

POLITICAL OPINION, SOCIETAL POWER, AND
NORTHERN TRIANGLE GANGS

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I. INTRODUCTION.....55
II. INTERPRETIVE BACKGROUND56
III. THE POLITICAL AS SOCIETAL POWER56
IV. NORTHERN TRIANGLE GANGS AS BOTH POLITICAL
AND NON-POLITICAL ACTORS58
V. CONCLUSION60

I. INTRODUCTION

Recent scholarship argues that the term “political opinion” under the 1951 Refugee Convention (“1951 Convention”) and the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”) should be interpreted as an opinion relating to an entity that has the capacity to exercise societal power or authority.¹ Thus, political opinions are not limited to those opinions that only concern the state or its government.

The present annotation examines one aspect of the application of this interpretation to refugee opinions about gangs in the Northern Triangle of Central America—a region comprising Honduras, Guatemala, and El Salvador. Specifically, it notes that Northern Triangle gangs present the complicated case of having both non-political and political roles. As organizations engaged in extortion, drug trafficking, and other illicit activities,² such gangs are criminal, rather than political, entities. But as the primary entities exercising power over society within

1. Colloquium, *The Michigan Guidelines on Risk for Reasons of Political Opinion*, 37 MICH. J. INT’L L. 234, 236 (2016). See Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion*, 37 MICH. J. INT’L L. 243, 297 (“In sum, it would be workable to define “political” as relating to the power structures of a given society that ultimately have the capacity, legitimately or otherwise, to compel an individual or group to behave in a certain way through coercive means.”); Amar Khoday, *Resisting Criminal Organizations: Reconceptualizing the “Political” in International Refugee Law*, 61 MCGILL L. J. 461, 470 (2016) (“I argue that what constitutes the term “political” within the context of articles 1A(2) and 1F(b) of the Refugee Convention needs to account for the substantial power held by criminal organizations within particular societies, and that challenges to their power can be considered “political” in their own right.”).

2. Ericka Welsh, *The Path of Most Resistance: Resisting Gang Recruitment as a Political Opinion in Central America’s Join-or-Die Gang Culture*, 44 PEPP. L. REV. 1083, 1083 (2017).

the communities that they control, they are also political actors.³ The interpretation of political opinion in recent scholarship highlights the latter role, whereas certain case law⁴ has emphasized the former.

With this in mind, asylum defense advocates arguing that their client's opinion about a Northern Triangle gang is a *political* opinion should show how that opinion concerns the gang in its role as an entity exercising societal power, and not merely in its role as a criminal organization.

II. INTERPRETIVE BACKGROUND

Under the 1951 Convention and 1967 Protocol, for a person to qualify as a refugee, she must, among other criteria, have a well-founded fear of persecution on account of an enumerated protected basis.⁵ One such basis is “political opinion.”⁶

However, the meaning of “political opinion” within the context of the 1951 Convention and 1967 Protocol is not entirely transparent. Because neither instrument defines the term,⁷ its meaning is subject to interpretation. Given the lack of a centralized international tribunal overseeing the construction of the 1951 Convention and 1967 Protocol, the task of determining what constitutes a political opinion has largely fallen to the domestic institutions of contracting states, including state courts.⁸ Yet, among state case law, there is little agreement as to what constitutes a political opinion.⁹

III. THE POLITICAL AS SOCIETAL POWER

In the face of this lack of clarity, legal scholars have taken up the inquiry of how to interpret “political opinion” within the 1951 Convention and the 1967 Protocol. For example, recent scholarship has argued that an opinion is political when it relates to entities that

3. *Id.* (“Transcending petty crime, gangs control entire communities in the Northern Triangle where they operate as de facto governments beyond law enforcement’s control.”).

4. *See, e.g., Zelaya-Moreno v. Wilkinson*, 989 F.3d 190, 201 (2d Cir. 2021) (stating that “so far as the administrative record here reveals, [*Mara Salvatrucha*] is a criminal organization in El Salvador, and not a political one.”).

5. Convention Relating to the Status of Refugees, art. I(a)(2), *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, art. I(2), *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

6. *Id.*

7. Khoday, *supra* note 1, at 473.

8. *Id.* at 469.

9. Dauvergne, *supra* note 1, at 265.

exercise societal power.¹⁰ On the one hand, this definition is inclusive. Such broad scope arises from the need to interpret the 1951 Convention in light of its object and purpose of “establishing a framework for surrogate human rights protection by the international community when an individual’s state of origin is unable or unwilling, for discriminatory reasons, to provide such support.”¹¹ On the other hand, this definition provides a limiting principle and recognizes that not every opinion pertaining to the structure of human society will be political.¹²

The *Michigan Guidelines on Risk for Reasons of Political Opinion* offer what is perhaps the most detailed statement of this interpretation of political opinion under the 1951 Convention and 1967 Protocol. These guidelines propose that a political opinion ought to be understood as:

[A]n opinion about the nature, policies, or practices of a state or of an entity that has the capacity, legitimately or otherwise, to exercise societal power or authority. A relevant non-state entity is one that is institutionalized, formalized, or informally systematized and which is shown by evidence of pattern or practice to exercise *de facto* societal power or authority.¹³

One important aspect of this interpretation is that it rejects the notion that for an opinion to be political, it must pertain to the state or its government. While not universally accepted,¹⁴ this rejection is reflected in some state case law. For example, in the United States, the Second Circuit has characterized political opinion as:

[A]n opinion [involving] some support for or disagreement with the belief system, policies, or practices of a government and its instrumentalities . . . ; an entity that seeks to directly influence laws, regulations, or policy . . . ; an organization that aims to overthrow the government . . . ; or a group that plays some other similar role in society.¹⁵

According to this characterization, an opinion may be political even if it does not pertain to the government, but rather concerns “a group that plays some other similar role in society.” However, the court did not define what this “similar role” was. One advantage of interpreting “political opinion” in terms of an entity that exercises societal

10. *The Michigan Guidelines on Risk for Reasons of Political Opinion*, *supra* note 1, at 236; Dauvergne, *supra* note 1, at 297; Khoday, *supra* note 1, at 470.

11. Dauvergne, *supra* note 1, at 249.

12. *Id.* at 297.

13. *The Michigan Guidelines on Risk for Reasons of Political Opinion*, *supra* note 1, at 236.

14. *See* Dauvergne, *supra* note 1, at 292 (discussing court decisions that require an opinion to concern the state or its government in order for the opinion to be deemed political).

15. *Zelaya-Moreno*, 989 F.3d at 199-201 (emphasis added).

power is that it specifies what the content of this “similar role” could be.

IV. NORTHERN TRIANGLE GANGS AS BOTH POLITICAL AND NON-POLITICAL ACTORS

A contentious question surrounding the 1951 Convention and 1967 Protocol concerns whether a refugee’s opinion constitutes a political opinion when it relates to criminal gangs. One of the principal contexts in which this question arises is asylum cases of refugees who have fled the Northern Triangle out of fear of persecution from gangs. For over twenty years, Honduras, Guatemala, and El Salvador have suffered epidemics of gang violence,¹⁶ particularly at the hands of *Mara Salvatrucha* and *Barrio 18*, the two most powerful gangs in the region.¹⁷ Within these countries, gang activity intersects with the lives of ordinary citizens in innumerable ways. Common examples often arising in asylum cases include gangs attempting to force non-members to join their ranks,¹⁸ gangs forcing non-members to aid in the gang’s illicit activities in positions of unpaid coerced servitude,¹⁹ and gangs forcing non-members to pay extortion fees.²⁰ After suffering or fearing violent reprisal on behalf of these gangs, non-members who resist flee and seek refuge in other countries. With respect to their eligibility for asylum, one argument refugees make is that the gang persecuted or will persecute them on account of their actual or imputed political opinion. The core of this opinion is opposition to the gang.²¹

It is helpful to consider whether opinions about Northern Triangle gangs such as *Mara Salvatrucha* and *Barrio 18* constitute political opinions under the 1951 Convention and 1967 Protocol according to two perspectives.

The first perspective is the interpretation featured in recent scholarship that characterizes a political opinion as an opinion relating to an entity exercising societal power. It is well established that *Mara*

16. Welsh, *supra* note 2, at 1095–6.

17. *Id.* at 1096.

18. *Id.* at 1101.

19. Thomas Boerman & Adam Golob, *Gangs and Modern-Day Slavery in El Salvador, Honduras and Guatemala: A Non-Traditional Model of Human Trafficking*, 7 J. OF HUM. TRAFFICKING 241, 241 (2021).

20. Eric Hershberg, Expert Affidavit of Dr. Eric Hershberg ¶29 (2019).

21. See, e.g., *Zelaya-Moreno*, 989 F.3d at 194 (stating that an asylum applicant from El Salvador “. . . claimed that the gang persecuted him because of his political opinion that gangs are bad for his town and country.”); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 741 (9th Cir. 2008) (stating that the asylum applicant from El Salvador had “. . . claimed persecution on account of his anti-gang political opinion.”).

Salvatrucha and *Barrio 18* exercise enormous societal power. In Honduras, for example, “[g]ang ‘ownership’ of a particular territory involves effective governance of these zones, as the official institutions of state have largely retreated from gang-controlled areas.”²² The gang views itself not as just controlling the territory, but also as controlling the people who live there, subjecting the inhabitants to its rules and control.²³ Thus, according to the interpretation that an opinion is political when it concerns an entity exercising societal control, opinions about *Mara Salvatrucha*, *Barrio 18*, and gangs similar to them can be political opinions.

The second perspective is an undercurrent raised in some case law. This perspective postulates that opinions relating to entities that are purely criminal organizations are not political. This undercurrent is seen, for example, in the Second Circuit’s opinion in *Zelaya-Moreno v. Wilkinson*. There, the court held that an asylum seeker’s opinion opposing *Mara Salvatrucha* in El Salvador was not a political opinion.²⁴ A central reason for the court’s holding was that “so far as the administrative record here reveals, [*Mara Salvatrucha*] is a criminal organization in El Salvador, and not a political one.”²⁵ The assumption here is that opinions about organizations that are merely criminal, and nothing more, are not political opinions.

The combination of the above perspectives points to the conclusion that an opinion about entities like *Mara Salvatrucha* and *Barrio 18* may or may not be political depending on the role of the gang to which the opinion relates. When an opinion takes as its subject the gang, insofar as it is an entity exercising societal power, then that opinion will be political. An example of such an opinion might be “I should be free not to have to obey *Mara Salvatrucha*’s practice of forcing people to join their ranks.” However, when an opinion takes as its subject the gang, simply insofar as it is a criminal entity, then that opinion will not be political. An example of such an opinion might be “*Mara Salvatrucha*’s extortion practices are repugnant.”

Importantly, an asylum seeker’s opinion may relate to a gang both as an entity exercising societal power and as a criminal organization. This could be the case, for example, when the opinion is very general, such as “I disapprove of *Mara Salvatrucha*.” To differentiate these aspects, asylum defense advocates should pay close attention to the context of their client’s opinion, including his or her motivations for

22. Hershberg, *supra* note 18, at ¶18.

23. *Id.* at ¶ 28.

24. *Zelaya-Moreno*, 989 F.3d at 203.

25. *Id.* at 201.

holding it, and emphasize to the adjudicator those aspects of the opinion that concern the gang as wielding societal power.

Of course, this analysis is further complicated because the understanding that a political opinion is an opinion relating to an entity exercising societal power is an interpretation put forward by scholars, not the courts. However, given the lack of clarity surrounding the definition of political opinion in national case law, there may be opportunities to argue that something approximating this interpretation is implicit in, or at least consistent with, a court's political opinion jurisprudence. As noted above, this might be the case in the Second Circuit, where the court held that a political opinion may concern "a group that plays some other similar role in society" without specifying what that similar role is.²⁶

V. CONCLUSION

The 1951 Convention, 1967 Protocol, and national case law of contracting states, fail to provide a clear definition of "political opinion." Recent scholarship argues that this definitional gap may be filled by an interpretation according to which an opinion is political when it concerns an entity exercising societal power. Under this definition, opinions about Northern Triangle gangs such as *Mara Salvatrucha* and *Barrio 18* may count as political opinions. Yet, given the dual role of these gangs, asylum defense advocates should be careful to emphasize that their clients' opinions take as their subject the gang as a source of societal power, rather than merely a criminal organization.

26. *Zelaya-Moreno*, 989 F.3d at 199–201.