonel described the situation succinctly: “For convenience sake a civilian government is preferable, such as the one we have now; if anything goes wrong, only the Christian Democrats will get the blame. It’s better to remain outside[ — ] the real power will not be lost.”\textsuperscript{15}

Although a second civilian president, Jorge Serrano Elías, was recently inaugurated, few believe that he has either the desire or the power to curb the rule of the Guatemalan army. On the contrary, his former associations with the repressive military dictatorship of Ríos Montt and his law and order campaign platform suggest that he will continue to follow the army’s lead.\textsuperscript{16}

\textbf{B. Social Conditions for Indians in Guatemala}

Despite the fact that Indians constitute a majority of Guatemala’s population, they have almost no voice in the political or economic life of the country. Indigenous Guatemalans have been subject to discrimination from the Ladino population since the Spanish appeared. An anthropological study of Kanjobal Indians based on research carried out in 1932 remarked that Ladinos treated Indians “as one would a dog or a horse . . . but they have no conception of the brotherhood of man in regard to them.”\textsuperscript{17} A young Quiché Indian described this history: “The Indians of Guatemala are always in second place, living a history that we did not create, receiving an education that we do not understand, and working lands that belong to others.”\textsuperscript{18}

Despite the early efforts of President Arbenz, Guatemala now has one of the most unequal patterns of land distribution in the Western Hemisphere: over 70% of the land is owned by 2% of the nation’s population.\textsuperscript{19} A study by the U.S. Agency for International Development

\textsuperscript{14} Anderson & Simon, \textit{Guatemala Democracy is an Army in Disguise}, Los Angeles Times, May 29, 1988.

\textsuperscript{15} Colonel Edgar D’Jalma Dominguez, quoted in Perera, \textit{supra} note 2, at 41.

\textsuperscript{16} Freed, \textit{Fear and Apathy Color Guatemala Presidential Vote: Neither Candidate has Dealt with Human Rights or Civilian Control of the Military}, Los Angeles Times, January 5, 1991, at A3, col. 1.

\textsuperscript{17} O. LA FARGE, SANTA EULALIA: THE RELIGION OF A CUCHUMATÁN INDIAN TOWN 17 (1947). In fact, Mayan servants sometimes are treated worse by Ladino families than the family dog, as Rigoberta Menchú relates in her autobiography. R. MENCHÚ, I, \textit{RIGOBERTA MENCHÚ} 92 (1984).

\textsuperscript{18} An Indian Voice: The Suppression of Native Leadership, Anthropology Research Center Newsletter, June 1981, at 2 (hereinafter \textit{An Indian Voice}).

\textsuperscript{19} Steinberg, \textit{Human Rights Delegation to Guatemala Finds No “Democratic Opening,” IMMIGRATION NEWSLETTER}, March/April 1985, at 23.
ASYLUM POLICY IN ACTION

("AID") showed that this disparity increased between 1964 and 1979.\textsuperscript{20} To supplement their income from too-small plots of land,\textsuperscript{21} highland peasants journey to coastal plantations, where whole families labor picking coffee and other crops they cannot afford to consume.\textsuperscript{22} Since families rely on their children's labor, youngsters usually receive only three to four years of schooling at most.\textsuperscript{23} Among rural women the illiteracy rate is 90%.\textsuperscript{24} The little education that is received is administered entirely in Spanish.

Guatemala also has the dubious distinction of being second only to Haiti in having the hemisphere's highest right of infant mortality: 79 per 1,000 live births.\textsuperscript{25} In rural areas, medical care is rare, reaching only 15% of the population.\textsuperscript{26} Sixty percent of Guatemalan children die before reaching the age of five.\textsuperscript{27} The young Quiche's autobiography provides poignant testimony concerning his childhood:

Since the age of seven, I have worked with my father, planting corn, beans, squash and tomatoes, the basic diet of my people. Our land was very scarce, the harvests were poor, and I suffered much hunger. I also had illnesses like malaria and hardly any clothing. I did not use shoes. I am an Indian.\textsuperscript{28}

Victor Perera has stated that current army repression against Indian communities represents merely the third cycle in a process of oppression which began when Cortez' captain Pedro de Alvarado "plundered and slaughtered hundreds of Indian communities during the early years of the conquest."\textsuperscript{29} The second cycle occurred in the late 19th century, when peonage laws were passed by the Guatemalan legislature. These laws did away with communal land-holdings and ensured a "seasonal workforce of penniless Indians for the newly emerging coffee plantations."\textsuperscript{30}

The current cycle has been especially brutal: 440 villages have been entirely destroyed,\textsuperscript{31} and 1% of the indigenous population has been killed since 1978.\textsuperscript{32} Nearly a million rural peasants, who are largely Ma-

\begin{itemize}
  \item \textsuperscript{20} Hough et. al., \textit{Land and Labor in Guatemala: An Assessment}, 1-2 (1982), cited in Simon, supra note 3, at 20 n. 4.
  \item \textsuperscript{21} Steinberg, supra note 19, at 23.
  \item \textsuperscript{22} Simon, supra note 3, at 49-50.
  \item \textsuperscript{23} Id. at 51.
  \item \textsuperscript{24} Dangerous Labor: Women in Guatemala, \textit{Akwesasne Notes}, Early Fall 1987, at 19.
  \item \textsuperscript{25} Simon, supra note 3, at 42.
  \item \textsuperscript{26} Id. at 20.
  \item \textsuperscript{27} The War in Guatemala, 6 Global Perspectives 3 (1988).
  \item \textsuperscript{28} An Indian Voice, supra note 18, at 2.
  \item \textsuperscript{29} Perera, supra note 2, at 39.
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} Hidalgo, Guatemala: Violence Forces Mass Migration, Inter Press Service, Aug. 15, 1990.
  \item \textsuperscript{32} Miller, Indians' Culture Torn by Guatemalan Political Strife, Los Angeles Times, Nov. 29, 1985.
\end{itemize}
C. Kanjobal Indians as a Distinct Ethnic Group

Figure 1 shows the distribution of the different ethnic groups in Guatemala.34

Figure 1. Guatemalan Ethnic Groups.


Kanjobals have been rural farmers in the area of northwestern Huehuetenango since pre-Columbian times.35 The name of their lan-

33. Perera, supra note 2, at 39.
35. Kanjobals have lived in roughly the same homeland area for 3,000 years. Press, Guate-
guage, as well as of the tribe, derives from two words kan, "4-way" (i.e., "true" or "straight") and hobal, "language." In 1983, the Kanjobal population was estimated at 80,000. Most Kanjobals live in small, relatively isolated villages bound together by strong kinship ties. This custom spared the group somewhat from the first cycle of colonial repression, until the indentured labor system began to reach the highlands where they lived in the nineteenth century. Within a village, the houses tend to be spread out over a wide area, with each family's house having its cornfield (or milpa) nearby.

James Loucky, a UCLA anthropologist who has studied the Kanjobals for many years, lists five characteristics which set Kanjobals apart as a racial group from other Guatemalans:

1. Kanjobals have "distinctive physical features — short stature, jet-black hair, pronounced cheekbones, dark skin and long nose;"
2. Kanjobals have their own language, which is not mutually intelligible with some other Mayan languages spoken in different regions;
3. Kanjobals have a distinct geographic homeland — the department of Huehuetenango in northwest Guatemala and portions of southeast México;
4. Kanjobals have a unique system of personal names; and
5. Kanjobals maintain an animist tradition in their religious practices.

The Kanjobal naming system uses given names, e.g., Pedro or Tomás, as last names. Kanjobals thus identify their ethnic group merely by revealing their names. As described by La Farge, the system is complex: "the eldest son carries his father's names, reversed in order; younger sons take the father's first name as their last and are given first names 'according to saints' days' or from their relatives. Girls take first names from relatives, the older girl taking her mother's last name, and all have the father's first [name] as their last."

Along with the Catholicism brought by the Spaniards, and more

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36. LA FARGE, supra note 17, at vi, n. 2.
38. LA FARGE, supra note 17, at xi-xii.
41. Id.
42. LA FARGE, supra note 17, at 26.
recently introduced Evangelical Protestantism, Kanjobals practice an animist Mayan religious tradition which reveres family elders, and which accords plant and animal life great respect. "When [a] baby is born, he has a nahual or animal spirit which varies according to the date of birth." The land is perceived as a sentient being and treated as sacred. At planting time, the Indians conduct a ceremony asking the earth for permission to "wound" it in order to plant their crops. Similar ceremonies are carried out when the Mayans fell trees to build houses. The cycle of human life includes the land in both birth and death, for the Indians bury the umbilical cords of newborns as well as the bodies of their dead in holy ground. Thus, "the moment an Indian leaves his land, he loses a great part of his identity." For Kanjobals, "the dead are as alive in their thoughts as the living."

Curanderos (religious healers) are called to treat the sick. But Manz describes a recent kind of double cure practiced by Kanjobal Catholics in San Mateo, one of the larger towns in the Huehuetenango: ill family members are sent to the church health clinic, but Mayan religious elders are also asked to pray for the patients' recovery.

In traditional villages, men's and women's roles are differentiated early, with boys learning to tend the milpa, and girls to make tortillas, take care of the house, and weave colorful huipiles (blouses) and cortes (wrap-around skirts). Both boys and girls help tend the family livestock. Many women and children do not wear shoes. Marriages are arranged by the elders of the respective families. After childbirth, it is customary for the new mother to go through a purification period, during which sweatbaths are prescribed.

The Mayan calendar is considerably different from the Ladino, Gregorian calendar, and it is not at all unusual for a Kanjobal not to know the "Ladino" date on a given day. Along with this ancient way of life, Kanjobals are driven by modern economic pressures to serve as migrant laborers at least three months of the year to survive.

43. B. MANZ, REFUGEES OF A HIDDEN WAR 68 (1988).
44. Menchú, In Guatemala We Indians Have No Childhood, GUATEMALA IN REBELLION: UNFINISHED HISTORY 195 (J. Fried, M. Gettleman, D. Levenson & N. Peckenham eds. 1983).
45. Id.
46. Catholic priest commenting on effects of displacement, quoted in Miller, supra note 32.
47. Miller, supra note 32.
49. SIMON, supra note 3, at 175.
50. LA FARGE, supra note 17, at 41.
51. In the Mayan year, there are eighteen twenty-day months and one five-day month. Many Kanjobals do not know or celebrate their birthdays. FATHER MORIARTY CENTRAL AMERICAN REFUGEE PROJECT [hereinafter FMCARP], THE IMPACT OF CULTURAL FACTORS ON CREDIBILITY IN THE ASYLUM CONTEXT 3-4 (1988). For further discussion of Kanjobals' memory for past events, see Section II(B)(2) infra.
52. See supra note 3, at 42.
D. A Culture in Danger

During the 1970's, the highland Indians took part in a number of organizations, for example, agricultural cooperatives and the Catholic-church-sponsored Christian Base Communities. Many Kanjobals became lay catechists or health promoters, trained by the church. The military government regarded all such efforts as subversive; organizations' leaders began systematically to be murdered and disappeared. In 1980, the Comité de Unidad Campesina ("CUC": Peasant Unity Committee), a group made up of mostly indigenous people, organized a peaceful protest for land rights at the Spanish Embassy in Guatemala City. The Guatemalan government responded with a police assault, setting the Embassy afire and burning thirty-nine people alive. The sole Indian survivor, who had been taken to a hospital, was dragged from his bed and later found murdered. The sheer ferocity of the opposition seemed to galvanize CUC, which successfully struck for an increase in the minimum plantation wage later that same year.

Armed opposition to the military government was also increasing. In Huehuetenango, the Ejército Guerrillero de los Pobres ("EGP": Guerrilla Army of the Poor) grew to considerable power in the early 1980's. In other areas, the Organización de Pueblo en Armas ("ORPA": Organization of the People in Arms) and the Fuerzas Armadas Rebeldes ("FAR": Rebel Armed Forces) were active. Some peasants voluntarily supported the guerrillas, hoping to better their lot, while others saw no other choice. A foreign visitor to a highland area controlled by ORPA in 1981 found only two groups of people: "those who collaborated with the guerrillas and those who await[ed] death, trapped between terror and starvation."

By 1980-81, the EGP and the Guatemalan army were skirmishing openly in the northern highlands. Anthropologist Shelton Davis reported, "[a]t the end of 1981, the EGP controlled much of the territory of the Department of Huehuetenango, had destroyed 19 of the department's 31 municipal buildings, blew up 5 major bridges, and was able to harass bus and truck traffic along the main highway leading from the departmental capital to the Indian townships in the north . . . ."

To quell the guerrilla insurgency, the Guatemalan Army began "draining the ocean to kill the fish," that is, trying to defeat the guerrilla

53. MANZ, supra note 43, at 69.
54. BLACK, supra note 6, at 99-101. For a vivid description of the Spanish Embassy massacre, see MENCHÚ, supra note 17, at 182-7. Menchú's father was one of the protesters who died at the Embassy.
55. BLACK, supra note 6, at 104.
movement by erasing its base of support among the highland peasants. This tactic led to numerous widescale massacres, as Figure 2 shows.

**FIGURE 2. MASSACRES CARRIED OUT BY THE GUATEMALAN ARMY, 1981-1985.**

In June of 1982, during the presidency of Ríos Montt, the army went into northern Huehuetenango with 10,000 troops, reestablishing control of the area with an iron hand. At the end of that offensive, Davis reports, "the number of widows among the Kanjobal population [was] well over 1,000 and . . . orphans [numbered] between 3,000 and 5,000 . . . ." Two of the biggest massacres in Huehuetenango occurred at Coyá, municipality of San Miguel Acatán, on July 19, 1981, and at San Francisco, Municipality of Nentón, on July 17, 1982. The death tolls were "over 150" and 302, respectively. Survivors' stories detailed the army's methods:

Those people at Coyá were massacred by soldiers. They were massacred by the very same soldiers who had attempted to organize us into the civil patrols. When they arrived at Coyá, there were four trucks full of soldiers. . . . On that day also there were two helicopters and one small plane utilized on the attack on Coyá. . . . It appeared almost like it was raining bullets. The next day . . . the soldiers had left and we could see all the dead people. Another group of men arrived in the afternoon and we all buried the dead people right there in the town square. The reason I was on my way to Coyá was I was going there for the market. I saw about 50 bodies. Another thing that scared me was that after the killings the soldiers went house to house and they violated many women. . . . In the aldea of Coyá, before the attack, there were about 500 people. Later, there was only maybe 200 to be found there.60

We left [San Francisco, Nentón] when the army came to massacre our entire family. They came about 11 in the morning and first asked for two bulls to eat. . . . Finally we gave them the bulls and killed them. Then they called all the families and said they were going to share the food with us. But when we didn't go to get our families, they went and got them from the houses to come to a meeting. They gathered everybody and made the women and children go into the church. They put us, the men, in the courthouse. . . .

When they finished eating, they divided up into two groups. About 70 or 80 of them went to search our houses and take our things. . . . They took everything. . . . When finished robbing, they took the women in groups of 20 and left the little children outside. They put the women in the empty houses and shot them and threw grenades to kill them. Then they set the houses on fire. Then they took the other groups of 20 and threw grenades and shot them and burned them. Anything that moved was burned and all the houses became ashes. They finished off the women and then the children. . . . When they finished killing the little ones, they began with us. . . .

They took the old people and killed them with knives like animals. They kept crying out. What crime did they commit? When they finished with the old people, they went for the working men. They took them all tied up and shot them four times each in groups of ten and threw them back in the church. They piled them up in the church. And they were getting everyone. But God is greater. When there were only about 20 to 25 of us left, God inspired one of us to open the window of the courthouse. It was already on fire and feeling the heat, the soldiers got to one side and left the window open. One companion escaped and saw that there was no one on that side. About six got out and finally it occurred to me to get out, too. They shot at us with bullets, but by the grace of God I got away. We were saved, but everything else was lost. What

crime have we committed? Certainly we are peasants, but hard workers.61

Under Ríos Montt and his successor, General Mejía Víctores, the watchword of the Guatemalan army was very similar to that of the U.S. Cavalry in the nineteenth century: "The only good Indian is a dead Indian." Ríos Montt's press secretary, Francisco Bianchi, explained this reasoning: "The guerrillas won over many Indian collaborators, therefore, the Indians were subversives, right? And how do you fight subversion? Clearly, you had to kill Indians because they were collaborating with subversion."62

Mejía Víctores declared his intention to wipe out even the word "indigenous," for the mere maintenance of Mayan customs was regarded as subversive.63 Soldiers killed children brutally, apparently believing that, if allowed to live, they would continue their parents' supposed "subversion."64 But Mayans themselves considered this attribution preposterous, arguing that, "[t]hese people are labeled subversives, communists and guerrillas. But the Indians live in their own culture and do not accept foreign types of thinking like communism, socialism, leftism, capitalism and imperialism. The Indians do not know what is left or right, and it is absurd when they are accused of having one of these ideologies."65

This separateness did not spare traditional Kanjobal community or religious leaders from persecution. On the contrary, the army intentionally set about destroying "the core of Indian community life"66 and substituting its own members as the only governing structure in the countryside. Shelton Davis describes the assassination of a Mayan spiritual leader and his assistant:

In 1981, the Army killed the major ceremonial leader of this community and his assistant, the alcal chaj as he is called in Kanjobal, be-

61. MANZ, supra note 43, at 246-47. This incident was widely reported in the U.S. and international press. See e.g., Riding, Guatemalans Tell of Murder of 300, New York Times, Oct. 12, 1982. The San Francisco massacre alone caused 9,000 indigenous people to flee the department of Huehuetenango. Press, supra note 35.
63. Perera, supra note 2, at 41.
64. Rights Group Asserts Guatemala is Killing Indians, New York Times, May 8, 1983 (summarizing findings of Americas Watch). In 5 GUATEMALA! (Newsletter of the Guatemala News and Information Bureau ("GNIB")), Nov./Dec. 1984, at 6-8, an Indian catechist characterizes the soldiers' belief in hereditary subversion:

We [Indians] never cut a section of coriander unless we have sown more to replace it. It is the same with us and our children. We will die. They will remain to continue our work, our customs. Perhaps because of this, when soldiers killed the children in the village . . . they yelled, "We must kill the little ones because they are the children of the Indians. They will learn the vile deeds of their parents."
65. An Indian Voice, supra note 18, at 2.
cause they were alleged to be praying for the success of the guerrilla movement. According to several independent accounts, soldiers came to the village . . . dragged the alcal chaj and his assistant out of their house when they were in the midst of carrying out a ceremony, shot them and then cut them into pieces, pouring their blood over a mound of rocks where the traditional religious leaders often prayed. This act essentially brought to an end a Mayan ceremonial organization which had existed since pre-Columbian times and survived nearly five centuries of conquest and colonization.  

Killings of Indian peasants in the countryside continued at an alarming rate in 1983 and 1984, despite the fact that the guerrilla forces in northern Huehuetenango had been mostly driven out or underground by the massive offensive in late 1982. U.S. Representative Clarence Long visited Guatemala in 1983, while Rios Montt was still in power, and on returning to the U.S., denounced Reagan administration claims that the human rights climate had improved in Guatemala and that the Guatemalan regime was now worthy of receiving U.S. military aid. Rep. Long conceded that perhaps there had been some improvement in the cities, "but up in the countryside, . . . it's still done by murder, mutilation, burning and looting in one village after another. . . . It's part of a centuries-old genocide by the upper class against the Indian population."  

Rep. Long was adamant that the Guatemalan regime should not receive U.S. support in this genocidal campaign: "The regime there supports mass murder and torture, and there isn't anything that would persuade me to do anything for that crowd."  

I. Army Reglementation of Village Life

While massacres on the scale of 1983 no longer are frequent in Huehuetenango, military control of the area is still extremely pervasive. Guarded roads and military outposts, often built through peasants' forced labor, are a constant reminder that at any time, massive violence can recur. In the late 1970's and early 1980's, the Guatemalan military instituted three programs which have had no less devastating effects on the Mayan way of life than the massive killings: (1) a system of spies (orejas, literally "ears"), (2) "model villages" for resettlement, and (3)

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68. No Aid for Guatemala, 3 WASHINGTON REPORT ON THE HEMISPHERE 2 (April 19, 1983). Rep. Long's assessment that the army's actions constituted genocide were shared by many other organizations, for example, the Guatemalan Commission on Human Rights (Comisión de Derechos Humanos de Guatemala). In its REPORT ON THE SITUATION ON HUMAN RIGHTS IN GUATEMALA, 40TH GENERAL ASSEMBLY, at 60-70 (Oct. 1983), the OAS agreed with a Pastoral Letter issued by the Episcopal Conference of Guatemala, which denounced the counterinsurgency campaign as genocidal.
69. No Aid for Guatemala, supra note 68.
forced participation of peasants in civil defense patrols. None of these programs has been altered in the slightest by the election of a civilian president. 70 

a. Orejas

The Guatemalan armed forces have long maintained computerized lists of “suspected subversives” through information gathered by a special intelligence unit known as the G-2. 71 To get information for its list, the G-2 uses torture on any suspect it captures. 72 Information from the G-2 is supplemented by civilian informers (orejas), who are variously motivated to bring harm on their neighbors.

Highland Indians in the late 70's discovered that denouncing an annoying neighbor to the army as a guerrilla sympathizer is a more immediate way to get revenge than traditional magic techniques. 73 False denunciations have sometimes been used by jilted sweethearts. 74 Some informants are paid. In perhaps the majority of cases, orejas are hoping to save themselves by pointing at their neighbors. 75 Children serving as orejas have been observed selecting victims for death in army sweeps. 76

The spy network has very effectively undermined community solidarity, replacing this sentiment with suspicion and silence. 77 An Amnesty International delegation investigating killings and disappearances in a rural village found villagers very reluctant to discuss abuses they had witnessed, for fear of army reprisals. A priest told the delegation, “[y]ou must watch their eyes. No one will talk. You must try and see what they may be trying to tell you with their eyes.” 78 For fear of orejas’ reports to the military, people “don’t talk much about freedom . . . [or] much about understanding, and you don’t talk much to anyone you don’t know.” 79

In traditional village life, community leaders were chosen on the ba-

70. Former President Cerezo did not contest “any [of the army’s] operations to establish the country’s rural highland[s] . . . as a permanent military reservation.” Anderson & Simon, supra note 14. It is very unlikely, given the background of recently-elected President Serrano, that he will oppose the army’s policies in this regard.
71. SIMON, supra note 3, at 221.
72. The G-2's techniques are graphically described by Emetrio Toj Medrano, a founder of CUC, who was tortured into giving a staged television “confession,” which he later recanted. Medrano, A Guerrilla is Captured, Confesses, Then Escapes, in GUATEMALA IN REBELLION: UNFINISHED HISTORY, see supra note 11, at 253-56; see also Simon, supra note 3, at 130.
73. SIMON, supra note 3, at 84-85.
74. Id. at 127.
75. Many informants, like Toj Medrano, endured torture and were released only on the promise that they would continue to periodically inform on others. See AMNESTY INTERNATIONAL, GUATEMALA: THE HUMAN RIGHTS RECORD 37-38 (1987).
76. SIMON, supra note 3, at 134.
77. MANZ, supra note 43, at 70-71.
78. Amnesty International, supra note 75, at 36.
sis of “age, respect, and community consent.” Nowadays, military or paramilitary authorities, such as the civil patrol (discussed below) have replaced civilian leaders as the arbiters of all campesino disputes. Whereas previously, complaints of crimes or damages to property would be taken to the mayor or regional judge, now the pattern is “¡por cualquier problema, a la zona!” (for any problem, off to the [military] base)\(^81\) The local or regional military commander resolves the dispute through violence\(^82\) which may include imprisonment, torture and/or disappearance.

b. Model Villages

The scorched earth policies of Ríos Montt and Mejía Víctores sent thousands of rural peasants fleeing for their lives into México or into the mountainous areas of the highlands. Some of these internal refugees gradually filtered back on their own, after enduring sickness, exhaustion and near starvation, to see what was left of their homes.\(^83\) Others were forcibly herded, or enticed by army promises of land and food, into army-controlled concentration camps, called “model villages.”

The system of model villages began under Mejía Víctores as a method of subduing the rural populace. Model villages were constructed in areas where the guerrillas had a strong influence in prior years. The system of villages is administered by a local, regional and national network of “Inter-Institutional Coordinating Committees” (IIC) and a special army division for civilian affairs, called the S-5.\(^84\) The organizational chart of the IIC includes civilian input, but in practice, the army maintains control over all development funds and activities in the model villages through the IIC.\(^85\) The IIC also controls telecommunications throughout Guatemala.\(^86\) One army officer boasted that everything (todito) in his model village had come from U.S. AID.\(^87\) Each model village is built near or adjacent to a prominent army garrison. Although

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81. James Loucky comments that “[i]n one case of drunkenness, which earlier would have resulted in a small fine and a night in the local jail, a Kanjobal youth and seven others were sent to the Huehuetenango base for interrogation...” Affidavit of James Loucky, October 26, 1989, at 6 (available in the office of the La Raza Law Journal).
83. After coming to the attention of the army, these refugees are usually interrogated at army garrisons before being placed in a militarized settlement. SIMON, supra note 3, at 236.
84. MANZ, supra note 43, at 42-46.
85. Id. at 72-73.
86. James Loucky, letter to the editor of the Los Angeles Times, January 2, 1986 (Metro section) at 4, col. 6.
87. Development: The New Face of War, supra note 34, at 27.
forty-nine villages were originally planned, construction stopped in February 1986, when the camps' population was approximately 65,000-70,000.

Refugees themselves built most of the model villages through a "food for work" program instituted by the army. Many of the laborers were women and children. In the camps, traditional housing patterns are altered, with houses laid out close together on a predetermined grid. The army assigns houses by lot, which may result in relatives living far from one another. Many of the refugees in the camps do not share a common language, much less the common kinship patterns of free indigenous villages. The army sometimes discourages customary religious fiestas and the wearing of traditional clothing. To build the camps and roads, the army has forced campesinos to fell large trees, which violates indigenous people's religious beliefs. In the camps, land is provided for planting, but it is usually too small to sustain a family. Even the traditional emphasis on corn as a subsistence crop has been supplanted, because the army urges the villagers to plant cash crops, such as snow peas and broccoli. Permission from the military is required to enter or leave the village. This permission requirement, coupled with civil patrol duty, makes it difficult and sometimes impossible for families to supplement their meagre food-for-work wages with income from migrant labor. Near some military bases, Indian women have been driven to prostitution to survive.

88. Manz, supra note 43, at 42.
89. Americas Watch, Closing the Space 82 (1988).
90. Simon, supra note 3, at 155.
91. Lernoux, supra note 39.
92. Miller, supra note 32.
94. Maria, an indigenous Guatemalan, describes this clash of beliefs:
   'We cut down a tree only if there is a need to do so. Such is the case when we need to make a house or when we need firewood; we ask the tree for permission. . . . We ask permission of the Other who is Creator of all things . . . Soldiers do not think about the life of trees. Therefore, when they form the civil patrols, they force the people to clean the roads and cut the trees. In my village, the people became very distressed when they were told to do that.' 5 Guatemala!, at 6 (Nov./Dec. 1984).
97. Some army personnel consider that such freedom of movement fostered subversion among the highland indigenous people, and thus, is best prohibited altogether. Development: The New Face of War, supra note 34, at 29.
98. Previously prostitution was almost completely unheard of in the highlands. Manz, supra note 43, at 243 n. 59.
In the camps, refugees are subjected in various ways to constant propaganda against “subversives.” The very names of the streets are part of the reeducation program: “New Life,” “National Army Avenue,” etc.99 Soldiers bring the refugees together for films and “ideological talks.” 100 Twice a day, refugees must participate in patriotic exercises, saluting the flag, singing the national anthem and the hymn to the Guatemalan soldier.101 The goal of this indoctrination is not only to foment patriotism; it also aims to “submerge and then neutralize the ethnic identities of rebellious Indian communities...” 102 Guatemalan Archbishop Penados condemned the model villages as “an incredible sterilization program, which is contrary to moral, ethnic and cultural values.” 103 His opinion is shared by regional and international human rights organizations who have visited Guatemala. 104

c. Civil Patrols

Today, some 600,000 Guatemalan peasants are organized into civilian militias, called the “Patrullas de Autodefensa Civil” (Civil Defense Patrols). 105 The system of patrols was instituted under Rios Montt, 106 and at its height encompassed one million persons. 107 The army explains that the patrols are necessary to aid in the military’s campaign against the guerrillas, but many have pointed out the absurdity of this justification, since the army consists of roughly 40,000 troops 108 while estimates of current guerrilla strength range between 1,200 and 2,000. 109

The real motivation behind the system of civil patrols, like the model villages, is social control of the population. 110 And, like the model villagers, civil patrolmen receive a heavy dose of pro-military indoctrina-

99. SIMON, supra note 3, at 172.
100. Id. at 178.
101. Krueger, supra note 96, at 43.
102. Perera, supra note 2, at 42.
103. Development: The New Face of War, supra note 34, at 29.
104. See e.g., COMISIÓN DE DERECHOS HUMANOS DE GUATEMALA, REPORT TO THE SUBCOMMISSION ON THE PREVENTION OF DISCRIMINATION AND THE PROTECTION OF MINORITIES OF THE UNITED NATIONS ON THE HUMAN RIGHTS SITUATION OF THE GUATEMALAN INDIGENOUS POPULATION 7 (Geneva, August 1984); AMERICAS WATCH, GUATEMALA: A NATION OF PRISONERS (1984). But others tended to see the militarized villages as a benign phenomenon, most notably, the special rapporteur of the United Nations, who visited the area between 1983 and 1986, and the U.S. State Department. SIMON, supra note 3, at 182-85.
106. AMERICAS WATCH, CIVIL PATROLS IN GUATEMALA 16 (1986).
107. Id. at 27.
108. AMERICAS WATCH, supra note 105, at 9.
109. For example, Perera, supra note 2, cites estimates of 2,000 guerrillas (in 1986), while a more recent UPI report appraises guerrilla strength at 1,200 combatants. Kirby, Peasants Denounce Forced Service on Defense Patrols, UPI, BC Cycle, January 23, 1989.
110. AMERICAS WATCH, supra note 106, at 19, 53.
All rural men between eighteen and fifty are obliged to participate, although in some areas, the age range is much wider. While civil patrol leaders may be Ladinos, rank and file members are nearly 100% indigenous. Army spokesmen maintain that the patrols are voluntary, but investigation by human rights groups confirms that patrollers are recruited through violence and intimidation. Those who refuse to patrol, for whatever reason, are regarded as subversive and punished.

In each village the army appoints a civilian military commissioner who is in charge of all the patrols and who reports directly to the local army officials. Under the commissioner are leaders of individual patrols, who command a group of about ten men. Most civil patrolmen do not have guns; their weapons are machetes and sticks. Duties of the civil patrols are: (1) to serve as “the eyes and ears of the military,” reporting anything suspicious to army personnel; (2) to monitor traffic into and out of their villages and on the roads, stopping vehicles to check identification; (3) to serve as cannon fodder in army sweeps into guerrilla territory; (4) to aid in ferreting out internal refugees and bringing displaced persons to the attention of the local military base; (5) to build roads and military installations for the army; (6) to aid in interrogation of “suspected subversives;” and (7) to “do the army’s dirty work” — commit human rights violations against fellow villagers. Patrolmen are not paid for any of these duties. Nor are they provided with food, and in some cases, they are forced to buy uniforms or weapons out of their own pockets.

In order to travel, a man of patrolling age must frequently produce documents proving his service and permission to leave. In addition, he must either pay a fine or get a substitute for the time he is absent. Nationwide, patrollers serve an average of 10 hours every 10 days, although 24 hours every week or two weeks is common, and in smaller villages, patrol duty may be every three to four days for 24 hours.

Peasants, religious groups, and human rights organizations have all

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111. AMERICAS WATCH, supra note 105, at 8.
112. AMERICAS WATCH, supra note 106, at 26-27.
113. Id. at 77; AMERICAS WATCH, supra note 105, at 9.
114. AMERICAS WATCH, supra note 106, at 38-40.
115. Hockstader, Indian Rights Proves Risky Cause, Washington Post, September 11, 1989. Punishment for not serving is not a purely local phenomenon, but has been articulated as military policy by the chief of the Guatemalan army, General Gramajo. AMERICAS WATCH, supra note 89, at 81.
116. AMERICAS WATCH, supra note 106, at 28.
117. Id. at 51-66.
118. Id. at 29-30.
119. Id. at 54, 70-72. See also AMERICAS WATCH, supra note 89, at 77.
120. AMERICAS WATCH, supra note 106, at 51, 70.
denounced the civil patrol system as a modern-day form of slavery. In February 1988, the president of the Guatemalan Supreme Court characterized the patrols as "unconstitutional, illegal and despicable." Catholic church officials have repeatedly called for the disbanding of the patrols as illegal and immoral: "What most worries us is the moral damage affecting our brothers' conscience when they are obligated to act against innocent people and when they are encouraged to act with a war-like spirit." The 1985 Guatemalan constitution, Article 34, expressly forbids obligatory patrol service:

The right to freedom of association is recognized. No individual shall be forced to associate with or form part of groups or associations of self-defense or similar organizations.

Thus, in order to continue the patrol system, the army must maintain the fiction that patrollers serve voluntarily. Yet even President Cerezo admitted that most patrollers do not serve voluntarily.

Since about 1986, a protest movement against the patrols has been gaining strength in the province of El Quiché and throughout Guatemala. The organization is called Consejo de Comunidades Étnicas "Runujel Junam" ("CERJ," Council of Ethnic Communities "We are All Equal"). Reflecting its indigenous origin, the last two words of the group's name are in the Quiché language. Its leader is Amílcar Méndez Urizar, a rural elementary schoolteacher who speaks both Quiché and Spanish. CERJ has 6,000 members, but most of these are in four provinces other than the Kanjobals' home territory of Huehuetenango. Nevertheless, the experiences of CERJ protesters are relevant not only for their own areas, but serve to highlight what happens to any Indian who refuses to cooperate with the patrol system.

Amílcar Méndez and other CERJ members have "gone through channels," presenting written petitions for exemption from patrol service not only to local army officials, but also to civilian government functiona-
ries, including the President. In August 1988, CERJ organized a march on Guatemala City to present a petition asking the (largely ineffectual) Congressional Human Rights Commission to oversee patrol activities, and to ensure that constitutional rights were observed. According to Americas Watch, it is the fundamental conception behind CERJ — the idea that constitutional guarantees could apply to Indians — which arouses army opposition and reprisals against CERJ members. These reprisals have included murder and disappearance of CERJ members, and numerous death threats against its leaders.

Most recently, military commissioners assassinated María Mejía, an active member of CERJ, and wounded her husband in the village of Parraxtut, Sacapulas, Quiché province. Her family had been the target of constant abuse by the authorities because Ms. Mejía's sons refused to patrol. After the killing, the commissioners threatened to murder other CERJ members, who fled from the village. Amílcar Méndez, two representatives of the office of the Human Rights Attorney, two policemen and other officials accompanied the threatened CERJ members back to their town to investigate the killings. The police carried warrants for the arrest of the military commissioners. But the delegation was prevented from entering the village by a mob of armed civil patrollers and military commissioners who shouted, "Kill them!" and shot at Méndez as he left. One official identified himself as an authority and was immediately surrounded by the mob and beaten with clubs.

This incident reveals not only the courage of those opposed to the civil patrols, but also the military's utter disdain for objectors' fundamental rights under the Guatemalan constitution and the legal channels supposedly designed to protect those rights.

Together, the military's three key tactics — spies, model villages and civil patrols — serve to monitor every move in indigenous communities. The regimentation and suspicion that the monitoring engenders have changed "the cultural landscape of rural Guatemala" more in the last decade than in the preceding 100 years.

128. Id. at 2.
132. Id.
133. Stuermer, supra note 130.
134. Manuel, supra note 131.
135. Stuermer, supra note 130.
136. AMERICAS WATCH, supra note 106, at 11.
2. Displaced Indian Peasants in Urban Areas

Many thousands of indigenous people, torn from their communities by the war, have fled to regional centers or to Guatemala City. They are driven not only by economic necessity, but also by the hope of escaping the civil patrol system and constant army surveillance.

Nevertheless, these refugees soon discover "[b]eing where you don't belong raises suspicions."\(^{137}\) Human rights organizations report that in some instances, urban death squads have brought rural *orejas* along to point out potential targets from the informers' hometowns. In an effort to blend in, Kanjobals and other indigenous refugees give up their traditional clothing and avoid using their native tongue, meanwhile scrambling to eke out a living as street vendors, beggars, servants or washerwomen.\(^{138}\) A great many of these newly-urban refugees are widows and orphans. Guatemala City has 10,000 homeless children.\(^{139}\)

Not only refugees' language and dress are changed by urban life, but traditional community solidarity and religious beliefs are as well. Urban pressure to assimilate may destroy any vestiges of traditional values, especially among youth.\(^{140}\) Alcoholism is widespread.\(^{141}\)

For most refugees, the city holds little promise of self-sufficiency. Guatemala's economy is in a shambles, with "the most common complaint [being] there is simply no work."\(^{142}\) At least half of the working-age population is unemployed or underemployed.\(^{143}\) 500,000 live in the slums of Guatemala City and recently, as in Peru, these urban settlers began appropriating vacant land.\(^{144}\) In one such settlement, El Mezquital, a campaign for basic services was successful only after children who had died from drinking contaminated water were placed on the steps of the National Palace.\(^{145}\)

Along with these hardships, regardless of their efforts to assimilate, indigenous Guatemalans in cities continue to bear the brunt of racial discrimination.\(^{146}\)


\(^{138}\) Lernoux, *supra* note 39.

\(^{139}\) *Id.*

\(^{140}\) *Id.*

\(^{141}\) Simon, *supra* note 3, at 173.

\(^{142}\) MANZ, *supra* note 43, at 48-49.

\(^{143}\) Simon, *supra* note 3, at 205.

\(^{144}\) Hidalgo, *supra* note 31.


\(^{146}\) Miller, *supra* note 32. Simon notes that expressions such as *No seas indio* ("Don't be an Indian." i.e., Don't be stupid) are commonplace in Guatemala. Simon, *supra* note 3, at 59.
3. **Kanjobals in México**\(^\text{147}\)

Approximately 100,000 indigenous Guatemalan refugees are currently living in México.\(^\text{148}\) As of 1984, Kanjobals made up about half of the those living in refugee camps administered by COMAR (Comisión Mexicana de Ayuda a Refugiados), an office of the Mexican government.\(^\text{149}\) Furthermore, the number of Kanjobals in the Mexican refugee camps at that time was equivalent to or greater than the number of Kanjobals still living in Guatemala.\(^\text{150}\) Little has been done to stem this exodus. Only a small number of refugees in the camps have returned to Guatemala, despite a visit by Raquel Blandón de Cerezo, the wife of the former Guatemalan president, urging them to do so.\(^\text{151}\)

Indigenous people from Huehuetenango in the camps have expressed concern that their languages and way of life will be lost. For example, a Chuj-speaking schoolteacher stated, "[w]e want to make sure our children grow up speaking their own languages, but if they grow up surrounded by Mexicans, that might be impossible."\(^\text{152}\)

By all accounts, the Mexican refugee camps in the states of Chiapas, Campeche and Quintana Roo are not luxurious places to live.\(^\text{153}\) In some camps, water is perpetually scarce.\(^\text{154}\) In others, housing, food and health care leave much to be desired. The Mexican refugee camps also share certain features with the model villages of Guatemala: movement in and out is controlled, with permission required, the (Mexican immigration) authorities are present, and refugees are dependent on the camp administrators for their livelihood because work is restricted. Camps in Chiapas are vulnerable to incursions by the Guatemalan army.

A large number of Guatemalan refugees in México do not live in the camps, but like the urban migrants in Guatemala City, seek to pass unnoticed among the general population. The Mexican government has no provisions for granting asylum or permanent resident status to Guatemalans,\(^\text{155}\) however, and even though there is a special immigr-
tion status available to parents of children born in México, the Mexican government has refused in most instances to grant Mexican birth certificates to children born in the refugee camps. The most the immigration authorities will accord to Guatemalans is a temporary “border visitor” visa, without refugee status. A person to whom this visa is issued is restricted to an area within fifty miles of the border and must renew his or her immigration status every ninety days.

If Guatemalans are apprehended outside the camps, they may be forced to pay a bribe and let go, or jailed in the same cells with common criminals, until such time as they are taken to the border and handed over to Guatemalan officials. “Guatemalan detainees have no legal recourse in México and it is almost impossible to stop a deportation.”

The international press has reported mistreatment of Guatemalan refugees by Mexican immigration officials, both in the camps and outside. Guatemalans have been robbed, physically abused, and in the case of women, raped or forced into prostitution. Kanjobals I interviewed uniformly said that they avoided the Mexican authorities and if stopped by an official, said they were from Oaxaca, an area of México in which there are many indigenous people.

It is not unusual for Kanjobals to spend a fairly long period of time in México, at least a year, as they gradually earn the money for their own and their family’s journey into the United States. Refugees must pay not only living and transportation expenses, but also the price of a coyote (border smuggler) for each individual in the family. The length of time spent in México is not a sign of security, however, since at any time, a Guatemalan apprehended by the Mexican authorities may be deported.
Kanjobals in the United States

Kanjobals in the United States, numbering between 5,000 and 7,000, are concentrated in only two areas: California and Florida. Los Angeles is home to about 4,000, and at least 500-800 live in southern Florida. Some Kanjobals also work as migrant fieldworkers in other states, including Colorado.

Adjusting to life in a new country has been difficult, but for some fortunate people, family ties still hold: Many members of the Los Angeles and Florida refugee communities come from one area of Huehuetenango, the municipality of San Miguel Acatán.

Like refugees living in México, Kanjobals in the U.S. are haunted by their experiences of terror. The psychological scars are particularly evident among children. Young Kanjobal children interviewed by a psychologist in Florida wrote poems and drew sad pictures expressing their fear. Some children still suffer from recurring nightmares of Guatemala and may be thrown into panic by circumstances which remind them of massacres they witnessed. For example, one day when a television news team came in a helicopter to an elementary school where Kanjobal children were enrolled, María (age 7) and other Kanjobal refugee children ran for cover. “We thought it came to drop bombs again or take us away from our parents.”

Kanjobals’ traditional rural ways, where life revolves around kinship ties, have ill-prepared them for survival in the urban jungles of Los Angeles. Unaccustomed to the anonymity of urban life, and unable to communicate with Spanish-speaking neighbors, “[a] lot of women sit alone and cry at home.” Even among the large Latino community of Los Angeles, older Kanjobals may be isolated by their lack of literacy and fluency in Spanish. For instance, an elderly Kanjobal woman was living with her son, but after he left for work each day, she spent her time talking to herself in Kanjobal, crying and telling anyone she could find about the horrible events she had fled. Finally she returned to Guatemala. Her son commented, “[s]he preferred to die in her village than to


163. Hernández, supra note 160.
164. Press, supra note 35.
166. Boothby, Uprooted Mayan Children, 10(4) CULTURAL SURVIVAL Q. 48, 50-53 (1986).
167. Id. at 52.
live here."169

Homesickness for the old ways strikes younger people also. One young Kanjobal woman stated, "[i]t's really true what that young girl said . . . when she died . . . [in the movie El Norte]. There's really no place left for us."170 A 20-year-old Kanjobal man commented, "[w]hat bothers me is that if I stay here, I'm going to get involved with people who are very different, who don't understand me and who I don't understand. I don't think I could be happy."171

But some refugees are starting to reject the Kanjobal ethic of community cooperation. A young Kanjobal man described taking up a collection to help widows and orphans of families left behind, but now he has found that the pace of urban life and indifference makes this hard. "Before the violence started, whenever someone died in our town, everyone was concerned. We'd run to the family to find out what happened and to offer our help. But now, they're not a surprise. . . ." A journalist adds, "[n]ot unless the death is from natural causes."172

Kanjobal children in Florida and Los Angeles are rapidly taking in the values of U.S. popular culture, rejecting what they remember of their language for their schoolmates' English and Spanish. In some homes, youngsters' posters of U.S. and British rock stars share wall space with the parents' religious tributes to saints.173 At least one developmental specialist fears that their mass acculturation to U.S. ways through schooling may make it very difficult for Kanjobal children to adjust to rural life again, should they go back.174

As in the case of urban refugees still in Guatemala, family stress is a problem.175 Traditional sex roles are abandoned for the sake of making a living: women now work outside the home, and sometimes women have an easier time finding work than men, because as household servants, women are less visible to immigration authorities. Most Kanjobal men work in low-paying jobs, such as factory, restaurant, or janitorial work or in construction labor.

Refugees are highly vulnerable to street crime. In South Los Angeles, where some Kanjobal families now live, the newcomers are marked as easy pickings for gangs.176 Police report that because the refugees don't speak English or Spanish, "the gangs mark them for street robber-

169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
174. Boothby, supra note 166, at 53.
176. Id.
Most of the Kanjobals in the United States entered illegally, and are thus considered deportable by the INS. Only a few have managed to gain legal residence through the amnesty program of IRCA (Immigration Reform and Control Act of 1986). "To avoid deportation to Guatemala, [Kanjobals] make every effort to appear Mexican. The women have shed their huipiles and cortes . . . [and] they try to remain as inconspicuous as possible." During 1983-84, Los Angeles immigration authorities returned more than 1,000 Guatemalans to an uncertain future in their home country.

In some instances, the INS has also attempted to take advantage of Kanjobals' unfamiliarity with U.S. ways. In one notorious incident in south Florida, the INS took a group of Kanjobals from the Krome detention center, where they were being held as deportable, to the Guatemalan consulate, where they were interrogated by Guatemalan officials. The Indians, terrified, refused to give even their names.

E. Possibilities for Repatriation

International refugee organizations, such as the United Nations High Commissioner for Refugees ("UNHCR"), prefer for refugees to be repatriated, eventually, to their home country, rather than continue indefinitely in camps or assimilate into the life of a second country. Kanjobal refugees in México want to return, but are held back by fear. Their fear of army reprisals upon returning is a very real worry. The Guatemalan government considers all returning refugees suspect. This distrust became crystal clear when Guatemalan troops raided refugee camps in Chiapas, México, killing and wounding the survivors of earlier massacres. Residents of the Chiapas camps are considered so tainted politically that the military commander of a town had the civilian (Kanjobal) mayor stripped of his office simply for visiting a Chiapas refugee camp.

177. Id.
178. Hernández, supra note 160.
179. Id.
182. General Gramajo, the Defense Minister under Cerezo, stated publicly that guerrilla organizations have readied refugees for subversive operations to be carried out upon returning to Guatemala. El Gráfico, March 10, 1987; MANZ, supra note 80, at 25-26.
183. Raids were fairly regular events until the Mexican government transferred a large number of refugees from Chiapas to Campeche and Quintana Roo. For accounts of these raids, see e.g., Carlin, Mexico Drives Refugees into Guatemalan Hands, London Times, Nov. 6, 1982; Orme, Attack on Guatemalans in Mexico Reported, Washington Post, May 1, 1984.
184. Declaration of Loucky, supra note 81, at 7.
Like Mejía Víctores' equation of "indigenous" and "subversive," a recent Defense Ministry report equates the terms "refugee" and "subversive." Beatriz Manz, who reviewed the report and interviewed army officers, found that:

whereas all refugees are suspect and considered to be collaborators, refugees who come from areas in which the insurgents were or continue to be active would be more directly linked in the minds of the military with the insurgents. . . . Soldiers and officers . . . frequently made statements to the effect that those who left these conflict zones were guerrillas or guerrilla supporters. If not, they often told me, why would they have left?

Since Huehuetenango is considered a "conflictive area," Kanjobals who came from or return there risk arrest, interrogation, and even disappearance or death as suspected collaborators. Within the group who fled Huehuetenango, certain indigenous returnees may be especially distrusted, either because of their religious beliefs (in the case of Catholic catechists) or because of demonstrated or suspected competence as a leader. Young Kanjobals who have "aspirations to affect changes in standards of living in their villages" are regarded as likely subversives. Rather than welcoming back their neighbors who fled, villagers who stayed in Guatemala steer clear of them, fearing that their very presence may cause the army to suspect the whole village of collaboration.

Returning refugees may also have to sign an amnesty document and this fact alone would mark them as being either repentant guerrillas or guerrilla sympathizers. After the coup attempt in 1988, President Cerezo agreed that all returning exiles would be obliged to accept government amnesty.

When refugees arrive in their home area without papers, the civil patrol is likely to turn them over to the army. For example, when refugees returned from the México camps to Nubila in January of 1987, they were stopped by the patrol at the entrance to the village and denounced as subversives. The heads of the families were forced to go to the military base in Huehuetenango and were detained there for ten days. Only

187. Loucky, supra note 81, at 7.
188. Id. at 8.
189. Id.
190. CLOSING THE SPACE, supra note 89, at 108; San Francisco Examiner, November 17, 1987 at B8.
191. CLOSING THE SPACE at 2.
constant protests secured their release. Refugees who left may also find that what little land they had has been given to others whose support for the government is less in question.

What happened to a Kanjobal woman who returned to visit relatives is illustrative of why Kanjobal refugees should fear government reprisals. Maria Elena Gaspar Xuncax, who left in the early 1980's and who is now a legal temporary U.S. resident, returned to Barillas to visit her father on June 30, 1988. She was detained first by the police and later by the army for a six-day period, on the basis of an informant's testimony that he had seen her attacking vehicles and killing two soldiers, despite the fact that she had not been in Guatemala at the time of the alleged attacks.

Human rights observers stress that such incidents are not isolated occurrences. Even former President Cerezo admitted that the safety of returning refugees could not be guaranteed. In addition, since Kanjobals would be returning to an area in which reporting is scarce, the actual frequency with which authorities mistreat refugees could be much more common than is generally realized.

Returnees fall under the all-encompassing surveillance of the armed forces. As Schirmer points out, the "military has compiled and maintained a computerized database of 'subversives' and activities of the entire Guatemala population has been closely watched." Thus, "[t]he military knows which villagers . . . left Huehuetenango and when. Once such information goes into a database, it remains available for years and past actions can come back to haunt one later, upon return." Thus, "[t]he military knows which villagers . . . left Huehuetenango and when. Once such information goes into a database, it remains available for years and past actions can come back to haunt one later, upon return."

Given all these potential dangers to returnees, human rights monitors have advised caution in promoting repatriation, stressing that return should be voluntary and attempted only when the government in power can ensure returnees' safety — a condition which in present-day Guatemala seems an impossible dream.

F. Summary of Part II

The cultural existence of Kanjobals — both those who have remained in Guatemala and those who fled — is perilously close to extinc-

192. MANZ, supra note 80, at 46-47.
193. Id. at 40-45. Manz interviewed one man who watched his neighbor reaping a profitable harvest from land he had planted. The dispossessed man was afraid to protest this usurpation because if he did, "they would inform the military base." Id. at 42.
196. Id.
197. Id.
198. MANZ, supra note 80, at 70-72.
tion. For those who remained in the Guatemalan countryside, military control has undermined the solidarity of hundreds of years; in the cities, grinding poverty and fear accompany attempts at assimilation. Despite the fact that one half of the tribe now lives outside Guatemala, México offers, at best, a precarious and temporary safety for Kanjobal refugees.

The next section examines Kanjobals' prospects for achieving safety under United States refugee law.

III.

U.S. REFUGEE STANDARDS AND KANJOBALS

A. Legal Basis for Refugee Status


Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to 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.


Displaced persons can also apply for withholding of deportation under INA § 243(h), 8 U.S.C. § 1253(h), which adopts the Protocol's principle of non-refoulement (meaning, roughly, "no forced return"). Parties to the Protocol are prohibited from returning a refugee to a country where his "life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

199. The discussion to follow concentrates on political asylum and withholding of deportation, because these are the only immigration remedies available to the majority of Kanjobals who have fled to the United States. For more information on U.S. refugee law as applied to Central Americans, see ILRC MANUAL, supra note 157, and D. Anker, THE LAW OF ASYLUM IN THE UNITED STATES: A MANUAL FOR PRACTITIONERS AND ADJUDICATORS (1989).

200. It is also possible for a person to be selected for admission to the U.S. as a refugee while still within his or her home country, via INA 101(a)(42)(B): the President, consulting with Congress, may designate certain refugees for admission to the U.S.—those who are "of special humanitarian concern to the United States." Many South East Asian refugees entered under this provision, but it has never been applied to Kanjobals.

political opinion." 202

In 1979, the United Nations High Commissioner for Refugees published a Handbook on application of refugee standards, which, although it is not binding on U.S. courts, has been very influential both in the U.S. and other countries in defining who is entitled to protection. 203

Under U.S. procedures, the INS considers an application for political asylum as also an application for withholding of deportation. The burden of proving eligibility for either remedy falls on the applicant.

There are several practical differences between asylum and withholding. Refugees granted political asylum may adjust their immigration status to that of permanent U.S. resident a year later, 204 while there is no provision for such adjustment in the case of a person granted only withholding. Asylum is a discretionary remedy, which an Immigration Judge may deny even though the applicant meets the refugee definition; withholding, in contrast, is mandatory. 205 Asylum may be granted on the basis of persecution in the past or because of a well-founded fear of future persecution. On the other hand, applicants for withholding must show that there is a "clear probability" of future persecution upon return to the home country. Asylum may be granted based on fear of future persecution even though the applicant fails to show that persecution is more likely than not, as long as the fear is "well-founded." 206 Asylum is warranted when the applicant shows that "a reasonable person in his circumstances would fear persecution." 207 Given the stricter evidentiary standards (i.e., the necessary showing of "clear probability") for withholding of deportation, it is rare for a person to be denied asylum and granted withholding of deportation.

An applicant is precluded from either asylum or withholding if he or she persecuted others. 208 Other preclusions apply to applicants who have been convicted of a "particularly serious crime" in the U.S., to those who are suspected of committing a non-political crime before entry, and to persons the United States considers security risks. 209 Regula-

205. ANKER, supra note 199, at 3.
tions promulgated by the INS list several negative factors to be considered in an asylum decision; probably the most relevant for Kanjobals is the notion of "firm resettlement." A refugee may be denied asylum in the U.S. if a third country has made "an outstanding offer" of resettlement, the refugee will not be persecuted in the third country, and resettlement there would be in the public interest.

The decision to grant or deny refugee status is made on an individual, case-by-case basis. Nevertheless, in some instances, the mere fact of membership in a persecuted group may be sufficient for the trier of fact to infer that an individual would be persecuted upon return.

B. Application of the Standards

Applications for political asylum are adjudicated either by an informal process, through the INS, or through a formal hearing in deportation proceedings before an Immigration Judge, who is an officer of the Executive Office of Immigration Review ("EOIR"). Kanjobals, like most other applicants, usually confront the U.S. refugee standards in a deportation hearing.

The most common scenario is for a Kanjobal to enter the United States unbeknownst to immigration authorities, thus violating INA § 241(a)(2), 8 U.S.C. § 1251. While crossing the border or some time thereafter, INS agents arrest the Kanjobal and place him or her in detention under bond. An Order to Show Cause ("OSC") is issued, requiring the detainee to appear before an Immigration Judge and to present evidence as to why he or she should not be deported.

If the detained Kanjobal can speak or read Spanish or if there are other, knowledgeable Kanjobals in the detention center, or if the detainee has been able to communicate with relatives, he or she may obtain release on bond or own recognizance. Also, if the Kanjobal is fortunate, he or she will find legal assistance to apply for political asylum. Such assist-

210. This preclusion was set forth at 8 C.F.R. § 208.8(f)(1) of interim regulations in effect up to October, 1990. During the decade following the passage of the Refugee Act, there were no final regulations implementing the Act's asylum provisions. These were finally issued on July 27, 1990 and took effect on October 1, 1990. 55 Fed. Reg. 30,674 (1990) (to be codified at 8 C.F.R. § 208).

The new, final regulations seem to be a considerable improvement over the former, interim set in several respects, one of which is a more restricted definition of "firm resettlement." Helton, Final Asylum Rules: Finally, 67 INTERPRETER RELEASES 789, 790 (1990). Nevertheless, there are insufficient data so far to determine whether the apparent improvements will result in greater fairness for Kanjobal applicants. The text which follows concentrates on adjudication of Kanjobal asylum cases predating the new regulations, but refers to the differences between these practices and the new regulations where relevant.

211. Previous 8 C.F.R. § 208.8(f)(2). Under the new regulations, an applicant is to be considered firmly resettled only if he or she "received an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15.

212. Hernández-Ortiz v. INS, 777 F.2d 509, 515-16 n.6 (9th Cir. 1985). As an example of such a persecuted group, the court mentioned the Jews in Nazi Germany.
ance is strictly at the applicant's own expense.213

At the time of the merits hearing before the Immigration Judge, the applicant will testify about the fear which prevents him or her from returning to Guatemala and will present other evidence, such as expert testimony and documentary material, to support his or her claim to refugee status. The Immigration Judge will acknowledge and include in the record an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs ("BHRHA"), recommending acceptance or denial of the individual's application.214

During the hearing, basic due process protections apply; for example, the applicant is entitled to competent interpretation of the proceedings,215 and to the assistance of an attorney.216 An applicant may present favorable evidence and cross-examine the INS' witnesses. Proceedings are routinely tape-recorded. The decision of the Immigration Judge must be supported by substantial evidence.217 If the applicant is denied relief, he or she may then appeal to the Board of Immigration Appeals ("BIA" or "Board"), to the Federal Circuit Court of Appeals,218 and ultimately to the Supreme Court, although the latter appeals are exceedingly rare.

Since the passage of IRCA 1986, which requires employers to inspect workers' immigration documents, more refugees — and Kanjobals among them — are applying to the INS for political asylum affirmatively, before being located by INS agents. The advantage of affirmative application is that, in at least some jurisdictions,219 the applicant will be


214. Under the new asylum regulations, an application may be adjudicated without a letter from the State Department. 55 Fed. Reg. 30,677 (1990) (to be codified at 8 C.F.R. § 208.11).

215. "The very essence of due process is a meaningful opportunity to be heard." Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984) [citations omitted]. The right to competent interpretation is based not only on Fifth Amendment considerations of fundamental fairness, but also on federal legislation and regulations of the INS. 8 U.S.C. § 1226(a) (1987); 8 C.F.R. § 242.12 (1990).

216. It is estimated that up to half of those who apply for asylum appear pro se at their merits hearing, without benefit of legal assistance. Such applicants are much less successful than those represented by an attorney. "According to the GAO, represented applicants are more than three times as likely to receive asylum..." Anker, Determining Asylum Claims in the United States: Summary of the Adjudication of Asylum Claims Before the Immigration Court, 2 INTERNATIONAL JOURNAL OF REFUGEE LAW 252, 261 (Jan.1990); Government Accounting Office ("GAO"), ASYLUM: APPROVAL RATES FOR SELECTED APPLICANTS, Appendix Table L1 (June 1987).

217. Vides-Vides v INS, 783 F.2d 1463, 1466 (9th Cir. 1984).

218. ANKER, supra note 199, at 46.

219. Asylum applicants who present a "non-frivolous" case are entitled to work authorization.
granted permission to work while his or her asylum case is being adjudicated. A significant disadvantage is that the affirmative application process has fewer due process safeguards; for example, the INS does not record applicants' interviews with the adjudication officer. If an affirmative application is denied, an OSC will be issued and the asylum seeker then proceeds through an EOIR merits hearing in the deportation context, as described above.\textsuperscript{220}

\textbf{C. Procedural Obstacles Confronting Kanjobals Seeking Asylum}

Although the same adjudication procedures affect all applicants, certain built-in biases in the adjudication process affect Kanjobals in a uniquely negative way.

1. \textit{Political Bias}\textsuperscript{221}

No statistics are available on the success of Kanjobals, in particular, in gaining asylum. Nevertheless, several surveys of asylum applicants have revealed a clear political bias against Guatemalans. The Government Accounting Office analyzed data from affirmative asylum applications over a roughly two-and-a-half year period between 1983 and 1986.\textsuperscript{222} During that time, only 0.9\% (14/1475) of Guatemalan appli-

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Previous 8 C.F.R. § 274a.12(c)(8). Frivolousness has proved to be very much in the eye of the beholder. In the Ninth Circuit, work permission is routinely granted. This relatively happy state of affairs is the consequence of a suit against INS offices. \textit{Alfaro-Orellana v. Ichert}, 720 F.Supp. 792 (N.D. Cal, 1989). In contrast, in Texas INS proceedings (in the Fifth Circuit) as of January 1990, even those applicants who had been successful at the Immigration Judge level were being denied work permission if the INS filed an appeal to the BIA.

The new asylum regulations seek to remedy these inequities by defining frivolous as “manifestly unfounded or abusive” and by providing for more continuous work authorization during the application process. 55 Fed. Reg. 30,676 (1990) (to be codified at 8 C.F.R. § 208.7).

\textsuperscript{220} \textit{ANKER, supra} note 199, at 18.

\textsuperscript{221} Data such as those presented in this section (on procedures which were in effect until October, 1990) formed the basis for a landmark discrimination suit brought by Salvadoran and Guatemalan refugees against the INS, \textit{American Baptist Churches v. Thornburgh (“ABC”)}, Civ. No. C-85, 3255-RFP (N.D. Cal. 1990). The recent \textit{ABC} settlement mandates readjudication of thousands of cases in which Guatemalan refugees were denied asylum over the last decade. Deportations of eligible Guatemalans — both those who have applied and been denied and those who have not yet applied — have been stayed. The readjudication process, which begins in July, 1991, will take place under the new asylum regulations and under additional rules specifically designed to eliminate political bias from the process. Salcedo, \textit{Second Chance for Central Americans}, Newsday, Dec. 20, 1990, at 3; D. Smith, L. Guttentag & M. Van Der Hout, Summary of the \textit{ABC} Settlement Agreement (1991). Surveying the changes made by the new \textit{ABC} case and the new INS regulations, one attorney commented, “on paper it's all very good news.” Montana, \textit{Refugees Cautious on New Rules}, Chicago Tribune, January 11, 1991, at 7. For Kanjobals in particular, such a cautious attitude seems warranted, since other types of bias may still infect the asylum adjudication process.

\textsuperscript{222} \textit{GAO, ASYLUM: UNIFORM APPLICATIONS OF STANDARDS UNCERTAIN — FEW DENIED APPLICANTS DEPORTED} (1987), see especially table entitled, “Asylum Cases Filed with INS District Directors, Approved and Denied, by Nationality, June 1983 to September 1986” at 9.
cants were granted asylum, while the grant rate for Eastern Europeans ranged between 11% (31/280) for Yugoslavs and 51% (424/830) for Romanians.223

A similar bias appeared in a statistical survey of asylum applications granted at the appeals level by the BIA during 1987.224 Only one Guatemalan was granted asylum, along with a sole Salvadoran, although 30% of the applications the BIA received during that year were from these two nationalities.225 In contrast, eighty percent of the BIA’s asylum grants went to applicants from six countries whose policies the U.S. government opposed: Nicaragua, Cuba, the Soviet Union, Afghanistan, Poland and Iran.226 The BIA survey also found that when cases presented similar facts, a difference in outcome could often be predicted on the basis of the nationality of the applicants.227

More recently, Deborah Anker’s survey of Immigration Judge decisions in a single immigration court documented political bias, along with other troublesome problems in adjudication, on a local level.228 During her two-year study, no Guatemalan applicant was granted asylum. Anker concluded that there is a great gulf between Congressional intent in passing the Refugee Act, and actual asylum adjudication, where individual judges’ “ideological preferences” and uninformed political judgments color their decisions to a large extent.229

A major contributor to politically biased decisions is the advisory opinion provided by the State Department.230 Where advisory opinions are given in Guatemalan cases, they are almost always negative. For the majority of Guatemalan applicants, the BHRHA does not provide an advisory letter, but uses a sticker advising correspondents that it has no information on the applicant in question and referring the reader to the State Department Country Reports.231 The Immigration Judge is not bound to follow the recommendations of the BHRHA,232 but in practice,
a negative recommendation definitely provides a pessimistic slant on an applicant's case. In Anker's study, all but one of the cases granted asylum had received a positive recommendation.233

2. Cultural Biases of Adjudicators234

In deciding whether an asylum applicant fits the definition of refugee, an Immigration Judge must determine whether the applicant's fear of persecution is reasonable, considering all the relevant circumstances of the individual.235 In a sense, the judge is asked to place him- or herself in the applicant's shoes, applying the frame of reference appropriate in the individual's home territory. But, in practice, such empathy from adjudicators is virtually impossible because cultural assumptions are pervasive and unexamined. Often, the adjudicator may think that empathy has been achieved when, in fact, there has been a cross-cultural misunderstanding. "Too often officials assume that the way they think is also the way the asylum-seeker thinks."236

For Kanjobals, given the many differences between the normal way of life in rural Guatemala and the norms of behavior in the United States, such misunderstandings are bound to be exaggerated. Three areas are especially problematic: (a) Norms of discourse and social communication; (b) Notions of time and the importance of dates in remembering past events; and (c) Conceptions of "Common Sense" or "What makes Sense."

a. Norms of Discourse

For most indigenous Guatemalans, the communication atmosphere in an asylum hearing is an unprecedented experience. In the hearing, rural peasants accustomed to a situation in which privacy is essential to survival are forced to reveal potentially dangerous beliefs and acts, as well as details about harm to family members, to totally unfamiliar authority figures — the Immigration Judge and the INS attorney. Since in Guatemala, contact with authorities usually means repression, it is to be

233. Anker, supra note 216, at 258. Under readjudication procedures mandated by the ABC settlement, applications may not be sent to the BRHRA for comment until after the adjudication officer has made an initial decision to grant or deny asylum. Smith, Guttentag & Van Der Hout, supra note 221.

234. Much of the information in this section is based on observations of asylum proceedings in which the applicants were Kanjobals, and on two essays: FMCARP, supra note 51, and Kalin, Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing, 20 INTERNATIONAL MIGRATION REV. 230-41 (1986).

235. See UN HANDBOOK, supra note 203, at Paragraph 42: "The applicant's statements cannot.. be considered in the abstract, and must be viewed in the context of the relevant background situation." See also Paragraph 43: "The situation of each person must. . .be assessed on its own merits."

236. Kalin, supra note 234, at 234.
expected that this very unusual discourse event would inspire fear. In fact, every Kanjobal I have interviewed approached the hearing with very great apprehension.

Sometimes Kanjobals’ shame at describing physical abuse will be manifested by seemingly incongruous facial expressions or self-effacing smiles, which the judge may interpret as indications of untruthfulness. In other instances, witnesses may appear emotionless, as a result of Post Traumatic Stress Syndrome.

Kanjobals’ fear of authority figures may lead them to treat both the judge and the INS attorney with deference, assenting to their questions as much as possible. This strategy causes inconsistencies in the applicant’s testimony, provokes doubts about the witness’ credibility, and sometimes exasperates the questioners.

A second strategy which may lead to confusion is narration of past events in “long, indirect stories,” including many details which the questioners consider irrelevant. Among rural Guatemalans and in other parts of Latin America, such answers are considered highly deferential. In the immigration hearing, however, they are usually fragmented by the exigencies of consecutive interpretation. Moreover, narratives are frequently interrupted by judges’ demands that the witness “get to the point” or “just answer the question.”

b. Notions of Event Time

Because rural Kanjobals may use a different calendar from the Gre-

237. FMCARP, supra note 51, at 5-6.
239. FMCARP, supra note 51, at 7.
240. Id. at 9.
241. Id.
242. In fact, linguistic research has shown that longer, narrative answers may be more positively evaluated than brief answers, by triers of fact in U.S. courts. W. O’BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 76-78 (1982). Fragmentation of narratives by interpreters may cause the witness to appear less truthful. Berk-Seligson, The Importance of Linguistics in Court Interpreting, 2 LA RAZA L. J. 14, 45-46 (1988). For further discussion of problems caused by interpretation, see infra notes 255-259 and accompanying text.
243. I have observed this exchange not only in immigration hearings, but also in many doctor-patient interviews where North American doctors were attempting to elicit medical histories from rural Central Americans.
244. Unpublished IJ decision, San Francisco, California, April 21, 1989. For a description of the case, see Asylum Denied to Kanjobal Civil Patrol Deserter whose Father was Killed by Army as Suspected Guerrilla Supporter, UPDATE (Newsletter of the Emergency Representation Program of the San Francisco Lawyers’ Committee for Urban Affairs), Sept 1989, at 5-6.
gorian calendar used in the United States, questions about the exact date on which a certain event occurred are likely to be answered with conjecture or confusion. More fundamental than dates themselves is the manner in which past events are remembered in rural Guatemala. In the U.S., important events might be remembered because they occurred near the witness’ birthday or near a national holiday, such as Christmas. For Guatemalan peasants, “frames of reference [for past events] consist of lifespans, agricultural processes, fiestas or momentous events.” Thus, a question like, “When did you leave your village?” might well be answered, “Shortly after the Fiesta of San Miguel,” or “After the army killed my brother.” For these reasons, it is not unusual for Kanjobals’ oral testimony to contradict dates indicated on their written asylum applications. The sequence of events, nevertheless, will usually be consistent. Minor inconsistencies, such as these date problems, are not sufficient reason to impugn an applicant’s credibility.

c. “Common Sense”

Cultural ideas about what is appropriate behavior often cause judges to remark that refugees’ testimony “doesn’t make sense,” or that “it doesn’t make sense” to have behaved the way they did, if they truly feared persecution. Yet common sense is a culture-specific notion that may actually distort adjudicators’ view of an applicant’s claim.

For example, a judge denied asylum to a Kanjobal man, reasoning that because the young man’s wife and child still live in his village, he need not fear harm on return. This reasoning is flawed since young men of recruitable age (and the age of forced service in the civil patrol) may be conscripted and obliged to commit atrocities. Furthermore, returning refugees (as discussed above) are identified as potential subversives and subject to detention and human rights abuses by the army. The applicant’s wife and child run none of these risks.

In another case, the judge rejected a young Kanjobal man’s fear of reprisals from the guerrillas as not believable because on the one occasion armed guerrillas had attempted to forcibly recruit him, they did not kill him. (He escaped by running away). Those familiar with the Guatemalan reality probably would be less sure of the young Kanjobal’s future safety than the judge was.

Judges’ common sense notions may ignore important differences between the ways in which authorities operate in Guatemala in compari-

245. See supra note 51.
246. FMCARP, supra note 51, at 3-5.
247. Id. at 4.
248. Viloria-López v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988).
249. Kalin, supra note 234, at 236.
sion to their American counterparts. For most Guatemalans, it would be absurd to report a murder or disappearance to the security forces, since (1) security forces are often the perpetrators of these abuses, and (2) the person reporting the crime would thereby associate him- or herself with the victim — a very dangerous thing to do if the victim were killed for "suspected subversion."  

Although the federal Courts of Appeals have condemned "improper inferences" such as those in the examples above, Anker's recent study and the Kanjobal case data presented below clearly show that judges continue to base asylum decisions on them.

3. Lack of Competent Interpretation

Some judges compromise Kanjobals' constitutional, statutory and regulatory rights to competent interpretation in the interests of avoiding continuances. Since Kanjobal is a relatively rare language, it is often necessary for hearings to be continued while a Kanjobal/English interpreter is located. Such continuances may delay the proceedings for months, and judges are rarely anxious to grant them.

INS regulations do not specify a method for determining applicants' language competence. Occasionally, the judge will question the applicant briefly in Spanish through a Spanish interpreter, concluding that the applicant can proceed in that language. In other instances, the judge's decision will be swayed by the INS attorney's strenuous objections to continuances for the purpose of finding a qualified interpreter. Such objections are especially likely if the applicant appears to be able to converse in Spanish.

But testifying in a legal proceeding requires more than just conver-
sational ability in a language. Subtle problems in communicating in Spanish may not become evident until well into the applicant's testimony. For example, one Kanjobal misunderstood a question in Spanish “¿Cuándo se enteró de esto?” (When did you find out about that?) to refer to a burial (Spanish entierro). Relying on cultural norms of deference to authority, Kanjobal applicants may attempt to answer Spanish questions they do not understand, resulting in nonsequiturs and hopeless confusion. Hesitation in responses, due to language problems, may be perceived, erroneously, as a sign of untruthfulness. Kanjobals with limited Spanish may give brief, unelaborated answers which do not reveal the true nature of their fear, but when they are questioned in Kanjobal, more narrative, substantive answers emerge.

In Matter of Tomás, the BIA remanded a case in which the judge forced a Kanjobal couple to testify through a Spanish interpreter, aided by the couple's fifteen-year-old daughter, who spoke both Kanjobal and Spanish. The Board held that such interpretation seriously interfered with the applicants' statutory right to present testimony relevant to their claim, for “there is a great difference between understanding a language and being able to fully translate thoughts from one language to another.”

Even when a professional interpreter is provided, dialect differences may cause misunderstandings. For example, a Kanjobal from San Miguel Acatán was unable to understand an interpreter who spoke the Kanjobal dialect of Santa Eulalia. Few asylum attorneys have access to persons whose competence in both English and Kanjobal is sufficient to monitor the accuracy of interpretation, which may vary considerably across INS hearings, even in more familiar languages. Thus, it is essential that asylum applicants be assertive in asking for a competent Kanjobal interpreter and protesting when interpretation errors make a question unintelligible.

257. Id. at 3.
259. See e.g., Augustin v Sava, 735 F.2d 32, 38 (2d Cir. 1984) (Haitian applicant's procedural rights were abridged where “the translation of the asylum application was nonsensical [and] the accuracy and scope of the hearing translation are subject to grave doubt. . . .”); Kovac v INS, 407 F.2d 102, 108 (9th Cir. 1969) (transcript of Czech applicant's hearing on withholding of deportation shows nonsequiturs indicating he did not understand the interpreter and was unable to fully comprehend the proceedings; decision reversed and remanded).
D. Kanjobals and the Five Substantive Grounds for Asylum

In addition to examining the procedural biases which especially affect Kanjobals, it is important to investigate how well individual Kanjobals have fared in gaining asylum under each of the five substantive grounds: race, religion, nationality, political opinion, and membership in a social group.\(^{260}\)

As Section II(D) described, Kanjobals have been victims of human rights abuses in the past and continue to suffer persecution under the current Guatemalan regime. Assuming that a Kanjobal applicant's fear of persecution is well-founded, the central question a judge must decide is whether the persecution suffered, or feared, is on account of one of the five crucial characteristics.

1. Race and 2. Nationality

On the face of it, Kanjobals would seem to have a good claim to persecution on account of race and/or nationality, since the Guatemalan army systematically targets members of the Mayan race, and Kanjobals specifically, for extermination as subversives.\(^{261}\) Civil patrol service also constitutes racially based discrimination\(^{262}\) and may deprive Kanjobals of a livelihood.\(^{263}\)

3. Religion

Both Kanjobals practicing traditional Mayan beliefs and those who are Catholics may oppose military service and refuse to commit human rights abuses against their neighbors for moral and religious reasons. Persecution for religiously-based objection to military service is grounds for asylum in the Ninth Circuit.\(^{264}\)

4. Political Opinion

Some Kanjobals were either members of the EGP or supported the guerrilla movement; there is no doubt that these Kanjobals, if their alle-

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\(^{260}\) For a detailed analysis of asylum theories applicable to Kanjobal refugees, see Van Der Hout & Silverman, *Theories for Establishing Well-Founded Fear in Central American Cases* in ILRC MANUAL, supra note 157, at 5001-5018.

\(^{261}\) See UN HANDBOOK, supra note 203, at Paragraph 70: "The mere fact of belonging to a certain racial group will not normally be enough to substantiate a claim to refugee status." However, under certain circumstances, membership alone may be cause to fear persecution.

\(^{262}\) David Brooks has developed a cogent argument for Kanjobal asylum based on cumulative racial discrimination. An outline of this argument is included as an Appendix.

\(^{263}\) Kovac v INS, 407 F.2d 102, 107 (9th Cir. 1969) ("deliberate imposition of substantial economic disadvantage" on account of race, nationality, religion, political opinion or membership in a particular social group is persecution within the meaning of U.S. refugee law).

\(^{264}\) Cañas-Segovia v INS, 902 F.2d 717 (9th Cir. 1990) (two young Jehovah's Witnesses who objected to Salvadoran military service on grounds of pacifism granted asylum).
giances become known, will suffer severe government reprisals. The U.N. Handbook advises that if such punishment is disproportionate because of race or another of the five characteristics, it is persecution.\textsuperscript{265}

Kanjobals who left the guerrilla movement may also be sought out and punished by their former colleagues. The Ninth Circuit has held that guerrilla harassment of this sort is persecution,\textsuperscript{266} but the BIA and other circuits disagree.\textsuperscript{267}

Many Kanjobals have sought to remain politically neutral. This opinion can also be a source of persecution when either the insurgents or the army demands that neutral bystanders take sides.\textsuperscript{268}

A related concept is imputed political opinion. The Ninth Circuit has recognized that a refugee may endure persecution not only because of actual beliefs, but also because of beliefs falsely attributed to him or her by a persecutor.\textsuperscript{269} In this situation, the true political opinion of the persecuted person becomes irrelevant. Instead, the focus is on what the persecutor believes and the fact that the persecutor causes suffering to a refugee based on that belief.\textsuperscript{270} For example, the Guatemalan army may attribute "subversive" opinions to Kanjobals for many reasons: because of their race, the area in which they live, their refusal to serve in the civil patrol, their status as returning refugees, their relationship to persons considered subversive or their leaving the village without permission, etc. Murder, torture or disappearance based on this attribution would be persecution on account of imputed political opinion.\textsuperscript{271}

\textbf{5. Membership in a Social Group}

The social group basis for asylum is not as well-developed as the others. Social groups may be defined by interpersonal relationships (e.g., family members) or by such external factors as geography. Since this concept could potentially afford asylum to many people, judges have applied it in a narrow way.\textsuperscript{272} In the Ninth Circuit, persecution on the basis of membership in a social group is rarely the source of asylum.\textsuperscript{273} But, in Kanjobal cases (as will be seen below), social group and race, or social group and imputed political opinion, may provide complementary

\textsuperscript{265} UN HANDBOOK, supra note 203, at Paragraphs 56-60; see also ILRC MANUAL supra note 157, at 3010.

\textsuperscript{266} Maldonado-Cruz v INS, 883 F.2d 788 (9th Cir. 1989).

\textsuperscript{267} Matter of Maldonado Cruz, Int. Dec. 3041 (BIA 1988); ILRC MANUAL, supra note 203, at 3015.

\textsuperscript{268} Bolanos-Hernández v INS, 767 F.2d 1277, 1324-25 (9th Cir. 1984).

\textsuperscript{269} Hernández-Ortíz v INS, 777 F.2d 507, 517 (9th Cir. 1985); ILRC MANUAL supra note 203, at 5006-5010.

\textsuperscript{270} Id.

\textsuperscript{271} ILRC MANUAL, supra note 157, at 5006-5007.

\textsuperscript{272} Id. at 5014.

\textsuperscript{273} Id at 3017, 5018.
or interwoven reasons for a judge’s grant of asylum.274

E. Survey of Guatemalan Asylum Cases

In order to determine how judges construe the five grounds for asylum with respect to indigenous Guatemalan applicants, I collected data on sixteen unpublished cases; in fifteen, the applicants were Kanjobals.275 In one case, the applicant was from the Chuj ethnic group, which also resides in Huehuetenango.276 In some ways, these cases are representative. For example, the Ninth Circuit treated applicants more generously than the Eleventh, where no Kanjobal applicants were granted asylum. In other ways, they are very unrepresentative: unlike the GAO statistics cited above,277 half of the cases I examined resulted in a grant of political asylum.

The sample is also somewhat tainted by the unpublished nature of the cases. The only written opinions I was able to examine were those in which appeals are pending, along with one BIA case. For the others, I relied on oral or written summaries of immigration judges’ decisions by applicants’ attorneys or refugee representation projects. For one case, I also used my own notes taken at the asylum hearing.

Table 2 gives basic descriptive information about the sixteen cases.

Table 2: Asylum Outcomes in 16 Indigenous Guatemalan Cases

<table>
<thead>
<tr>
<th>Nature of Claim</th>
<th>Circuit</th>
<th>Result</th>
<th>Grounds for Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Former member of EGP; forced to serve in Civil Patrol (“CP”).</td>
<td>9th</td>
<td>granted asylum</td>
<td>“Nationality or ethnic heritage” and political opinion</td>
</tr>
<tr>
<td>2. CP deserter, refused to kill those who wouldn’t serve in CP.</td>
<td>9th</td>
<td>granted asylum</td>
<td>Imputed political opinion</td>
</tr>
</tbody>
</table>

274. It is striking to compare the statement of General Mejía Víctores equating the words “indigenous” and “subversive,” see Section II(D) supra, with the UN Handbook’s description of individuals deserving asylum because of these intertwined reasons for persecution: A social group may incur persecution “because there is no confidence in the group’s loyalty to the Government . . . .” UN HANDBOOK, supra note 203, paragraph 78; quoted in ILRC MANUAL, supra note 157, at 5016.

275. All of these cases were decided under procedures in force before the adoption of the new, 1990 regulations.

276. I am especially grateful to those refugee representation programs and individual attorneys who provided information about their cases: Mark Silverman of the Immigrant Legal Resource Center, Sara Campos and David Rorick of the Lawyers’ Committee for Urban Affairs, Mike Ortiz of the Legal Aid Foundation of Los Angeles, David Rabin of the El Centro Asylum Project, John Gianola of the UC Davis Immigration Law Clinic, Jonathan Fried of the American Friends Service Committee, Carol Salvati of the Central American Refugee Program in Phoenix, Mark Bender in Los Angeles and David Brooks in San Francisco.

277. See supra notes 221-229.
<table>
<thead>
<tr>
<th>Nature of Claim</th>
<th>Circuit</th>
<th>Result</th>
<th>Grounds for Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. Family fled after watching army kill parents in massacre.</td>
<td>9th</td>
<td>denied</td>
<td>Discretion: family had well-founded fear of persecution, but “firmly resettled” in México</td>
</tr>
<tr>
<td>4. Young woman fears rape by soldiers.</td>
<td>9th</td>
<td>denied</td>
<td>Not “singled out;” also could have applied for asylum in México</td>
</tr>
<tr>
<td>5. A objects to CP service, claims CP restrictions deny him a livelihood.</td>
<td>9th</td>
<td>granted both</td>
<td>Race: forced service was “a serious human rights violation based on A’s Mayan race”</td>
</tr>
<tr>
<td>6. CP deserter; family members killed as suspected collaborators; religious objections to killing.</td>
<td>9th</td>
<td>denied</td>
<td>Objection to killing not on the basis of religion; not “singled out”</td>
</tr>
<tr>
<td>7. A objects to CP for reasons of conscience; fled after exhuming bodies of those who had also objected to CP service.</td>
<td>9th</td>
<td>granted asylum</td>
<td>“CP is a form of slavery”</td>
</tr>
<tr>
<td>8. Couple who fled Coyá massacre; positive SD letter.</td>
<td>9th</td>
<td>granted both</td>
<td>Unclear: race and/or imputed political opinion</td>
</tr>
<tr>
<td>9. Guerrillas killed A’s grandfather; think A has same political beliefs.</td>
<td>9th</td>
<td>granted both</td>
<td>A’s membership in social group (family) and political opinion imputed to A</td>
</tr>
<tr>
<td>10. A threatened with denunciation as subversive because fled CP and had fight with official’s son.</td>
<td>9th</td>
<td>granted both</td>
<td>Imputed political opinion</td>
</tr>
</tbody>
</table>
### Table 1: Nature of Claim and Grounds for Decision

<table>
<thead>
<tr>
<th>Nature of Claim</th>
<th>Circuit</th>
<th>Result</th>
<th>Grounds for Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>11. A’s family members harmed: father killed for giving food to guerrillas, mother disappeared by guerrillas.</td>
<td>9th</td>
<td>BIA appeal granted</td>
<td>Imputed political opinion</td>
</tr>
<tr>
<td>12. A fears guerrillas; political opinion is neutrality.</td>
<td>11th</td>
<td>denied</td>
<td>Conditions changed; A not “singled out”</td>
</tr>
<tr>
<td>13. Young woman fears persecution from both sides.</td>
<td>11th</td>
<td>denied</td>
<td>Not “singled out;” in alternative, negative factors for discretion: entered illegally, found safe haven in México</td>
</tr>
<tr>
<td>14. A fears return because refugees seen as collaborators.</td>
<td>11th</td>
<td>denied</td>
<td>Returnee persecution is “strictly speculation;” A could live safely in another town</td>
</tr>
<tr>
<td>15. A’s dispute with official led to denunciation as guerrilla.</td>
<td>11th</td>
<td>denied</td>
<td>Not entirely credible; not “singled out”</td>
</tr>
<tr>
<td>16. A fled when heard of massacres; brother since disappeared, home destroyed.</td>
<td>11th</td>
<td>denied</td>
<td>Imputed political opinion rejected as basis; no evidence that A persecuted because he is Kanjobal</td>
</tr>
</tbody>
</table>

Table 2 shows that imputed political opinion is by far the most important basis for favorable asylum decisions in Kanjobal cases.\(^{278}\) Cases 8 and 16 show the contrasting approaches of the Ninth and Eleventh circuits. In the Ninth Circuit, where imputed political opinion is an accepted theory, a couple who escaped massacre as indigenous “suspected subversives” were granted asylum. In the Eleventh Circuit, where this theory is not accepted, a young man who fled in similar circumstances was denied refuge. The young man’s fear of persecution on account of race was crucially dependent on the army’s view of Kanjobals as subver-

\(^{278}\) This is consistent with Ninth Circuit jurisprudence in Central American asylum cases. ILRC MANUAL, *supra* note 157, at 3016.
sives; therefore, failure to acknowledge the army’s attribution also doomed the young man’s claim of race-based persecution.

Kanjobal race or ethnicity figures prominently in four of the sixteen cases. Nevertheless, only in Case 5 was race the sole stated ground for a favorable decision. And even in this case, it seems probable that there was a nexus between imputed disloyalty (political opinion) and race. Because race, like social group, is potentially a broad-based asylum theory, judges may avoid granting asylum solely on race, for fear of establishing too lenient a standard.279

Social group was defined narrowly in the one case where it figured prominently, Case 9. In that case, the group suffering persecution was a family. But as in Case 16, the group’s persecution was linked to the persecutors’ (in this case, the guerrillas’) erroneous beliefs about group members’ political opinions.

In the one case where a judge considered the applicant’s religious convictions, Case 6, he immediately rejected a connection between religion and refusal to serve in the Civil Patrol, stating that this objection was merely the applicant’s personal preference. Nevertheless, Case 7 strikes a hopeful note for many Kanjobals who have fled obligatory service in the Civil Patrol, viewing forced service as a racially discriminatory form of slavery. In almost half of the cases in Table 2, issues arose concerning Civil Patrol service.

Equally as important as the grounds for granting asylum in these cases are the reasons for denial. The most common reason was: the applicant failed to show he or she would be singled out for persecution. That is, the applicant did not show that he or she was selected, or would be selected, as a specific target based on one of the five grounds.280 In the denied cases, judges apparently considered documentary evidence of widespread Kanjobal persecution to reflect only wartime conditions, in which rural civilians suffer indiscriminate human rights abuses. But, by this backwards logic, the more evidence of persecution an applicant presents, the less likely it becomes that the judge will grant asylum. The Ninth Circuit resolves this paradox in favor of the applicant, following the UN Handbook, which may account in part for the differences in grant rate between the Ninth and Eleventh Circuit asylum cases in Table 2.281

279. Interview with Karen Musalo, University of San Francisco Law Clinic, February 20, 1990.
280. Matter of Acosta, Int. Dec. 2986 (BIA 1985) at 22 (asylum applicant must establish that persecutor is willing and able to punish the applicant on the basis of specific statutory characteristics).
281. Bolanos-Hernández v. INS, 767 F.2d 1277, 1285 (9th Cir. 1985) (significance of individual’s claim is not diminished by evidence that a large number of persons have been similarly injured or threatened); see also UN HANDBOOK, supra note 203, at Paragraph 43 (what happened to others is relevant to determining whether applicant’s fear is well-founded). The new asylum regulations state,
Other important grounds for denial were credibility of the applicant’s testimony (in Case 15), as well as preclusions based on manner of entry (Case 13), and “firm resettlement” or the rather vague notion of “safe haven.” Credibility determinations may well be based on cultural bias. Manner of entry is only one of many circumstances to be considered in adjudicating an asylum case; it can be outweighed by other factors. Rejection of asylum claims based on Kanjobals’ “firm resettlement” or “safe haven” in México is erroneous because México is not a source of security for Kanjobals.

Finally, in Cases 12 and 14, the court held that Kanjobal applicants could return to Guatemala without fear, in Case 12, because conditions had changed, and in Case 14, because the applicant could easily escape persecution by moving to a different area. Apparently, any claims of past persecution in these cases were discounted. In both cases, adjudicators seem to have arrived at dangerously mistaken conclusions about present-day social conditions in Guatemala.

F. Summary of Part III

In theory, Kanjobals fleeing to the United States are eligible for political asylum and withholding of deportation under domestic legislation designed to bring the U.S. into compliance with its obligations under international treaties. In practice, the likelihood of most Kanjobals receiving protection under U.S. refugee law is nearly zero, due to bias in the adjudication process, ignorance of social and political conditions in Guatemala, and overly narrow interpretation of the five legal bases for refugee status in the case of Kanjobals.

Innovations in the asylum process instituted in 1990 represent a new, bright hope for Kanjobals. However, given the number and subtlety of biases which have plagued Kanjobal asylum adjudications to date, asylum officers will require a great deal of education and sensitivity in order to make real improvements.

IV. Ensuring Kanjobal Survival: Recommendations for Change

In the past, the United States’ rejection of Kanjobals as true refugees has been interdependent with U.S. foreign policy toward the Guatemalan...
government. After the election of a civilian president in Guatemala, the U.S. State Department was loath to recognize that the Guatemalan security forces, bolstered by U.S. training and military aid, continued to persecute ordinary citizens of Guatemala.

But, as mentioned above, the current State Department Country Reports indicate that this policy may be undergoing change, which would be helpful to refugees. Nevertheless, real protection for Kanjobals, as well as for other indigenous Guatemalans, will require much more substantial enforcement of existing U.S. obligations to refugees under both domestic and international law than we have seen to date. In addition, domestic law prohibiting security assistance to certain countries must be enforced. Temporary U.S. refuge for Guatemalans may also be achieved through new legislation.

Finally, the international community should bring pressure on Guatemala to observe its obligations to its own people under regional and international treaties.

A. Enforcement of U.S. Law

Anker and other researchers who have closely examined application of U.S. refugee law have recommended several changes. These improvements are needed to bring asylum law, as practiced, into alignment with the law as envisioned by Congress when it passed the Refugee Act of 1980. Of course, such changes would affect all applicants, not just Kanjobals. Some of the most important recommendations for change are: (1) Train immigration judges; (2) Provide attorneys for all applicants; (3) Publish more asylum cases, especially those which are favorable; (4) Establish a “Non-Governmental Human Rights Documentation Center”; (5) Eliminate the necessity for a BHRHA advisory opinion; and (6) Make the refugee adjudication process subject to “more rigorous oversight” by Congress. Only a few of these changes: (1), (4) and in part, (5) are mandated by the 1990 final asylum regulations.

The prospects for Kanjobals who have remained in Guatemala can be improved by enforcement of section 502(b) of the U.S. Foreign Assistance Act. The Act calls for a cut-off of security assistance to those countries who “engage[ ] in a consistent pattern of gross violations of internationally recognized human rights.” For fiscal year 1990, the Bush administration proposed $2.9 million in military aid to Guatemala and

285. See supra note 231.
286. Anker, supra note 216, at 261-63; By Any Other Name, supra note 224, at 720-21.
287. Anker, supra note 216, at 261-63; see also By Any Other Name, supra note 224, at 720-21.
288. See Helton, supra note 210, at 790.
289. AMERICAS WATCH, supra note 251, at 6-7 and 79.
$56.5 million in economic aid. Given the overwhelming evidence implicating the Guatemalan security forces in human rights abuses, all security aid should be immediately stopped. The Bush administration's suspension of military aid to Guatemala in December, 1990 is a step in the right direction.

In the last 3 years, AID has provided $1.5 million to the Guatemalan judiciary, purportedly to improve investigation in criminal matters, through a joint program with Harvard Law School. According to a journalist's report, General Gramajo will be in residence during the 1990-1991 academic year at Harvard's Kennedy School of Government. The Harvard program should be investigated to see if, in reality, AID funds have been used for security assistance. At the very least, the program may have allowed the Cerezo government to claim it was working to improve the justice system, while in fact, there is still no justice for the great majority of Guatemalans.

B. Extended Voluntary Departure and Temporary Protected Status

In addition to enforcement of existing domestic law, those who have lived and worked among Kanjobals in Guatemala have urged the U.S. Congress to enact new legislation, affording Extended Voluntary Departure status to Guatemalans until it is safe to return to their country. Shelton Davis argued for this measure as early as 1983: "For the Kanjobal Indians in Florida, extended voluntary departure status may mean the difference between temporary but safe haven in the U.S. and the likelihood of continued persecution and death in Guatemala."

Extended Voluntary Departure ("EVD") is an ad hoc immigration remedy, in which the INS decides not to prosecute undocumented persons of a certain nationality upon recommendation from the State Department. Several Congressional bills have been introduced which would have provided EVD status to Salvadorans and Nicaraguans. President Bush has strongly opposed these efforts. But refugee protection through EVD is not particulary unusual; it was invoked on 15 occasions between 1960 and 1982. For example, in 1978, it was extended to

290. Id. at 79.
291. Id. at 76.
293. Davis, supra note 37, at 8.
296. ALEINKOFF & MARTIN, supra note 294, at 728.
Ugandans fleeing the brutal regime of Idi Amin, a ruler to whom the Guatemalan generals have been compared.

Given that the State Department now recognizes that human rights conditions in Guatemala were not radically improved by the election of a civilian government, the present political climate may be more favorable to Congressional action on EVD status for Guatemalans.

As mentioned above, the President may also designate refugees from a certain country as being of special humanitarian concern and grant them entry to the United States. It is most unlikely that the current President would invoke this remedy to protect Kanjobals, because it applies only to refugees who are still in their country of origin, and the Bush Administration probably would not wish to create an incentive for further northward migration.

Immigration legislation passed on November 29, 1990 sets up a new category of persons who may take temporary refuge, of up to 18 months, in the United States. The Attorney General may designate a country whose nationals merit “Temporary Protected Status” ("TPS") in cases of armed conflict, environmental disasters, or other extraordinary conditions in their home countries. Section 303 of the Act affords such status to Salvadorans, but the plight of Guatemalans was ignored, even though legislators “urged” the Attorney General to confer temporary protection on citizens of other nations enduring a civil war, e.g., Liberians. Given the goal of the legislation — to provide group protection where the individual asylum process is inadequate — it is illogical and inequitable not to extend such status to Guatemalans as well.

C. Enforcing U.S. Obligations Under International Law

The United States' obligations to protect Guatemalan refugees stem not only from the UN Convention and Protocol, but also from the Geneva Conventions of 1949, the Protocols Additional to the Geneva Conventions and customary humanitarian norms. This body of law

300. See supra notes 201-202, and accompanying text.
303. See Parker, Geneva Convention Protections for Salvadoran Refugees: An International Law Defense against Deportation and a Justification for Sanctuary, 13 IMMIGRATION NEWSLETTER 1-13,
serves to protect civilians caught up in a war.

Under the Geneva Conventions, the United States is bound to protect fleeing civilians' right to life and security. It is prohibited from knowingly deporting such civilian refugees to a wartime situation in which their government will injure or kill them. On the contrary, it is obliged to bring pressure on the errant government to observe its own obligations under international law.

So far, efforts to make U.S. immigration courts enforce these international obligations have not been very successful. In Matter of Medina, the BIA held, in part, that the Geneva Conventions could not be invoked to prevent deportation of a refugee to El Salvador because no domestic law had been enacted to implement the treaty's relevant provisions.

Despite Parker and Broder's innovative articles, U.S. immigration attorneys' efforts in the realm of international refugee law are still in their infancy. The passage of the 1980 Refugee Act and U.S. courts' attention to the provisions of the UN Handbook show that it is possible to bring international law to bear on domestic refugee adjudication. Not only for Guatemalans, but for others fleeing civil strife, this area of jurisprudence must be a focus of more concentrated effort.

D. Enforcing Guatemala's Obligations Under International Law

Guatemala has international obligations to protect its citizens from human rights abuses, racial discrimination, and genocide. Racial discrimination, torture and murder are prohibited by the American Convention on Human Rights, which Guatemala ratified in 1978. It is instructive to remember that this ratification came shortly after President Carter stopped U.S. military aid to Guatemala because of pervasive human rights abuses.

The U.N. Convention on the Prevention and Punishment of the
Crime of Genocide, which Guatemala ratified much earlier, in 1950, defines genocide as a set of human rights abuses “committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.”

These treaty obligations were obviously flaunted by the generals who governed Guatemala during the last decade, and they continue to be flaunted by the current government. Article VIII of the Convention provides that any party to the Convention may raise the issue of another party state’s genocidal acts at the United Nations and may ask the UN to take appropriate measures to prevent these acts in the future. Legal scholars have also commented that violations of the Convention’s provisions may form the basis for a ruling by the Inter-American Court of Human Rights.

Given the U.S. complicity in Guatemala’s actions against its indigenous population, it is unlikely that the U.S. would be the nation to bring these violations of the Convention to the attention of the UN or the Inter-American Court of Human Rights. However, a neutral group of signatory nations, similar to the Contadora Group, could be an effective voice in getting these international organizations to put pressure on Guatemala. For the sake of preventing the extinction of Kanjobals as a cultural group, such a body should begin work immediately.

311. Id. at 39.
312. Id.
APPENDIX: DAVID BROOKS, OUTLINE OF DISCRIMINATION ARGUMENT

I. A sufficient degree of cumulative discrimination based on one of the grounds enumerated in INA section 101(a)(42)(A) may establish a well-founded fear of persecution sufficient to justify a grant of asylum.

   A. The well-founded fear of persecution necessary to qualify for asylum has been interpreted to mean a "reasonable possibility" of persecution.

   B. The UNHCR Handbook is an important source of guidance in interpreting the Refugee Act of 1980.

   C. The Handbook recognizes that sufficient cumulative discrimination may give rise to a well-founded fear of persecution.

II. The respondent is a member of a racial group which has historically suffered cumulative discrimination in its native country.

   A. The Indians of the Guatemalan highlands suffer institutionalized discrimination which is pervasive in nature and which is based solely on their race and membership in a particular social group.

      1. The most blatant form of discrimination, outright genocide. Guatemala has a tradition of more than 450 years of massacres of the Indian population, continuing to the present day.

      2. Forced service of indefinite duration in the civil patrol, in violation of Guatemalan law. The country's Ladino population is not subjected to any similar obligation.

      3. Denial of such basic human rights as access to health care and education, or conditioning such rights upon service in the civil patrol, again in violation of Guatemalan law.

      4. Denial of the opportunity to own land. The notion of land reform has long been considered subversive by Guatemala's ruling elite; it was the promise of land reform by the reform government of Jacobo Arbenz which led to the military's 1954 coup d'état. The leaders of movements for land reform, such as Father Andrés Girón, have been repeatedly threatened and attacked.

      5. Denial of meaningful opportunity for representative participation in the country's government.

      6. Conditioning of the opportunity to work and earn a living on compulsory service in the civil patrol, as in the Food for Work program instituted in "model villages" or "development poles" created by the army in the highlands.
7. Restrictions on the right to travel freely for inhabitants of the model villages.

8. Forced collaboration by Indians with the army’s program of model villages and civil patrol service, e.g., having to spy and inform on their fellow villagers for the army. These activities target Indians for retaliation by guerrillas. No such collaboration with the army is demanded of the Ladino population.

B. The respondent has personally suffered such pervasive discrimination at the hands of the Guatemalan army, based solely upon his race and membership in a particular social group.

1. He was forced to serve against his will in the civil patrol for a period of [HOWEVER MANY] years. He will testify at hearing that he was never advised that civil patrol service is voluntary under Guatemalan law, nor was he ever given any meaningful choice to refuse to participate or to terminate his participation if he so chose. He will testify that he heard many reports of other Indians being killed by the army after refusing to perform this “voluntary,” uncompensated service.

2. He was forced to spy and inform on his fellow villagers in order to satisfy the demands of the local army commanders. This activity was highly repugnant to the respondent and he fears it may have resulted in his being targeted by the guerrillas for possible retaliation.

3. His right to travel freely was restricted. [INSERT FACTS CONCERNING LIFE IN THE “MODEL VILLAGES,” e.g. curfews, restricted travel into and out of the village, need to carry compulsory “identity papers,” etc., all of which are part of life for Indians but not Ladinos.]

4. His right to work, simply to provide for his basic needs and those of his immediate family, was conditioned on his “voluntary” participation in the civil patrol, again in violation of Guatemalan law. (The army’s euphemism for this indentured servitude is the “Food for Work” program.)

5. [ADD ANY OTHER FACTS establishing great hardship or denial of access to basic services based upon race or membership in a particular social group (highland Indians). Example: respondent lost a child in its infancy because no health care was available in the area where they lived. Example: respondent is illiterate because there were no schools to attend in the area.]