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Decolonizing Human Trafficking in Cambodia

by Corrin Chow

INTRODUCTION

The 2000 U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Trafficking Protocol”) is a prosecution-driven solution to human trafficking.[1] However, under a decolonized analysis, the Protocol ignores victims’ and survivors’ agency, thus perpetuating ill-fitted solutions. This case study is about Cambodia. In 2008, Cambodia passed national counter-trafficking legislation entitled the Law of Suppression of Human Trafficking and Sexual Exploitation (LHTSE).[2] Although these were celebratory moments, statistics on prosecuted cases and convictions are lacking. The U.S. Department of State, which monitors the Cambodian government’s remedial measures, ranked Cambodia’s weak efforts in the annual U.S. Trafficking in Persons Report (TIP Report).[3] The Cambodian Phnom Penh Post, an English-newspaper established since 1992, reported government spokesman Phay Siphon speaking against Cambodia’s 2019 Tier 2 Watchlist status.[4] He said, “[w]e have failed to satisfy the U.S. but, in line with the code of ethics and culture of Cambodia, we are committed to combatting trafficking.”[5] There is a pertinent human trafficking crisis in Cambodia, but implementation is an issue. Since the current criminal justice approach is not procuring favorable results, scrutinizing the current model through a decolonized lens might suggest a more pertinent approach.

A decolonized perspective critiques the Eurocentric and Western bias in international human rights norms and regimes. Makua Mutua best explains this perspective using the savage-victim-savior (SVS) imagery.[6] The savage represents the State or cultural foundations that “choke or oust civil society” or cause the culture to deviate from human rights.[7] Individuals whose dignity and human rights are violated by savage state practices and cultures are perceived as victims. The

victim is inherently innocence, helpless, and powerless in the face of the primitive savage. The savior acts as a shield against the savage’s tyranny and “protects, vindicates, civilizes restrains, and safeguards.”[8]

Embodied in the SVS critique is an understanding that cultural differences and race relations influence and construe who is the savage, victim, or savior. As we assess Cambodia’s counter-trafficking efforts, SVS highlights two flaws in Cambodia’s LHTSE and enforcement mechanisms. Firstly, Cambodia’s internalization of the U.N. Protocol ignored the victim-stakeholder’s priorities, and, consequently, Cambodia’s relationship with Western influences color the problematic realities of implementing LHTSE.

The influence of SVS on Cambodia’s counter-human trafficking measures taken during Cambodia’s late 20th-century sociopolitical history. Under the Marxist Khmer Rouge leadership, Cambodia experienced gruesome civil war and the genocide of Cambodia’s intellectual class and political dissidents.[9] The United Nations sent the U.N. Transitional Authority in Cambodia (UNTAC) to help re-establish Cambodia in 1992. UNTAC’s arrival coincided with an increase in local sex work and the explosion of mostly Western NGOs.[10] Reportedly, when Cambodian Prime Minister Hun Sen was asked what the UNTAC’s legacy would be, he replied, “AIDS.”[11] The human rights savior created the savagery of sex trafficking within Cambodia that perpetuated Cambodia’s victimhood. Certain international NGOs framed the trafficking issue to significant donors by claiming the newly developing Cambodian government was too weak to address the problem.

This western influence and demand on Cambodia continue with the TIP Report. Countries on the Tier 2 Watchlist have not complied with the minimum

standards listed in the U.S. Victims of Trafficking and Violence Protections Act of 2000 and have not demonstrated significant progress.[12] The TIP Report incentivizes the re-structuring of human rights violating states by threatening economic sanctions on totally non-compliant countries.[13]

LEGAL BACKGROUND

The U.N. Protocol's definition of "trafficking in persons" includes many crucial, but non-legal, terms, like: "exploitation" and "abuse of power" that have muddied an otherwise operational definition to detect victims and perpetrators. Cambodia, like many other countries, has adopted the Protocol's definition word for word. In adopting and modeling LHTSE after the Protocol's definitions and priorities, Cambodia misses the opportunity to prioritize the trafficking victim/survivor's priorities. LHTSE features only four articles concerning the victim's welfare: right of nullified and voided exploitative contracts (Article 45), right to damages and restitution (Articles 46-7), right to concealed identity from being published or broadcasted (Article 49). In Cambodia's 2010 Criminal Code to LHTSE, Article 287 criminalizes any prevention of a public agency or "competent private organization" that assists victims or at-risk persons.[14]

Cambodia does have a minimum standards of protection policy, which presents itself as victims-first legislation.[15] The 2009 policy strives to fill in a human rights gap but within a prosecution framework. It includes progressive measures, such as Article 6(10), a victim's right to a reasonable reflection period before making a decision.[16] This recovery time allows a victim to access services and begin recovery without undue pressure to cooperate with law enforcement or make an immediate decision.[17] Unfortunately, these minimum standards fall short of full judicial adherence and implementation.[18]

ANALYSIS

A. Critiquing the Development and Application of Counter-Trafficking Law

Cambodia's 2008 LHTSE amended the 1996 Law on Suppression of the Kidnapping, Trafficking, and Exploitation of Human Beings. Under pressure from multiple anti-trafficking NGOs and programs that

were looking for significant donor funding, Cambodia "hastily enacted" its 1996 statute without much understanding of trafficking; for instance, the undefined "accomplice" could criminalize law enforcement, protecting the brothels.[19] The statute also criminalized commercial sex work only (disregarding forced labor) and indiscriminately labeled the "victim" as a person who voluntarily consented to engage in commercial sex work.

In the early 2000s, the Bush Administration—who considered all sex work as forced and exploitative—supported Cambodia and other countries with \$50 million to pass new anti-trafficking bills.[20] Cambodia, with the consultation of an international group, passed the 2008 LHTSE. However, the 2008 LHTSE did not address the 1996 LHTSE's inconsistencies or leave the emphasis on sex trafficking; neither did it interpret what "exploitation" meant (Keo 2014).[21] According to the Cambodia Center for Human Rights (CCHR) 2010 report, the application of LHTSE has been "inconsistent at best and incorrect at worst." [22] One of CCHR's recommendations regarding victim protection was that the Cambodian government should ensure Cambodia's judiciary recognizes that victim protection is crucial to prosecution, and should implement and adhere to a common minimum standard of care for victims of human trafficking.

B. Benefits of a Decolonized Approach

Cambodia's economic and governance dependency makes it suspectable to the good intentions of foreign organizations and stakeholders.[23] Human trafficking is a horrific violation that should be eradicated. However, the SVS critique prompts an awareness that not all good intentions thoughtfully produce objectives or laws sensitive to power imbalances, colonial influences, and the complexities of contributory factors to human trafficking within the context of the individual's daily world. Legal practitioners, advocates, and policymakers must be aware that the various stakeholders in the counter-trafficking sector may have conflicting interests and/or different priorities (Gallagher and Surtees 2011).[24] Cambodia's anti-trafficking framework cannot be separated from its history of the West's influence. The international community's desire to rescue and redeem Cambodia from its horrific Khmer Rouge is dangerously paternalistic. This paternalism overshadows the deeply imbedded ethnic stereotypes,

ethnic preferences, migrant workers, and misogyny of victimhood.[25] These biases may determine which victims get rescued by law enforcement and their cases prosecuted. Clear demarcations between who is/is not a victim do not provide justice for the diverse perspectives and experiences of Southeast Asian sex workers. Justice calls for making the worker's voice the dominant and influential narrative.

A decolonized approach also recognizes the SVS critique in Cambodia's legislation. Cambodia's legislation was passed with the substantial help and influence of international voices. Cambodia inherited the ideals of the savior without coming into its own voice. The Western condemned Cambodia's governance ideals as savage while simultaneously recasting Cambodia's new democracy as an unblemished project, free and separated from the legacies of its colonial past. As a result, Cambodia's legislative focus on sex trafficking perpetuates a feminization of victimhood, excluding the thousands of trafficked Cambodian men working in Thai fishing vessels.[26] A decolonized perspective encourages identifying which actors and systems support trafficking schemes. Let the survivors and advocates lead the data collection by setting metrics based on their insight into the industry. Cambodia, not a Eurocentric entity, should identify which stakeholders' voices could best navigate through and whose priorities best address anti-trafficking.

CONCLUSION

Some may argue that a victim-centered approach is only as good as the enforcement. They may propose that, since corruption has made cooperation between the Cambodian police and judicial systems weak, perhaps Western intervention would be more helpful than leaving Cambodia's government alone. A Western powers-backed prosecutorial crackdown of senior Cambodian government officials may be best practice to change the culture of corruption from top-down. It may show that counter-trafficking efforts must be taken seriously. Nevertheless, prosecution should not be the only approach. Corruption is a symptom of a cultural norm. In order to tackle a pervasive practice, SVS critique forces human rights practitioners to consider the victims/survivors themselves. Relying on the survivors and advocates and listening to their priorities is how well-meaning interventions can avoid harmful implications.

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Punished for Being Abused: The Unfair Prosecution of Children Affiliated with ISIS

by Mary Kate O'Connell

Since regaining control of their state from ISIS in 2017, Iraqi and Kurdistan Regional Government Authorities (KRG) have arrested and detained approximately 1,500 children for alleged ISIS affiliation.[1] Of the children detained, an estimated 185 have been convicted for terrorism and sentenced to prison in Iraq.[2]

Many of these children were not voluntary affiliates of ISIS and should not be imprisoned for serving as child soldiers. The Paris Principles and Guidelines on Children Associated with Armed Forces of Armed Groups ("Paris Principles") defines a child soldier as a person under 18 who has been recruited or used by an armed force or armed group in any capacity, including, but not limited to, children used as fighters, cooks, porters, spies or for sexual purposes.[3] Since 2014, ISIS has kidnapped, bought, and enslaved children to assist with terrorist operations.[4] ISIS has recruited the children using aggressive propaganda that persuades parents that giving their children to ISIS leads to wealth, honor, and prosperity for the family.[5] In some ISIS controlled areas of Syria, high school and university students were required to pledge allegiance to ISIS to graduate.[6] Once successfully recruited by ISIS, many of these children are placed into religious camps where they are indoctrinated with ISIS' beliefs and missions.[7] Recruited children over the age of ten are then placed into military training.[8] If any child tries to escape or dissent, they are often beaten or killed.[9] ISIS has the most widespread use of child soldiers in modern history and continues to use child soldiers to this day.[10]

KRG's criminalization of children for their involuntary service to ISIS as child soldiers violates international law.[11] Under the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ("Paris Principles"), children who escape or are released from involvement with armed forces

retain their human rights as children and international law must be applied to any proceedings involving the children.[12] More specifically, under international law, the children may not be subjected to torture or cruel punishment, may not be sentenced to death nor life imprisonment without possibility of release, and may not be deprived of their liberty.[13] The Paris Principles also require that all appropriate action is taken to ensure family re-unification and the re-integration of the child into society.[14] The release process of a child from an armed group is crucial to the child's re-integration, and the child should not be detained or prohibited from receiving rehabilitative services.[15] The KRG is violating the Paris Principles by immediately detaining children released from ISIS control and using torture methods to elicit confessions of ISIS affiliations from children. The KRG has also not taken any necessary steps to assist in the rehabilitation or re-integration of child soldiers released from ISIS.[16]

Punishing child soldiers also violates the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[17] While the UN Convention on the Rights of the Child outlines each child's juvenile justice rights, the 2000 Optional Protocol specifically addresses the issue of children involved in armed conflict.[18] Reaffirming the importance of protecting children's rights, the Protocol describes the harmful impact of armed conflict on children and prohibits the recruitment or participation of any person under the age of 18 in armed conflict.[19] Article 7 of the Optional Protocol specifically requires member states to assist in the rehabilitation and social reintegration of persons under 18 who were recruited and involved in armed conflict. [20] Iraq ratified the Optional Protocol in 2008 which means that the KRG's current detention and sentencing of ISIS child soldiers is in violation of international

law.[21]

As a signer of the Optional Protocol, Iraq should be held accountable for violating Article 7. While the KRG is a semi-autonomous region of Iraq, it is considered part of Iraq by the United Nations. Therefore, since the KRG has violated the 2000 Optional Protocol to the Convention on the Rights of the Child and Iraq is a signing member of this treatise, the UN Security Council should make efforts to intervene in the KRG's punishment and detainment of child soldiers of ISIS. Such efforts should include requiring the KRG to release child soldiers after questioning and to implement reunification plans between child soldiers and family members. Unfortunately, Iraq is not a state member of the International Criminal Court, which means that the ICC's ability to intervene in the KRG's punishment of child soldiers is limited.[22]

Given the recent actions of KRG towards child soldiers released from ISIS control, the international community can and should intervene under the 2000 Optional Protocol to prevent further punishment of child soldiers.[23] The UN Convention on the Rights of the Child requires member states to take corrective action to protect the best interests of children and to allow all children to enjoy basic human rights.[24] KRG is violating the basic human rights of ISIS child soldiers by preventing them from family reunification and using torture methods to elicit confessions. International law requires the reintegration and rehabilitation of child soldiers, and KRG is violating international law by instead detaining, convicting, and imprisoning child soldiers for their involuntary affiliation with ISIS.

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Court of Justice of the European Union Rules Against Polish Law on the Supreme Court

by Ben Phillips

The Europe Union (EU) is embroiled in an internal struggle over the rule of law and preserving its democratic rights and values against creeping authoritarianism. The Polish legislature passed a law that lowered the retirement age of Supreme Court judges to remove current judges and pack the courts with judges that are loyal to the Law and Justice Party. In *Commission v. Poland*, case C619/18 (6/24/19), Court of Justice of the European Union (CJEU) ruled that the Polish Law on the Supreme Court (“Law on the Supreme Court”) was contrary to EU law.[1] The CJEU addressed Poland’s practice of packing courts with loyal political appointees and demonstrated how this subverts judiciary independence.[2] This decision is a major development in combating the trend of authoritarian regimes using legal methods to undermine democratic checks and balances.

The Law on the Supreme Court, passed on April 3, 2018, forced Supreme Court judges to retire at the age of sixty-five, unless they are granted an extension by the President. The CJEU struck down this law on June 24, 2019 for violating EU law on rule of law and independent judiciaries.[3] The CJEU is the constitutional supranational court of the EU, and they are often trying to balance protecting the uniformity of EU law and respecting the autonomy of the European member states. Here, the Court held that the Polish law had no legitimate government interest and violated the provisions of the Treaty on European Union (TEU).[4] The CJEU specifically pointed to the principles of independent judiciaries and the irremovability of judges. The EU is currently embroiled in what has been called the “rule of law crisis.”[5] Prior to this case being decided by the CJEU, the European Commission referred the matter of the breakdown in the rule of law in Hungary, Poland, and Romania to the Council of Europe.[6] The two major regimes that have brought about this crisis are the Law and Justice Party in Poland and Prime

Minister Victor Orban’s Fidesz Party in Hungary. These two authoritarian regimes denounce the European judiciary for undue interference with national politics and espouse a form of unchecked nationalism. [7] This CJEU case on Poland’s attempted court packing is part of a larger narrative stemming from the “rule of law crisis” and challenges to the principles of democratic governance, rule of law, and human rights law enshrined in the Treaty on the Functioning of the European Union and in the United Nations Declaration of Human Rights.[8]

At first glance, the issue of court packing may not stand out as a democratic or human rights issue. Many countries have packed courts without human rights implications. However, Hungary and Poland are packing their courts to undermine accountability and judicial independence.[9] The right to effective remedy and the right to a fair trial before independent national judiciaries are specifically protected by Articles eight and ten of the United Nations Declaration of Human Rights.[10] The right to effective remedy and fair trial are also protected under Article 47 of the Charter of Fundamental Rights of the European Union.[11] The right to a fair trial and judicial independence are critical to protecting individual rights, and these rights are also imperative for enforcing checks on other human rights abuses as well.

These authoritarian regimes use legal methods to undermine their own institutions and advance their illiberal law and policies. There are concerted efforts in both Hungary and Poland to dismantle democratic protections.[12] These regimes did not gain power all at once. Instead, their leaders and political groups have slowly and strategically subverted their country’s democratic institutions and processes in order to entrench themselves in power and destroy the checks and balances within their systems.[13] These regimes

focused on compromising the impartiality of the judiciary, replacing judges and packing courts, and increasing political appointments of loyal judges.[14] The compromised impartiality of the Polish and Hungarian judiciaries have paved the way for attacks on reporters, detaining asylum seekers and immigrants in Hungary, and restricting the rights of Civil Society Organizations and Human Rights organizations to gather freely in Poland.[15] These largely unchecked actions are possible, in part, thanks to the Polish and Hungarian regimes sabotage of their democratic institutions. These actions are the backdrop for the CJEU decision in *Commission v. Poland*.

The CJEU struck down the Law on the Supreme Court because it violated EU Law. Specifically, the CJEU cited to Article 19(1) of the TEU, “Member States shall provide remedies sufficient to ensure effective legal protection” of EU law and Article 47 of the Charter of Fundamental Rights of the European Union, the right to effective remedy and a fair trial.[16] The Court argued that Poland’s compulsory retirement of judges on the Supreme Court undermined the independence and effectiveness of the judiciary, in violation of the fact that domestic courts are also EU courts and must monitor the effective implementation of EU law.[17] The Court further argued that the law compromised the judges’ impartiality because the President had complete discretion to extend (or not extend) judicial terms past the retirement age.[18] The Court ruled that court packing and eroding judicial independence violated the principle of rule of law espoused in Article 2 of the TEU, which lays out the fundamental principles of the EU and its member states.[19] This ruling shows that the CJEU and laws of the EU can still be relied on to deal with the rule of law crisis in Europe.

Since the CJEU’s judgement, the judges removed by the Law on the Supreme Court have been reinstated.[20] If the CJEU can have such effect in Poland, it can also monitor other laws and policies that undermine judicial independence in Romania and other European countries edging towards illiberal policies and authoritarianism.[21] These governments intentionally compromise their own judiciaries to silence political opposition and circumvent the enforcement of other human rights obligations. However, the effective use of the CJEU and other EU institutions is an important strategy to curb the spread and empowerment of authoritarian regimes. Most importantly, it demonstrates

that these countries are still able to be held accountable and cannot completely evade enforcement. Outside of actual changes caused by the CJEU decision, it also represents an ideological demonstration that the EU will take active measures to stand against policies and laws meant to undermine judicial independence and other democratic values. The intervention of the EU and the CJEU is a concrete step toward combatting undemocratic policies and laws that limit access to an independent judiciary and a fair trial.

The CJEU decision on Poland’s Law on the Supreme Court is an important moment in addressing the rule of law crisis in Europe. The EU must apply and replicate these processes in the other member states in the EU that are employing similar practices to threaten the independence of their judiciaries. This is imperative to combat the erosion of judicial independence and maintain checks on authoritarian executive and legislative powers. The right to a fair trial and independent judiciary are vital human rights because they protect the rule of law and ensure that other obligations are being enforced.

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A New Approach: Gang-based Asylum in the Age of “Zero Tolerance”

by Caylee Watson

A record number of migrants are fleeing the Northern Triangle. In recent years, about 265,000 migrants have left annually. This number is on track to more than double in 2019.[1] Gang violence, corruption, and a lack of economic opportunity and security challenge Guatemala, El Salvador, and Honduras.[2] Homicide rates in the Northern Triangle have been among the world’s highest for decades.[3] It is no secret that the U.S. foreign policy in the 1970s through the 1990s laid the foundation for much of the instability in the region. Over the past twenty years, the U.S. has attempted, with limited effect, to remedy the situation by aiding programs that try to combat the underlying issues causing some of the instability.

During the 2016 presidential campaign, Donald Trump promised to reduce “illegal immigration.”[4] When he became president, in addition to developing a scheme to build a wall on the Mexican northern-U.S. southern border, President Trump enacted “zero-tolerance” policies that led to family separation.[5] Since Trump took office three years ago, not only has the United States seen an influx in irregular entries at the southern border, but the zero-tolerance policies may even violate domestic and international law.[6]

For example, in the spring of 2018, the Trump Administration (“Administration”) implemented a zero-tolerance policy which sought to criminally prosecute all adults entering the United States irregularly, including asylum seekers, and those traveling with children.[7] Simultaneously, the Administration cut hundreds of millions of dollars in aid to the Northern Triangle because the countries “failed to slow migration flows to the United States.”[8] These policies contradict each other — experts agree that cutting off assistance aimed to help programs improve safety and economic security in the region was only going to cause migration to increase.[9] In fact, the policies have failed to slow

the number of migrants and have led to overcrowded detention centers and a massive backlog in U.S. immigration courts.

One aspect of immigration policy that the Administration cannot override through proclamation or executive order is asylum law. Under the Refugee Convention and Protocol, the U.S. cannot deny entry to asylum seekers.[10] Domestically, an asylum applicant meets the definition of a refugee under INA § 101(a)(42) if the person seeking asylum is “unable or unwilling to return to . . . [his or her] country [of origin] 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.”[11]

However, in the past year, alongside the above-mentioned executive orders, the Attorney General (“AG”) has decided a number of cases that impede traditional Asylum law.[12] In *Matter of A-B-* and *Matter of L-E-A-*, the AG attempted to limit the scope of the frequently utilized protected ground, “particular social group,” by asylum applicants fleeing gang violence in the Northern Triangle.[13] Prior to *Matter of L-E-A-* and *Matter of A-B-*, an applicant could demonstrate that they were persecuted as a member of a particular social group if they could show that they were persecuted because of gender-based domestic violence or because of their familial ties. Now, in circuit courts that lack overriding precedent, both Attorney General Sessions’ and Barr’s interpretations present problems for applicants. This article suggests a supplementary approach—(imputed) political opinion—for attorneys representing asylum applicants fleeing gang-based persecution.

For an applicant to establish their eligibility for asylum on account of political opinion, the applicant must

allege specific facts from which it can be inferred that they hold a political opinion known to the persecutor, and that the persecution occurred on account of that political opinion.[14] The protected ground of (imputed) political opinion is a valid strategy when advocating for victims claiming asylum for gang opposition. For example, although gangs are not “the state,” in the Northern Triangle, certain gangs operate as the “de facto” government and wield more power and control over the country and its citizens.[15] The UNHCR explained that “[t]he ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and sociocultural context of the country of origin.[16] In contexts, such as in El Salvador and Guatemala, objections to the activities of gangs may be considered as opinions that are critical of the methods and policies of those in control and, thus, constitute a “political opinion” within the meaning of the refugee definition. For example, individuals who resist recruitment by gangs, or who refuse to comply with demands made by the gangs, such as demands to pay extortion money, may be perceived as holding a political opinion. In addition, the gangs in the Northern Triangle have demonstrated a capacity to challenge states directly by murdering state officials and controlling other corrupt law enforcement, political, or local security officers. Therefore, those victims who resist such authorities are persecuted on account of their political opinion because, in the Northern Triangle, the gangs have infiltrated the state and are in control of the political world.[17]

Although some immigration courts have failed to find asylum based on this approach, the adjudicators explained that they were not presented with enough evidence to show significant gang control of the state. For example, *Matter of S-P* held that imputed political opinion may satisfy the refugee definition.[18] Therefore, with some adjustments, advocates can use this case to make valid asylum claims.

Additionally, in *Koudriachova v. Gonzales*, the Second Circuit emphasized, for imputed political opinion, “the relevant question is not whether an applicant subjectively holds a particular political view, but instead, whether the authorities in the applicant’s home country perceive him to hold a political opinion and would persecute him on that basis.”[19] When determining authorities, “adjudicators must consider the claim within the context of the country itself.” Also, in the

Ninth Circuit, the Court in *Regalado-Escobar v. Holder*, found that opposition to a strategy of violence can constitute a political opinion for asylum purposes.[20]

In their article ‘Third Generation’ Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, Deborah Anker and Palmer Lawrence argue that despite the positive foundation, Immigration Judges dealing with seriously overloaded dockets, limited authority to grant continuances, and completion quotas will be hard-pressed to engage in “complex and contextual factual inquiry.”[21] Practitioners should do their best to educate adjudicators through country-condition evidence, expert testimony, memoranda of law, and detailed direct examination of the asylum seeker.

For example, in *Marroquin-Ochoma v. Holder*, the Eighth Circuit indicated that “. . . [e]vidence that the gang is politically minded could be considered evidence that the gang members would be somewhat more likely to attribute political opinions to resisters,” but found that a “generalized political motive underlying the gang’s forced recruitment” was inadequate evidence to establish that resistance to the recruitment efforts was based on an anti-gang political opinion.[22] More recently, this approach succeeded in the Fourth Circuit case, *Alvarez Lagos*, where the Court concluded that the country conditions and evidence presented by the applicant showed that Mara 18, a powerful gang in the Americas, imputed her anti-gang political opinion and that opinion was one central reason for her persecution.[23] Expert testimony showed that Alvarez Lagos’s failure to comply with the gang’s demands and subsequent flight to the United States would be seen by Mara 18 as “a direct challenge to its efforts to establish and maintain political domination within Honduras.” As a direct result, she would be “targeted for violence in a manner that was very graphic, and visible to the community.” Another expert explained that failure to pay was not simply a refusal to pay a debt, but Mara 18 would feel “compelled to crush what it views as political resistance.”

Although the imputed political opinion route may be weaker than the well-established, but recently contested, protected ground of “particular social group,” it does not diminish the fact that it is a perfectly valid way to argue a protected category. Under current case law, international law, and conditions in the Northern

Triangle, the Courts are making the correct decisions in recognizing (imputed) political opinion. The idea that opinions or matters that involve gangs might constitute political opinion is supported by the Office of the United Nations High Commissioner for Refugees (UNHCR), which has recently published Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Guatemala (January 2018), El Salvador (March 2016), and Honduras (July 2016).[24] Therefore, the U.S. has a duty under the obligations of the Refugee Convention and Optional Protocol to recognize this protected category.

Not only is (imputed) political opinion based on gang persecution a valid protected category, but it could lead a new age of asylum law practice during zero-tolerance.

1 Amelia Cheatham, Central America's Turbulent Northern Triangle, COUNCIL ON FOREIGN RELATIONS (OCT. 1, 2019), <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>.

2 Id.

3 Id.

4 Transcript of Donald Trump's Immigration Speech, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>.

5 Human Rights Watch, Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy (Aug. 15, 2018), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#>.

6 Amelia Cheatham, *supra* note 1; Jasmine Aguilera, Trump's New Restrictions on Asylum Seekers Violate U.S. and International Law, Experts Say, TIME (July 15, 2019) (updated July 24, 2019), <https://time.com/5626498/trump-asylum-rule-international-law/>.

7 Human Rights Watch, *supra* note 5.

8 Kevin Sieff, U.S. Officials Said Aid to El Salvador Helped Slow Migration. Now Trump is Canceling It, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/world/the_americas/us-officials-said-aid-to-el-salvador-helped-slow-migration-now-trump-is-canceling-it/2019/04/01/5a8ca570-540a-11e9-aa83-504f086bf5d6_story.html.

9 Id.

10 1951 Convention Relating to the Status of Refugees & 1967 Protocol Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 137.

11 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2018).

12 <https://cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e>

13 Matter of A-B-, Respondent, 27 I&N Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>; Matter of L-E-A-, Respondent, 27 I&N Dec. 581 (A.G. 2019), <https://www.justice.gov/eoir/page/file/1187856/download>.

14 INS v. Elias-Zacarias, 502 U.S. 478 (1992), <https://supreme>.

[justia.com/cases/federal/us/502/478/](https://www.justia.com/cases/federal/us/502/478/).

15 Jeffrey S. Chase, 3rd-Generation Gangs and Political Opinion, Blog Post (June 3, 2018), <https://www.jeffreyschase.com/blog/2018/6/3/3rd-generation-gangs-and-political-opinion>.

16 Id.

17 <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>

18 In re S-P-, Applicant, 21 I&N Dec. 486 (B.I.A. 1996), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3287.pdf>.

19 Koudriachova v. Gonzales, 490 F.3d 255 (2d Cir. 2007).

20 Regalado Escobar v. Holder, 717 F.3d 724 (9th Cir. 2013).

21 Jeffrey S. Chase, *supra* note 15.

22 Marroquin-Ochoma v. Holder, 574 F.3d 574 (8th Cir. 2009).

23 Alvarez Lagos v. Barr, 927 F.3d 236 (4th Cir. 2019).

24 UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala (2018), <https://www.refworld.org/pdfid/5a5e03e96.pdf>; UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador (2016), <https://www.refworld.org/pdfid/56e706e94.pdf>; UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras (2016), <https://www.refworld.org/docid/579767434.html>.