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**FILLING THE GAP BETWEEN THE T-VISA AND ASYLUM
LAW:
A CALL TO EXPAND THE T-VISA TO COVER
EXTRATERRITORIAL TRAFFICKING**

ARIFA RAZA*

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ABSTRACT

This Article examines the physical presence requirement for the T-visa which currently allows for extraterritorial trafficking claims when associated with law enforcement and prosecutorial needs. It argues that this requirement leaves vulnerable trafficking survivors at risk of harm. The Article proceeds by analyzing the physical presence requirement of the T-visa, which leaves certain victims of extraterritorial trafficking without protection. It then discusses asylum as a potential alternative for these survivors and concludes that asylum is not a viable option thereby exposing an intentional gap in protections. The Article goes on to argue that to further the goal of protecting trafficking victims, the T-visa should be amended and extraterritorial trafficking should be decoupled from law enforcement and prosecutorial needs.

INTRODUCTION

During my time as an immigration attorney, I came across countless migrants who were victims of trafficking that occurred either in their home country or on their journey to the United States. However, because they were not trafficked into the United States or in the United States' borders, they were not eligible for a T-visa. I watched many victims of human trafficking languish in immigrant detention to be expeditiously removed or fight an uphill battle to secure asylum. This Article argues that, rather than removing these trafficking victims, the United States should extend T-visa protections to them and thereby fulfill the intent of the Trafficking Protocol and the Trafficking Victims Protection Act (TVPA).

Part I of this Article provides an overview of the legal framework surrounding human trafficking, particularly the Trafficking Protocol and the TVPA. Part II, focuses on the physical presence requirement for the T-visa. Through this examination of the physical presence requirement, this Article highlights the presumption against extraterritoriality in the context of the T-visa, leaving certain victims without protection if they were trafficked outside the United States. While the T-visa's physical presence requirement was amended in 2017 to allow extraterritorial trafficking claims related to law enforcement needs, many victims of extraterritorial trafficking are left without recourse. Part III discusses the potential use of asylum to secure immigration relief for these victims, examining how courts have interpreted the "well-founded fear" standard in the context of trafficking-based claims and related claims of sexual and/or gang violence. Specifically, Part III highlights the limitations of asylum in providing immigration relief for these trafficking victims. Given the limited protection afforded under the TVPA to victims of extraterritorial trafficking and the difficulty of establishing asylum claims for trafficking victims, a persistent gap in immigration protections exists for certain victims of trafficking. Thus, Part IV calls for amending the T-visa requirement to allow protections for victims of extraterritorial trafficking irrespective of prosecutorial outcomes.

I. LEGAL FRAMEWORK OF HUMAN TRAFFICKING

A. *Human Trafficking in International Law*

The United Nations (U.N.), formed at the end of World War II, sought to develop an international legal framework to protect individuals from war and various human rights abuses.¹ This sentiment is expressed in the 1948 Universal Declaration on Human Rights (UDHR), which directs all U.N. member states to work toward promoting the dignity and equality of all peoples, protect against slavery, and prohibit slave trading in all forms.² In 1949, the General Assembly signed the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.³ Forty-nine years later, in December 1998, the General Assembly created an ad-hoc committee charged with developing a legal framework for addressing transnational organized crime, including human trafficking.⁴ Two years later, in November 2000, the General Assembly adopted the U.N. Convention Against Transnational Organized Crime.⁵ Under this Convention three ancillary protocols were established: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol);⁶ the Protocol against the Smuggling of Migrants by Land, Sea and Air;⁷ and the Protocol against the Illicit

¹ U.N. Charter art. 1, ¶ 1 (founding document of the U.N.).

² This document enshrines the rights and freedoms of all humans and was one of the first resolutions adopted by the United Nations. G.A. Res. 217 (III) A, art. 1, art. 4 (Dec. 10, 1948).

³ G.A. Res. 317 (IV) (Dec. 2, 1949). This treaty was limited in that it only addressed human trafficking as specific to prostitution, and it was not ratified by the United States. Multiple international treaties on the issue of human trafficking existed prior to the 1949 Convention. *See, e.g.*, International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101 (amended May 4, 1949), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-9&chapter=7&clang=_en; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-3&chapter=7&clang=_en; International Convention for the Suppression of Traffic in Women of Full Age, Oct. 11, 1933, 150, L.N.T.S. 431, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-5&chapter=7&clang=_en.

⁴ Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Works of its First to Eleventh Sessions, U.N. GAOR, 55th Sess., U.N. Doc. 1/55/383 (Nov. 2, 2000).

⁵ Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

⁷ Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2241 U.N.T.S. 507.

Manufacturing and Trafficking in Firearms.⁸ The Trafficking Protocol was the first of the three to enter into effect in 2003, and was ratified by the United States in 2005.⁹

The Purpose of the Trafficking Protocol is to prevent trafficking, to protect victims while “paying particular attention to women and children,” and to “promote the cooperation among State Parties in order to meet those objectives.”¹⁰ It defines the act of “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹¹

The Trafficking Protocol is divided into three components: (1) punishing traffickers through criminal penalties and prosecution; (2) protecting victims through various medical, psychological, social, and immigration interventions; and (3) preventing the crime of trafficking. The Articles outlined in the Trafficking Protocol reflect these components.

Many of the Articles relate to the criminalization of human trafficking. Article 3 defines the offense of “trafficking in persons,”¹² and Article 5 instructs State parties to adopt domestic legislation making trafficking a criminal offense.¹³ Article 10 addresses cooperation between law enforcement authorities, and Articles 11, 12, and 13 discuss immigration security.¹⁴ Articles 6, 7, and 8 outline protections for victims of trafficking.¹⁵ Article 6 focuses on protections for victims and recommends—rather than requires—that States provide appropriate medical and social services to victims.¹⁶ Article 7

⁸ Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, 2326 U.N.T.S. 208.

⁹ See Trafficking Protocol, *supra* note 6.

¹⁰ *Id.* at art. 2.

¹¹ *Id.* at art. 3(a).

¹² *Id.*

¹³ *Id.* at art. 5. One of the limitations in international law is that sovereign states ultimately decide whether to implement the treaty domestically. Where—such as here—a treaty contains domestic legislation, States that sign the treaty agree to give it effect domestically.

¹⁴ *Id.* at arts. 10–13. Article 11 focuses on the commercial carriers’ role in transporting potential victims of trafficking, while Articles 12 and 13 focus on the issue of fraudulent travel documents.

¹⁵ *Id.* at arts. 6–8.

¹⁶ *Id.* at art. 6.

encourages States to adopt appropriate immigration legislation so that victims can remain in the territory either temporarily or permanently, and Article 8 outlines safe repatriation measures for foreign-national victims.¹⁷

Article 9 outlines requirements for preventing trafficking and emphasizes research, media campaigns, economic initiatives, and policies relevant to protecting victims and preventing revictimization.¹⁸ Notably, Article 14 contains a saving clause that specifically states it does not affect existing rights and obligations under international human rights law, “in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”¹⁹ The principle of non-refoulement is a central tenant of international human rights law which prohibits States from expelling or returning a refugee to a territory where their “life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.”²⁰ Article 14 also contains a non-discrimination clause.²¹

Although the Trafficking Protocol outlines significant protections for victims of trafficking, its main emphasis is on establishing criminal penalties for traffickers rather than protecting victims.²² Because the Trafficking Protocol stems from a transnational criminal law framework, the obligatory nature of criminalizing and prosecuting trafficking (reflected in the language of *shall*) is not surprising. However, it is notable that the Protocol recommends social and

¹⁷ *Id.* at arts. 7–8. Specifically, Article 8 provides that, where a victim of trafficking is a national or permanent resident of a member State and the receiving State is also a member, the two States must work together to ensure the safety of the victim and allow for repatriation. *Id.* at art. 8, ¶ 1 (addressing the repatriation of victims of trafficking).

¹⁸ Trafficking Protocol, *supra* note 6, at art. 9.

¹⁹ *Id.* at art. 14(1).

²⁰ Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

²¹ Trafficking Protocol, *supra* note 6, at art. 14(2) (“The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”).

²² Scholars have critiqued the Trafficking Protocol at length for its focus on criminalization and prosecution over protection for victims. See James C. Hathaway, *The Human Rights Quagmire of ‘Human Trafficking’*, 49 VA. J. INT’L L. 1, 2 (2008); Anne Gallagher, *Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 EUR. J. MIGRATION & L. 163, 165 (2006); Jackie Jones, *Is it Time to Open a Conversation About a New United Nations Treaty to Fight Human Trafficking That Focuses on Victim Protection and Human Rights?*, in THE PALGRAVE INT’L HANDBOOK OF HUM. TRAFFICKING 1803, 1811 (John Winterdyk & Jackie Jones eds., 2019); Michael Dottridge, *Trafficked and Exploited: The Urgent Need for Coherence in International Law*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOUR AND MODERN SLAVERY 59, 59–60 (Prabha Kotiswaran ed., 2017).

immigration protections for victims (reflected in the language of *shall consider and to the extent possible*),²³ as well as reinforces existing rights and obligations under international human rights law, such as those related to the status of refugees, non-refoulment, and non-discrimination.²⁴

B. *Human Trafficking in U.S. Law*

The United States played a key role in drafting and enforcing the U.N. Convention Against Transnational Organized Crime and the related protocols.²⁵ At the domestic level, the United States developed anti-trafficking legislation which largely mirrors the Trafficking Protocol.²⁶ The United States enacted the TVPA in 2000 and has periodically reauthorized it since its implementation.²⁷

²³ The Trafficking Protocol includes mandatory and qualified provisions, as well as permissive language throughout its articles. The legislative guide to the Trafficking Protocol, explains permissive and qualified wording within the articles were a result of cost considerations for assistance and support for victims, as well as recognizing differing legal frameworks of State Parties. See UNITED NATIONS, LEGISLATIVE GUIDE FOR THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME 12 (2020). Where the phrase “to the extent possible within their legal system” is used, it qualifies the obligation set forth in the Protocol based on a State Party’s understanding. *Id.* Further, the legislative guide makes clear that while provisions regarding assistance and support for victims are not obligatory, they are not to be ignored “simply because a State Party does not have resources to spare. States Parties are required to consider implementing them.” *Id.* at 57; see Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 HUM. RTS. BRIEF 30, 31 (2001) (explaining how the permissive language of the Protocol regarding services and protections for victims is a potential weakness of the Protocol).

²⁴ Non-discrimination is another central tenet of international human rights. Non-discrimination as to race, color, sex, language, religion, political opinion, or other status was explicitly recognized in the Universal Declaration of Human Rights and has been included in all major human rights conventions such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3.

²⁵ See Janice G. Raymond, *The New UN Trafficking Protocol*, 25 WOMEN’S STUD. INT’L F. 491, 494 (2002) (noting that the United States “played a pivotal role in the evolution of the trafficking protocol”).

²⁶ Prior to 2000, the United States prosecuted cases of trafficking using the Mann Act for sex trafficking and the Thirteenth Amendment for labor trafficking. See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failure of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2994 (2006).

²⁷ See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960; William Wilberforce Trafficking Victims Protection

The TVPA and the Trafficking Protocol both utilize the “three Ps” approach to combating trafficking: “prevent, punish, and protect.”²⁸ This approach to combating trafficking is termed the 3Ps paradigm.²⁹ While the Protocol makes no distinction between types of trafficking, the TVPA tends to focus on the sex trafficking of women and girls, as indicated in its Purpose and Findings section: “Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.”³⁰

By highlighting that its purpose is to help women in “many parts of the world,” the TVPA presents itself as a sex-trafficking law. This is further evidenced by the fact that the TVPA separates sex trafficking from other forms of trafficking.³¹ It defines “severe forms of trafficking in persons” as:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.³²

Regarding protections, the TVPA allocates funds for rehabilitative and social services for victims,³³ immigration protections (discussed in the following

Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

²⁸ See Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 155, 159 (2011) (stating that “[l]ike the Palermo Protocol, the Trafficking Victims Protection Act promotes the ‘three Ps’ of combating human trafficking”).

²⁹ *Id.* at 159–60.

³⁰ Trafficking Victims Protection Act (TVPA), 22 U.S.C. § 7101(b)(2) (2000); *see also* Jayne Huckerby, *United States of America*, in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 230, 232 (Glob. All. Against Traffic in Women ed., 2007) (“The [United States’] definition of ‘severe forms of trafficking in persons’ is narrower than the definition of ‘trafficking in persons’ in Article 3 of the UN Trafficking Protocol, despite the fact that the US encourages other countries to incorporate the UN Trafficking Protocol’s ‘full definition.’” (citation omitted)).

³¹ 22 U.S.C. § 7102(b)(11) (2000).

³² *Id.*

³³ 22 U.S.C. § 7105(b)(2) (2000). The 2000 TVPA largely focused on immigration protections for foreign nationals who are victims of crimes. However, the 2005 reauthorization mandated that the Department of Health and Human Services create a residential treatment program for domestic juvenile victims. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 203, 119 Stat. 3558, 3570; HEATHER J. CLAWSON & LISA GOLDBLATT GRACE, U.S. DEP’T OF HEALTH AND HUM. SERVS., FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING (2007), <http://aspe.hhs.gov/hsp/07/humantrafficking/ResFac/ib.htm>.

subsection),³⁴ and a private right of action for victims to bring a civil suit against their traffickers.³⁵

C. *Immigration Relief Under the TVPA*

The TVPA allows certain victims of a human trafficking to remain in the United States for up to four years, through the issuance of T-nonimmigrant status, commonly known as a T-visa. To be eligible for a T-visa, an applicant must demonstrate the following: (1) they are or have been a victim of a severe form of trafficking; (2) they are physically present in the U.S. on account of their trafficking; (3) they have complied with reasonable requests from law enforcement for assistance in the investigation of human trafficking (unless they are under the age of 18 or unable to comply due to trauma);³⁶ and (4) they would suffer extreme hardship involving unusual and severe harm if they were to be removed from the United States.³⁷ Once approved, the T-visa provides for employment authorization and creates a path to adjust status to permanent residency at the end of the visa term.³⁸

³⁴ 8 C.F.R. § 214.11(b) (2021); 8 U.S.C. § 1101(a)(15)(T) (defining eligibility requirements for immigration relief).

³⁵ 18 U.S.C. § 1595(a) (2017) (establishing a civil remedy for victims of trafficking). The private right of action was included in the 2003 reauthorization. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(4), 117 Stat. 2875, 2878. However, to date, few actions have been brought in civil court. *See* Jennifer Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1623–24 (2010) (discussing that while there is a private right of action, few cases have been brought); Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 1–34 (2004) (examining the role of civil action as a tool to compensate trafficking victims).

³⁶ 8 U.S.C. § 1101(a)(15)(T)(i) (2012); 8 C.F.R. § 214.11(b) (2021). To qualify and obtain non-immigrant status and residency in the United States, T-visa applicants were originally intended to comply with reasonable requests for assistance by law enforcement in the investigation or prosecution of their traffickers. *See* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(e)(I), 114 Stat. 1464, 1477–78. Under the 2008 reauthorization of the T-visa, Congress relaxed this requirement so that a victim can still be eligible for a T-visa if it is unreasonable to expect cooperation with law enforcement due to psychological or physical trauma. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 201(a)(D) (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)(III)); *see also* 8 C.F.R. § 214.11(b)(3)(ii) (2021) (“An alien who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, is not required to comply with such reasonable request.”).

³⁷ 8 U.S.C. § 1101(a)(15)(T)(i) (2012); 8 C.F.R. § 214.11(b) (2021).

³⁸ *See* 8 C.F.R. § 214.11(d)(11) (2021) (stating that an applicant who is granted a T-visa is authorized to work and will be issued an Employment Authorization Document); 8 C.F.R. §

Notably, only 5,000 T-visas may be issued each year.³⁹ The number of visas allocated for trafficking victims does not meet the potential need; conservative estimates suggest that between 14,500 and 17,500 foreign nationals are trafficked into the United States every year.⁴⁰ However, due to the under-identification of trafficking victims, the cap of 5,000 has not been reached in any year reported since the implementation of the T-visa.⁴¹

II. TVPA EXTRATERRITORIAL PROVISIONS

The TVPA goes a long way toward creating a framework for punishing and prosecuting perpetrators of trafficking, but it does not go far enough to actualize the goal of protecting victims. This is most evident in its approach to extraterritorial trafficking. The TVPA has evolved over time to allow for extraterritorial jurisdiction over claims against traffickers.⁴² Further, the TVPA established monitoring mechanisms that track trafficking rates and

245.23(a) (2021) (outlining the eligibility requirement for T-visa recipients to adjust status to permanent resident). A T-visa holder may be eligible to adjust status prior to the requisite time period if the investigation or prosecution related to the trafficking has concluded, as determined by the Attorney General. *See* 8 C.F.R. § 245.23(a)(3) (2021).

³⁹ *See* 8 C.F.R. § 214.11(j) (2021) (“DHS may not grant T-1 nonimmigrant status to more than 5,000 [individuals] in any fiscal year.”). This means that derivative applicants are not counted against the annual cap.

⁴⁰ *See* HEATHER J. CLAWSON ET AL., CALIBER, ESTIMATING HUMAN TRAFFICKING INTO THE UNITED STATES: DEVELOPMENT OF A METHODOLOGY 2 (2006) (quoting a state department report on trafficking estimates from 2005); ALISON SISKIN & LIANA SUN WYLER, CONG. RSCH. SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 1 (2013) (“As many as 17,500 people are believed to be trafficked into the United States each year, and some have estimated that 100,000 U.S. citizen children are victims of trafficking within the United States.”); *see also* 22 U.S.C. § 7101(b)(1) (2007) (“At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.”). By Congress’s account, the T-visa cap leaves 90% of victims without relief.

⁴¹ *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., NUMBER OF I-914 APPLICATIONS FOR T NONIMMIGRANT STATUS (VICTIMS OF SEVERE FORMS OF TRAFFICKING AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER AND CASE STATUS 2008–2016 1 (2016), https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2016_qtr2.pdf (reporting a total of 6,114 T-1 visa applications received between 2008 and 2015); *see also* OFF. OF THE CITIZENSHIP AND IMMIGR. SERVS. OMBUDSMAN, U.S. DEP’T OF HOMELAND SEC., IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 5 (2009), http://www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf (“As of October 2008, USCIS had received less than 2,300 T visa principal applications: 1,308 were approved, 709 were denied or withdrawn, and 212 remained pending . . .”).

⁴² The 2008 Reauthorization extended jurisdiction to cover extraterritorial trafficking committed by foreign traffickers who found themselves in the United States. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223(a), 122 Stat. 5044, 5071.

governmental responses to trafficking in other countries.⁴³ As the next section will discuss, these extraterritorial responses to punishing traffickers, when juxtaposed with the limited protections afforded to victims, reflect the TVPA's preoccupation with prosecution at the expense of protecting victims.

A. *Extraterritoriality Principle for Punishing Traffickers*

The TVPA authorizes criminal and civil penalties against those who commit, or attempt to commit, slavery or sex trafficking.⁴⁴ The criminal penalty against traffickers is authorized regardless of where the trafficking occurred.⁴⁵ However, the 2000 TVPA did not explicitly provide for the principle of extraterritoriality in either prosecuting traffickers or bringing a civil claim against them.⁴⁶ In the 2005 reauthorization, Congress expanded criminal jurisdiction to apply extraterritorially to civilian U.S. government personnel and contractors who commit specific acts of trafficking abroad.⁴⁷ The 2008 TVPA reauthorization included an amendment further expanding extraterritorial jurisdiction to all crimes covered in the Act.⁴⁸ This amendment granted the United States:

[E]xtra-territorial jurisdiction over any offense . . . [of peonage, enticement into slavery, slave into involuntary servitude, forced labor, labor trafficking, and trafficking of children] if: (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence . . . (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.⁴⁹

⁴³ See 22 U.S.C. § 7103 (2019).

⁴⁴ See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1466, 1486–90 (amending 18 U.S.C §§ 1581, 1583, and 1584 to heighten punishment for traffickers).

⁴⁵ See 18 U.S.C. § 1596(a) (2008) (discussing how U.S. courts have jurisdiction over any offense under sections 1581, 1583, 1584, 1590, and 1591 [trafficking offenses] whether they were committed domestically or extra-territorially).

⁴⁶ See § 112, 114 Stat. 1464.

⁴⁷ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 3271(a), 119 Stat. 3558, 3562 (2005). See Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: 10 Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1294 (2011) (discussing the 2005 reauthorization as expanding criminal sanctions extraterritorially).

⁴⁸ 18 U.S.C. § 1596(a) (2008). Prior to the amendment in 2008, extraterritorial trafficking was effectively precluded from both criminal and civil penalties. See, e.g., *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 999–1003 (S.D. Ind. 2007) (finding that where allegations of forced labor occurred outside the United States neither the criminal statute (§ 1589) nor the civil remedy (§ 1595) applied); see also *Adhikari v. Daoud & Partners*, 994 F. Supp. 2d 831, 837–39 (S.D. Tex. 2014) (explaining that the extraterritorial basis is not retroactive).

⁴⁹ 18 U.S.C. § 1596(a).

The plain text and legislative history of the statute indicate that this amendment was created to intentionally cover extraterritorial forms of trafficking.⁵⁰ Senator Dick Durbin expressed this purpose by pronouncing that the Amendment “makes an important statement about this nation’s intolerance for human rights abuses wherever they occur.”⁵¹

In addition to extending its criminal statute to cover extraterritorial conduct, the TVPA also authorizes the United States to monitor and combat trafficking in other countries.⁵² The State Department’s Office to Monitor and Combat Trafficking in Persons partners with foreign governments and non-governmental organizations to implement strategies for prosecuting traffickers, preventing trafficking, protecting victims, and providing technical assistance in investigating crimes.⁵³ In addition to working with foreign governments to strengthen anti-trafficking laws, the State Department measures and evaluates the progress of countries in combating human trafficking.⁵⁴ These evaluations culminate in the *Trafficking in Persons Report*, which formally ranks countries’ effectiveness in combating trafficking and offers recommendations.⁵⁵

B. *Presumption Against Extraterritoriality in Protections for Victims*

While the criminal statute created by the TVPA applies to violations that occur outside the United States, the same is not true for the protections afforded to victims of trafficking. In fact, the T-visa eligibility requirements reveal an explicit position against extraterritoriality.⁵⁶ To be eligible for the T-visa, a survivor must show that they are a victim of a severe form of trafficking, and

⁵⁰ See, e.g., *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Hum. Rts and the L. of the S. Comm. on the Judiciary*, 110th Cong. 24–26 (2007); Caroline A. Fish, Note, *Extraterritorial Human Trafficking Prosecutions: Eliminating Zones of Impunity Within the Limits of International Law and Due Process*, 91 ST. JOHN’S L. REV. 529, 537–38 (2017).

⁵¹ 154 CONG. REC. S10937 (daily ed. Dec. 11, 2008) (statement of Sen. Dick Durbin).

⁵² See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 108–110, 114 Stat. 1464, 1480–82 (2000) (establishing annual reporting on trafficking conditions of countries that receive economic assistance from the U.S. and providing international aid for programs that combat trafficking).

⁵³ *Office to Monitor and Combat Trafficking in Persons*, U.S. DEP’T OF STATE, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-to-monitor-and-combat-trafficking-in-persons/> (last visited Jan. 21, 2022).

⁵⁴ *Id.*; see OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2021).

⁵⁵ OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 51, 74 (2021) (discussing methodology used for report and placements of countries, as well where to find each countries’ recommendations).

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

that they are physically present in the United States on account of the trafficking.⁵⁷

Historically, physical presence has been interpreted to mean that the trafficking occurred in the United States and that the victim had not left since being trafficked.⁵⁸ However, in 2017, the Department of Homeland Security (DHS) expanded the definition of physical presence to cover other circumstances, including instances where a victim departed the United States after escaping a trafficking situation and where trafficking occurred solely abroad.⁵⁹ In both situations, physical presence can be established so long as the applicant was brought into the United States for the purpose of participating in an investigation or prosecution related to the trafficking.⁶⁰

Conspicuously, in the proposal for this 2017 Rule, DHS clarified that “if a victim of trafficking abroad makes his or her way to the United States and the reason is not related to or on account of the trafficking and the victim was not allowed valid entry to participate in an investigative or judicial process related to trafficking or a trafficker, this victim cannot meet the physical presence requirement and would not be eligible for T nonimmigrant status on account of that trafficking incident.”⁶¹ While the changes in regulation initially appeared to extend protections for victims, by tying the physical presence requirement to law enforcement needs, DHS emphasized prosecution over protecting victims.

Prior to the 2017 Rule, cases of extraterritorial trafficking routinely declined to attribute an applicant’s physical presence to their trafficking.⁶² While the previous regulations were unclear on the physical presence requirement, the Administrative Appeals Office (AAO) interpreted it to be related to the trafficking.⁶³ For example, the AAO denied a T-visa for a seventeen-year-old

⁵⁷ *Id.*

⁵⁸ COALITION TO ABOLISH SLAVERY AND TRAFFICKING, “PHYSICAL PRESENCE ON ACCOUNT OF TRAFFICKING” ELIGIBILITY REQUIREMENT FOR T VISA APPLICANTS 1–2 (2020) [hereinafter “PHYSICAL PRESENCE ON ACCOUNT OF TRAFFICKING”], <https://castla.app.box.com/v/physicalpresenceadvisory>; see 8 C.F.R. § 214.11(g) (2002).

⁵⁹ Classifications for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 81 Fed. Reg. 92272, (Dec. 19, 2016) [hereinafter Interim T Rule]; 8 C.F.R. § 214.11(g) (2017) (establishing the requirement for physical presence).

⁶⁰ Interim T Rule, *supra* note 59, at 92273. DHS provided examples of types of trafficking cases that would qualify under the expanded physical presence requirement, such as child sex tourism, for which the U.S. has jurisdiction over cases involving citizens engaging in illicit sexual conduct abroad. *Id.*

⁶¹ *Id.*

⁶² See “PHYSICAL PRESENCE ON ACCOUNT OF TRAFFICKING”, *supra* note 58; see also Applicant, 2013 WL 5176183 (INS), at *2 (Apr. 30, 2013).

⁶³ The Administrative Appeals Office is the appellate arm of the United States Citizenship and Immigration Services (USCIS). See USCIS, *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-ao> (last visited Jan. 21, 2022). The AAO reviews appeals of decisions issued by the USCIS and in general issues non-

Indian minor who was the victim of human trafficking.⁶⁴ In this case, the minor's family was in debt to a private lender who threatened harm against his family if the debt was not repaid.⁶⁵ Desperate to repay the lender, the minor decided to leave his home in Punjab, India to work in the United States.⁶⁶ He traveled to Guatemala, where men promised to get him into the United States.⁶⁷ After months of traveling under the control of various men, he arrived in Mexico, where he was kept in a house with other boys and forced to work alongside them.⁶⁸ He was not compensated but was afraid to refuse, as the traffickers running the house had weapons and frequently beat the other boys.⁶⁹ After being held against his will and forced to work for twelve days, the applicant was abandoned along the U.S.-Mexico border.⁷⁰

In this case, the AAO determined that, based on the preponderance of the evidence,⁷¹ the minor was harbored in the house "for his labor though the use of coercion and for the purpose of subjecting him to involuntary servitude. Accordingly, during his stay at the final holding house prior to his arrival in the United States, the applicant was the victim of a severe form of trafficking in persons."⁷² Nevertheless, the AAO found that, while the minor was trafficked, his physical presence was not on account of his trafficking because he did not know who his traffickers were, and there was no evidence to show that the smugglers (the decision refrained from calling them traffickers) intended to subject him to involuntary servitude, peonage, debt bondage or slavery once in the United States.⁷³ Thus, the fact that he had been trafficked during his journey

precedential decisions. *Id.* The AAO at times issues precedent decisions to provide guidance to the public on the interpretation or administration of a given immigration law. *Id.*

⁶⁴ *Applicant*, 2013 WL 5176183, at *3.

⁶⁵ *Id.*

⁶⁶ *Id.* at *3–4.

⁶⁷ *Id.* at *3.

⁶⁸ *Id.* at *4–5.

⁶⁹ *Id.* at *4.

⁷⁰ *Id.* at *5.

⁷¹ The AAO follows the preponderance of evidence standard as articulated in *Matter of Chawathe*. 25 I&N Dec. 369, 369 (AAO 2010). It explains that to meet the preponderance of evidence standard a petitioner must submit "relevant, probative, and credible evidence that leads the director to believe that the claim is 'more likely than not' or 'probably' true." *Id.* However, "[i]f the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition." *Id.*

⁷² *Applicant*, 2013 WL 5176183 (INS), at *5 (Apr. 30, 2013).

⁷³ *Id.* "The record contains no evidence that the smugglers who transported the applicant from India to Guatemala, Mexico and into the United States intended to subject him to involuntary servitude, peonage, debt bondage or slavery through the use of force, fraud or coercion." *Id.* Consequently, the applicant has not demonstrated that he is physically present in the United States on account of a severe form of human trafficking, as required by section 101(a)(15)(T)(i)(II) of the Act." *Id.*

to the United States did not satisfy the physical presence requirement of the T-visa.

A recent AAO decision exemplifies this same line of reasoning, which was subsequently incorporated in the 2017 Rule. After the updated regulations took effect, in 2018, a Nepalese survivor of sex trafficking filed a T-visa application.⁷⁴ In her application, she asserted that she was a victim of sex trafficking, as she was kidnapped in Nepal, transported to India, and held in a brothel against her will.⁷⁵ She was beaten, tortured, and forced to have sex with men by her traffickers.⁷⁶ After being liberated from her traffickers by Indian police, she returned to Nepal, with the help of Indian law enforcement and a non-profit organization, and reported the trafficking to the local police.⁷⁷ However, rather than being protected, the applicant began receiving threats to withdraw her complaint.⁷⁸ Living in fear, the applicant came to the United States and subsequently filed a T-visa application which was denied.⁷⁹

In affirming the denial of the applicant's T-visa, the AAO cited the regulations that make clear that in order to meet the physical presence requirement, an applicant whose trafficking took place abroad must show their entry into the United States is a result of prosecution or an investigation.⁸⁰ In this case, because the applicant fled Nepal to the United States without the sanction of U.S. law enforcement, she was deemed ineligible for a T-visa.⁸¹

These two cases highlight an intentional gap in protections for survivors of human trafficking and reflect a policy geared towards prosecuting traffickers over protecting survivors. Although traffickers whose offense was committed abroad can be criminally and civilly punished under U.S. law, survivors are unable to attain protection in the United States for extraterritorial trafficking unless invited by law enforcement to assist in an investigation or prosecution.

⁷⁴ 11258500, 2021 WL 4708462 (DHS), at *1 (July 28, 2021) (non-precedent decision).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at *2.

⁷⁹ *Id.*

⁸⁰ *Id.* at *3. "The physical presence regulations also distinguish trafficking that occurred outside the United States as they specifically provide that applicants allowed lawful entry to participate in a trafficking-related investigation or prosecution would be considered to have met the physical presence requirement (under 8 C.F.R. § 214.11(g)(1)(v)), 'regardless of where such trafficking occurred.'" *Id.* "There is no such exception in the regulations for T applicants who seek to establish their physical presence under one of the remaining subsections at 8 C.F.R. § 214.11(g)(1)(i)-(iv) and whose trafficking occurred abroad." *Id.* "Consequently, applicants whose trafficking occurred abroad and ended prior to coming to the United States may only establish their physical presence under 8 C.F.R. § 214.11(g)(1)(v)." *Id.*

⁸¹ See 11258500, 2021 WL 4708462, at *3 (finding that applicant did not meet physical presence requirement under 8 C.F.R. § 214.11(g)(1)(v) because her trafficking occurred abroad and she did not establish her physical presence as related to an investigation or prosecution related to her trafficking).

Thus, numerous trafficking survivors who travel to the United States absent the blessing of law enforcement will continue to have fewer options for relief based on their trafficking.

III. ASYLUM AS AN ALTERNATIVE

As discussed above, survivors of extraterritorial trafficking who escape to the United States will not be afforded protections under the TVPA unless their physical presence is associated with law enforcement.⁸² This section discusses the option of claiming asylum as a potential way to protect this sub-group of trafficking survivors and the challenges associated with it.⁸³

A. Overview of Asylum

U.S. asylum law is an outgrowth of international human rights conventions. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948, recognizes the right of persons to seek asylum from persecution in other countries.⁸⁴ In 1951, the U.N. Convention Relating to the Status of Refugees (Refugee Convention) codified the rights and protections of asylum seekers and refugees.⁸⁵ Most notably, the Refugee Convention includes a non-refoulement provision.⁸⁶ This provision prohibits states from returning an asylum seeker to their country of origin if doing so would place them in danger.⁸⁷ The Refugee Convention went into force in April 1954 and was amended in the 1967 Protocol.⁸⁸ The United States ratified the Refugee Convention in 1968 but

⁸² See discussion *supra* Part II.

⁸³ The UN has previously discussed the possibility of trafficking victims also seeking asylum protections. See OFF. OF HIGH COMM’R FOR HUM. RTS., PREVENT COMBAT PROTECT HUMAN TRAFFICKING 53–54 (2011), https://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf; see generally U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: THE APPLICATION OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES TO VICTIMS OF TRAFFICKING AND PERSONS AT RISK OF BEING TRAFFICKED (2006), <https://data2.unhcr.org/en/documents/details/71320> (outlining how international refugee protections may be applied to victims of trafficking).

⁸⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) (stating that “(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”). Declarations are not binding meaning no obligations attach. See SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 28 (2006).

⁸⁵ Refugee Convention, *supra* note 20.

⁸⁶ *Id.* at art. 33.

⁸⁷ *Id.*

⁸⁸ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. This Protocol removed geographical “and temporal limits” laid out in the 1951 Refugee Convention. See Convention Relating the Status of Refugees, Introductory Note, <http://www.unhcr.org/3b66c2aa10.html> (last visited Jan. 21, 2022). Originally, the Refugee

did not enact any implementing legislation until it passed the Refugee Act of 1980.⁸⁹

Under the Refugee Act and subsequent regulations, to qualify for asylum, an applicant must meet the definition of a refugee.⁹⁰ A refugee is defined as someone who is unable or unwilling to return to the country of their nationality 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.⁹¹

To qualify for asylum, an applicant must prove the following elements: (1) a well-founded fear; (2) of persecution;⁹² (3) perpetuated by the government or an entity the government cannot or will not control; (4) on account of (nexus); (5) one of the five protected grounds.⁹³

Victims of human trafficking will find it challenging to establish all five elements of asylum; however, this Article focuses on the difficulties associated with establishing a well-founded fear on account of membership in a particular social group.

1. Establishing a Well-Founded Fear

A well-founded fear of persecution is established when an asylum seeker “shows that a reasonable person in his circumstances would fear persecution” if

Convention was a reaction to WWII, limiting protections to persons fleeing persecution prior to 1951 and only within Europe. *Id.* The Protocol removed these restrictions to cover all persons fleeing persecution. *Id.*

⁸⁹ Refugee Act of 1980, Pub. L. No. 96-212, § 643, 94 Stat. 102, 102.

⁹⁰ 8 U.S.C. § 1158(b)(1)(A) (2012).

⁹¹ 8 U.S.C. § 1101(42)(A) (2012). The persecutor in an asylum claim may be either a government itself or persons a government is unwilling or unable to control. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

⁹² Persecution is not defined in the Immigration & Nationality Act, and rather has been construed through case law. The Board of Immigration Appeals has held that “a threat to life or freedom . . . is always persecution.” *In re Laipenieks*, 18 I&N Dec. 433, 457 (B.I.A. 1983). However, threats alone are generally not sufficient to establish past persecution. *See Li v. Att’y Gen. of U.S.*, 400 F.3d 157, 164 (3d Cir. 2005). Notably, “serious physical harm, including rape and sexual assault,” can also constitute persecution. *In re D-V-*, 21 I&N Dec. 77, 79 (B.I.A. 1993) (finding that woman who was gang raped and beaten established past persecution). Various circuit courts have also found rape to be persecution. *See, e.g., Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072–74 (9th Cir. 2004) (finding that rape of villager by Guatemalan soldiers constitutes past persecution); *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (rape as form of torture); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000) (finding that rape by government official constitutes persecution). Importantly, to qualify for asylum, an applicant must demonstrate that a protected ground (race, religion, nationality, membership in a particular social group, or political opinion) was at least one central reason for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

⁹³ 8 C.F.R. § 208.13(b)(1) (2011); 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

removed to their home country, based on a subjective and objective fear.⁹⁴ This fear can be based on past persecution or future persecution.⁹⁵ If past persecution is established, there is a presumption of “well-founded fear of future persecution.”⁹⁶ For applicants who have not suffered past persecution, they bear the burden of establishing a future fear that is well-founded.⁹⁷ Victims of human trafficking will find it nearly impossible to establish a well-founded fear based on their trafficking experience.

2. Establishing “On Account Of” (Nexus)

An asylum applicant must establish their (past or future) persecution was on account of a protected ground and that the protected ground “was or will be at least one central reason for the persecutors motivation.”⁹⁸ This requirement, otherwise referred to as nexus, focuses on the motivation of the persecutor for harming the applicant. However, only harm motivated by the applicant’s protected characteristic may establish this element.⁹⁹ Both direct and circumstantial evidence are relevant to determining motive.¹⁰⁰ In the case of human trafficking, establishing motive on part of the trafficker may include re-trafficking of the asylum applicant by the persecutor/trafficker.

3. Establishing Victims of Human Trafficking as a Particular Social Group

An asylum seeker must show that the persecution or well-founded fear of persecution is because of at least one of the five enumerated grounds.¹⁰¹ One of

⁹⁴ *In re Mogharrabi*, 19 I&N Dec. 439, 445 (B.I.A. 1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987). An applicant must demonstrate a genuine fear of persecution for the subjective component, which can be established with credible testimony. *See Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004). The objective component requires credible, direct, and specific evidence. *Id.*

⁹⁵ 8 C.F.R. § 208.13(b)(1)–(2).

⁹⁶ 8 C.F.R. § 208.13(b)(1). This presumption can be rebutted if there has been “a fundamental change in circumstances” or the applicant could reasonably be expected to relocate to another part of the country.” 8 C.F.R. § 208.13(b)(1)(i)(A).

⁹⁷ *Id.*; *see In re Mogharrabi*, 19 I&N Dec. at 443.

⁹⁸ 8 U.S.C. § 1158(b)(1)(B)(i) (2012). The REAL ID Act modified the Immigration and Nationality Act’s asylum nexus requirement by adding the wording “at least one central reason.” REAL ID Act of 2005, Div. B. Pub. L. No. 109-13, 119 Stat. 302, 303 (amending 8 U.S.C. § 1158 (2012)). Notably, an exact motive is not necessary to establish past or future persecution. The BIA has recognized that “[p]ersecutors may have differing motives for engaging in acts of persecution.” *In re S-P-*, 21 I&N Dec. 486, 489 (B.I.A. 1996).

⁹⁹ Proof of motive can be direct or circumstantial. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *see also In re S-P-*, 21 I&N Dec. at 494 (explaining that either direct or circumstantial evidence is needed to demonstrate harm was motivated in part by a protected ground).

¹⁰⁰ *In re S-P-*, 21 I&N Dec. at 494.

¹⁰¹ 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

the enumerated grounds is membership in a particular social group (PSG).¹⁰² To date, courts have struggled to define what constitutes a PSG¹⁰³ and have adopted varying standards.¹⁰⁴ Presently, in order to establish a cognizable PSG, an asylum seeker must show that the group is: “(1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity.”¹⁰⁵

Focusing on the immutability prong, an immutable characteristic is defined as “one that the members of the group either cannot change or, should not be required to change because it is fundamental to their individual identities or consciences.”¹⁰⁶ Shared characteristics may include gender, kinship ties, or—in some circumstances—past experiences.¹⁰⁷ A shared experience may be an immutable characteristic due to the label or knowledge that the experience imparts.¹⁰⁸ Importantly, an immutable characteristic cannot be circularly defined by persecution.¹⁰⁹ For example, a PSG cannot be defined solely by the experience of having been trafficked.¹¹⁰

¹⁰² 8 C.F.R. § 208.13(b).

¹⁰³ See Nitzan Sternberg, *Do I Need to Pin a Target to My Back?: The Definition of “Particular Social Group” in U.S. Asylum Law*, 39 FORDHAM URB. L.J. 245, 249 (2011); see also Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 549–50 (1993) (discussing lack of legislative intent around PSG which is a reason for definitional inconsistencies around PSGs).

¹⁰⁴ This includes “common immutable characteristics,” “social visibility,” and “social distinction.” *In re C-A-*, 23 I&N Dec. 951, 959 (B.I.A. 2006) (discussing social visibility); *In re Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 1985) (discussing immutable characteristics). The social visibility standard was later renamed and clarified as the social distinction standard. See *In re M-E-V-G-*, 26 I&N Dec. 227, 228 (B.I.A. 2014).

¹⁰⁵ *In re M-E-V-G-*, 26 I&N Dec. at 237; see also *In re W-G-R-*, 26 I&N Dec. 208, 212–17 (B.I.A. 2014); *In re A-R-C-G-*, 26 I&N Dec. 388, 392 (B.I.A. 2014) (applying the three-part test put forth in *Matter of M-E-V-G-* and *Matter of W-G-R-*).

¹⁰⁶ *In re Acosta*, 19 I&N Dec. at 233. This definition has been expanded to include the requirements of social distinction and particularity. See *In re M-E-V-G-*, 26 I&N Dec. at 237–38; *In re W-G-R-*, 26 I&N Dec. at 210.

¹⁰⁷ *In re Acosta*, 19 I&N Dec. at 233.

¹⁰⁸ For example, the Seventh Circuit found that former truck drives constitute a PSG because their past actions and skills are unchangeable. See *Escobar v. Holder*, 657 F.3d 537, 546–47 (7th Cir. 2011). Other experiences recognized as immutable characteristics include former gang members, *Benitez Ramos v. Holder*, 589 F.3d 426, 427–29 (7th Cir. 2009), and former child soldiers, *Lukwago v. Ashcroft*, 329 F.3d 157, 178 (3d Cir. 2003).

¹⁰⁹ See *Lukwago*, 329 F.3d at 172 (finding that a PSG must exist independent of the persecution suffered by the asylum applicant).

¹¹⁰ In the context of human trafficking related asylum claims, various circuit courts have rejected PSGs which contain past trafficking experience as an immutable characteristic, even though in *Matter of Acosta* the BIA recognized the immutability of shared experience. See *Lushaj v. Holder*, 380 F. App’x 41, 43 (2d Cir. 2010) (rejecting PSG of “women who were previously targeted for sex-trafficking by members of the Haklaj gang and who managed to

Once an applicant establishes a cognizable PSG, they must also show that their membership in the PSG was a central reason for the persecution.¹¹¹ In other words, the persecutor must be motivated to persecute the victim because of the victim's membership in the PSG.¹¹² The primary challenge for trafficking victims is establishing a PSG that includes immutable characteristics beyond the trafficking experience.

B. *The Death Knell of Trafficking-Based Asylum Claims*

In situations like those faced by the Indian minor or the Nepalese sex trafficking survivor discussed above, an alternative to obtaining a T-visa may be asylum. Trafficking survivors likely do not fit into the preexisting categories of religion, nationality, race, or political opinion, based on the trafficking alone, and must therefore claim asylum as a member of a PSG. Given the high denial rates of asylum applications in the United States, coupled with policy changes that make asylum less obtainable, most asylum applicants face an uphill battle in winning asylum.¹¹³ It is particularly difficult for victims of trafficking to

escape and avoid capture” for being circularly defined); *Kalaj v. Holder*, 319 F. App'x 374, 376 (6th Cir. 2009) (rejecting PSG of “young, impoverished, single, uneducated women who risk kidnapping and forced prostitution”); *Kuci v. Att’y Gen.* 299 F. App'x 168, 169 (3d Cir. 2008) (rejecting PSG of “young women who have been approached or threatened with kidnapping, forced prostitution or killing by human traffickers” for being broadly and circularly defined); *Rreshpja v. Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005) (rejecting PSG of “attractive young [women] who risk[] being kidnapped and forced into prostitution” for being circularly and broadly defined). *But see* *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (holding that “young Albanian women who live alone” is a cognizable PSG based on the *Acosta* standard).

¹¹¹ See 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *In re W-G-R-*, 26 I&N Dec. at 224.

¹¹² See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (stating that establishing motive is “critical” and that the applicant “must provide some evidence of it, direct or circumstantial”); see also *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

¹¹³ The Transactional Records Access Clearinghouse (TRAC) reported 71 percent of asylum applicants were denied in fiscal year 2020 while 63 percent were denied in fiscal year 2021. TRAC IMMIGRATION, ASYLUM GRANT RATES CLIMB UNDER BIDEN (2021), <https://trac.syr.edu/immigration/reports/667/>. The standards for obtaining asylum have generally been difficult to meet since the passage of the Refugee Act. However, the impossibility of obtaining asylum was cemented by the Trump Administration's approach towards immigration in general. See Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All From Asylum*, MIGRATION POL'Y INST. (2020); see also Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L.J. 178, 240–45 (2021) (outlining the asylum policies implemented during the Trump administration that effectively sought to dismantle the U.S. refugee and asylum systems). While the Biden Administration has begun to roll back some of the worst of the Trump Administration's policies, including reinstating previous legal standards in asylum law, those standards as discussed in this section remain a challenge to meet for many asylum seekers. See Josh Gerstein, *Biden Administration Reverses*

establish asylum based on their trafficking experience since they must provide evidence of motive to prove past or future persecution.¹¹⁴ As the following cases demonstrate, a viable asylum claim based on a trafficking-related PSG requires that victims face potential retaliation by their trafficker to show motive. This requirement is problematic given that it exposes victims to violence and re-trafficking, which goes against a policy of protecting victims of trafficking.

In *Sarkisian v. Attorney General*, the Third Circuit found that the petitioner's past persecution was not motivated by her inclusion in a PSG, which the petitioner defined in terms of trafficking.¹¹⁵ In *Sarkisian*, a young woman fled from Armenia to the United States after she was abducted twice by traffickers intending to traffic her into prostitution.¹¹⁶ She testified that she feared returning to Armenia because the traffickers knew her identity and that of her family, making it possible that they would find her even if she relocated within Armenia.¹¹⁷ She further testified that she feared they would attempt to traffic her again.¹¹⁸ She argued that she was persecuted due to her membership in a PSG defined as "female virgin and orphan in Armenia who was actually trafficked in Armenia."¹¹⁹

On appeal, the Third Circuit determined that the petitioner's past persecution was not based on membership in a PSG, as the social group needed to exist prior to the persecution.¹²⁰ The Court reasoned that past persecution could not define a PSG motivating the past persecution.¹²¹ Further, the Court noted that the petitioner could not establish a well-founded fear of future persecution because she was unable to provide evidence that her trafficker would retaliate against her for escaping.¹²²

Based on this reasoning, past persecution claims in the context of PSGs are foreclosed to victims of trafficking as they must not only show that they were targeted for trafficking prior to the persecution (of trafficking), but they must

Trump-Era Asylum Policies, POLITICO (June 16, 2021), <https://www.politico.com/news/2021/06/16/asylum-standards-biden-494918>.

¹¹⁴ 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *In re S-P-*, 21 I&N Dec. 486, 494 (B.I.A. 1996).

¹¹⁵ *Sarkisian v. Att'y Gen.*, No. 07-2264, 2009 WL 1028038, at *4 (3d Cir. Jan. 30, 2009). This argument that the experience of trafficking is circularly defining aligns with most trafficking-based asylum claims. See *In re Acosta*, 19 I&N Dec. 211, 212 (B.I.A. 1985). But see *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (defining the PSG by gender and nationality and other vulnerabilities, not on the actual trafficking experience).

¹¹⁶ *Sarkisian*, 2009 WL 1028038, at *1.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *4.

¹²⁰ *Id.* ("Here, Sarkisian uses the past persecution—the trafficking and abductions—to define the social group that she claims was the motivation for her past persecution. This does not suffice.").

¹²¹ *Id.*

¹²² *Id.* at *5.

also show their membership in the trafficking-specific group is what motivated the traffickers to traffic or persecute them.¹²³ However, it is almost impossible for victims of human trafficking to establish they are part of a group that is easily trafficked, prior to the trafficking occurring. In attempting to show a well-founded fear of future persecution, a trafficking survivor meets similar difficulties in that they must demonstrate retaliation on the part of the trafficker.¹²⁴ A trafficking survivor may be able to establish a well-founded fear if there is strong evidence of re-trafficking or retaliation by traffickers, which suggests re-victimizing the survivor as demonstrated in *Gomez-Zuluaga v. Attorney General*.¹²⁵

In *Gomez-Zuluaga*, the petitioner lived in an area of Colombia controlled by the Revolutionary Armed Force of Colombia (FARC), a paramilitary group designated as a terrorist organization.¹²⁶ She was kidnapped by the FARC and chained to a bed.¹²⁷ After learning that she was attending school to become a health professional, members of the FARC decided to release her to finish school on the condition that she would return to assist them.¹²⁸ After she was released, the FARC watched over her, visiting and threatening her family, calling her, and threatening her if she did not return to them.¹²⁹ She believed that the FARC would pursue her if she stayed in Colombia and that they would kill her if she did not comply with their demands.¹³⁰ Her belief was based on the fact that members of her family had been shot for refusing to cooperate with the FARC.¹³¹ Specifically, her cousin had been forced into involuntary servitude under the FARC and was murdered when he attempted to escape.¹³²

The petitioner claimed membership in the PSG of “women who have escaped involuntary servitude after being abducted and confined by the FARC.”¹³³ The Third Circuit determined that the petitioner had established membership in a

¹²³ See *id.*; see also 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *Lukwago v. Ashcroft*, 329 F.3d 157, 179 (3d Cir. 2003) (finding that the petitioner established membership in a PSG where he and other members shared the past experience of abduction, torture, and escape as child soldiers).

¹²⁴ *Sarkisian*, 2009 WL 1028038, at *4 (citing *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 345–48 (3d Cir. 2008); *Lukwago*, 329 F.3d at 179–80) (discussing how retaliation by the trafficker must be motivated by petitioner’s past trafficking).

¹²⁵ See generally *Gomez-Zuluaga*, 527 F.3d 330 (finding that petitioner established a well-founded fear of future persecution based on her membership in the PSG “women who have escaped involuntary servitude after being abducted and confined by the FARC”).

¹²⁶ *Id.* at 335.

¹²⁷ *Id.* at 337.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 338.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 340.

PSG.¹³⁴ The court reasoned that the past mistreatment of individuals, including her own family, at the hands of the FARC, existed independently from her own persecution, thereby establishing a social group which she was a member of.¹³⁵ The court further found the petitioner's fear to be both subjectively and objectively reasonable.¹³⁶

Sarkisian and *Gomez-Zuluaga* provide insight into how victims of trafficking may establish a claim for asylum.¹³⁷ Notable to these cases is the court's emphasis on the potential for persecution by the trafficker against the trafficking victim.¹³⁸ In *Sarkisian*, the court denied the petitioner's claim because there was no evidence that her traffickers would retaliate against her or re-traffic her.¹³⁹ In *Gomez-Zuluaga*, the petitioner ultimately won her claim for asylum because the court believed her traffickers would harm her if she were to return.¹⁴⁰ This suggests re-trafficking situations are needed for a social group to exist.¹⁴¹ But if this is the case, it undermines the Trafficking Protocol mission to protect victims by sending them back to a situation where they're likely to be trafficked.¹⁴² This result also flies in the face of the policy of non-refoulement as laid out in the withholding of removal statute.¹⁴³ Non-refoulement, a concept in international human rights law, prohibits states from returning an asylum seeker to the territory where their life or freedom would be threatened, or where they would face torture or cruel, inhuman, or degrading treatment.¹⁴⁴ Surely, the risk of being re-trafficked constitutes a form of cruel, inhuman, or degrading treatment.

C. *Alternatives to the Trafficking-Related Social Group*

¹³⁴ *Id.* at 351.

¹³⁵ *Id.* at 345–46.

¹³⁶ *Id.* at 346–47 (finding petitioner's fear both subjective and objective given she feared retaliation by the FARC, and she had family members who were murdered by the FARC for escaping involuntary servitude). *But see* *Gomez v. I.N.S.*, 947 F.2d 660, 663 (2d Cir. 1991) (rejecting claim of asylum based on membership of “women who have been previously battered and raped by Salvadoran guerillas”). In *Gomez*, the court reasoned that the applicant did not establish future fear because it hasn't been shown that women who have previously been abused by the guerillas could be identified and persecuted. *Id.*

¹³⁷ *See Gomez-Zuluaga*, 527 F.3d at 345–48; *Sarkisian v. Att'y Gen.*, No. 07-2264, 2009 WL 1028038, at *3–5 (3d Cir. Jan. 30, 2009).

¹³⁸ *See Gomez-Zuluaga*, 527 F.3d at 349; *Sarkisian*, 2009 WL 1028038, at *5.

¹³⁹ *Sarkisian*, 2009 WL 1028038, at *5.

¹⁴⁰ *See Gomez-Zuluaga*, 527 F.3d at 348.

¹⁴¹ *See id.*

¹⁴² *See* Trafficking Protocol *supra* note 6.

¹⁴³ *See* 8 U.S.C. § 1231 (2006); 8 C.F.R. § 208.16 (2020).

¹⁴⁴ *See* Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, UNHCR 87, 89 (June 2001), <http://www.unhcr.org/419c75ce4.html>. In U.S. immigration law, this concept is found in withholding of removal under the INA: 8 U.S.C. § 1231 (2006) and 8 C.F.R. § 208.16 (2020).

Given the difficulties in establishing membership in a human trafficking-based social group, a survivor may try to claim membership in a non-trafficking based social group, such as youth resisting gang recruitment or women fleeing sexual violence.¹⁴⁵ Based on the relationship between trafficking, gang violence and recruitment, and sexual violence, examining how courts have interpreted social groups around gang recruitment and sexual violence provides further insight into the difficulties trafficking victims face in establishing asylum.¹⁴⁶

Empirical research suggests an overlap between gang violence, sexual violence, and human trafficking.¹⁴⁷ Focusing on Latin America and the Caribbean, factors such as poverty, lack of education, gang membership, and sexual abuse contribute to an individual being trafficked, both within a region and cross-regionally.¹⁴⁸ These factors push individual towards taking risky jobs, making them more vulnerable to traffickers.¹⁴⁹ In the case of children, these factors exacerbate their vulnerability to gang recruitment and sexual violence, leading to their trafficking.¹⁵⁰

As research suggests, there is a close relationship between human trafficking and gangs and sexual violence.¹⁵¹ While both quantitative and qualitative data on human trafficking is lacking due to the nature of the crime, it is likely that a portion of those fleeing gang recruitment and those fleeing sexual violence are at the same time fleeing from being trafficked. Once in the United States, a survivor may choose to base their asylum claim on membership in a PSG specific to the sexual violence or gang recruitment they experienced.¹⁵²

¹⁴⁵ Research is beginning to expose the relationship between gangs, human trafficking, and sexual violence which may lead to overlap in the areas of asylum and trafficking claims. *See generally* Thomas J. Boerman & Adam Golob, *Gangs and Modern-Day Slavery in El Salvador, Honduras and Guatemala: A Non-Traditional Model of Human Trafficking*, 7 J. HUM. TRAFFICKING 241 (2020) (discussing the relationship between human trafficking and coerced gang recruitment of males and forced intimate relationships with women, and arguing that new forms of modern day slavery has resulted from gang recruitment tactics); Laura J. Lederer, *Sold for Sex: The Link between Sex Gangs and Trafficking in Persons*, THE PROTECTION PROJECT J. HUM. RTS. & CIV. SOC'Y (2011) (addressing the link between domestic human trafficking and gangs in the United States).

¹⁴⁶ *See generally* Boerman & Golob, *supra* note 145.

¹⁴⁷ *See id.*; *see also* RIBANDO SEELKE, RL33200, TRAFFICKING IN PERSONS IN LATIN AMERICA AND THE CARIBBEAN, CONG. RSCH. SERV. 1, 4 (2016).

¹⁴⁸ SEELKE, *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 5; *see also* PAMELA COFFEY ET AL., USAID, LITERATURE REVIEW OF TRAFFICKING IN PERSONS IN LATIN AMERICA AND THE CARIBBEAN i, viii (2004), https://pdf.usaid.gov/pdf_docs/pnade552.pdf (stating that data suggests that the number of girls and boys sexually exploited in the region is increasing while the average number of labor exploited children is decreasing).

¹⁵¹ *See generally* Boerman & Golob, *supra* note 145.

¹⁵² *See Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 340 (3d Cir. 2008).

Unfortunately, as discussed below, a cognizable gang-based or domestic violence PSG is as difficult to establish as a trafficking-based group.

In the gang context, courts have refused to expand asylum to individuals fleeing gang recruitment.¹⁵³ The BIA first addressed whether resisting gang recruitment constituted a PSG in *Matter of S-E-G-*.¹⁵⁴ In *S-E-G-*, the petitioner was a female who fled from El Salvador with her two younger brothers to escape the threats and retaliation from the Mara Salvatrucha gang (MS-13) for not joining the gang.¹⁵⁵ In seeking to establish membership in a PSG, the petitioner articulated the group as “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership” or “family members of such Salvadoran youth.”¹⁵⁶ Focusing on the social group based on gang recruitment, the BIA determined that the group was not a protected class.¹⁵⁷ The BIA reasoned that the group lacked particularity and social visibility.¹⁵⁸ With respect to particularity, the BIA determined that the group had to be recognizable as a discrete class of persons, and in this case, Salvadoran youth who resist gang recruitment was too broad.¹⁵⁹ Due to the general climate of violence in El Salvador, there was no evidence that youth who refused to join a gang suffered from higher rates of violence than the general

¹⁵³ See Shane Dizon & Nadine K. Wettstein, 2 Immigr. L. Serv. 2d § 10:163 (West) (providing an overview of asylum cases based on gang recruitment in the various circuit courts and noting the difficulty in establish asylum with this social group).

¹⁵⁴ *In re S-E-G-*, 24 I&N Dec. 579, 582, 590 (B.I.A. 2008); see also *In re E-A-G-*, 24 I&N Dec. 591, 594–95 (B.I.A. 2008) (rejecting applicant’s proposed PSG of “persons resistant to gang membership” because it lacked social visibility).

¹⁵⁵ The Mara Salvatrucha gang, commonly referred to as MS-13, is a criminal organization found throughout El Salvador, Guatemala, and Honduras, and the United States. See *El Salvador: MS13*, INSIGHT CRIME (Sept. 22, 2021), <https://insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile/>. MS-13 was originally established in Los Angeles in the 1980s by Central American refugees and has become an increasingly violent criminal organization involved in illegal activities including extortion and drug smuggling. *Id.*; see also Sonja Wolf, *Mara Salvatrucha: The Most Dangerous Street Gang in the Americas?*, 54 LATIN AM. POLS. & SOC’Y 1, 66–99 (2012) (providing an overview of Mara Salvatrucha and assessing the current literature on the gang).

¹⁵⁶ *In re S-E-G-*, 24 I&N Dec. at 582, 585.

¹⁵⁷ *Id.* at 598–90.

¹⁵⁸ *Id.* In 2014, the BIA replaced the social visibility requirement with the social distinction requirement. For a critique of the particular and social visibility requirement in gang-related asylum cases, see Linda Kelly Hill, *The Gangs of Asylum*, 46 GA. L. REV. 639 (2012).

¹⁵⁹ *In re S-E-G-*, 24 I&N Dec. at 585–86 (finding that the group was “a potentially large and diffuse segment of society” and “too broad” and “inchoate” to qualify for relief).

population.¹⁶⁰ Moreover, the BIA found the group was not visible to the larger community, thus not meeting the social visibility requirement.¹⁶¹

In 2014, the BIA clarified the social visibility element discussed in *S-E-G* and renamed it “social distinction.”¹⁶² In *Matter of M-E-V-G-*, the BIA explained that the social visibility element did not mean “literal or ‘ocular’ visibility,” but instead meant a group that is perceived as distinct within a society.¹⁶³ The BIA provided examples of social groups that are not ocularly visible but are nevertheless distinct social groups, including, for example, homosexuals and women who are opposed to female genital mutilation.¹⁶⁴ The BIA upheld its holding in *S-E-G*, but left the door open to gang-based claims, stating that the outcome in *S-E-G* “should not be read as a blanket rejection of all scenarios involving gangs.”¹⁶⁵ Nevertheless, under the new “social distinction” standard, the BIA has yet to find a “gang recruitment” group eligible for protection.¹⁶⁶

While there is resistance towards recognizing those fleeing from gang recruitment as a protected social group,¹⁶⁷ there may be willingness among

¹⁶⁰ *Id.* at 587–88 (“The respondents in this case are victims of harassment, beatings, and threats from a criminal gang in El Salvador. There is little in the background evidence of record to indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be ‘perceived as a group’ by society, or that these individuals suffer from a higher incidence of crime than the rest of the population.”).

¹⁶¹ *Id.* at 586–88.

¹⁶² *In re M-E-V-G-*, 26 I&N Dec. 227, 234 (B.I.A. 2014).

¹⁶³ *Id.*

¹⁶⁴ *In re M-E-V-G-*, 26 I&N Dec. at 238–39 (citing *In re Kasinga*, 21 I&N Dec. 357, 365–66 (B.I.A. 1996); *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (B.I.A. 1990)).

¹⁶⁵ *In re M-E-V-G-*, 26 I&N Dec. at 251.

¹⁶⁶ U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 108 (2014), <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>; see Katelyn Masetta-Alvarez, *Tearing Down the Wall Between Refuge and Gang-Based Asylum Seekers: Why the United States Should Reconsider its Stance on Central American Gang-Based Asylum Claims*, 50 CASE W. RES. J. INT’L L. 377, 393 (2018) (discussing the United States’s refusal to grant gang-based asylum claims). In the companion case to *M-E-V-G-*, the BIA held that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” did not constitute a PSG for not being socially distinct within the society because there was “scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group.” *In re W-G-R-*, 26 I&N Dec. 208, 222 (B.I.A. 2014).

¹⁶⁷ See HILLEL R. SMITH, CONG. RSCH. SERV., LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE 2–3 (2018) (explaining BIA published decisions rejecting gang-based asylum claims due to inability to establish cognizable PSGs). *But see* Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009) (finding ex-gang member based PSG cognizable in the context of withholding of removal).

courts to acknowledge those fleeing sexual violence as a social group.¹⁶⁸ Nevertheless, the variability of outcomes related to domestic violence-based asylum claims indicates hesitation by some judges to afford asylum protection to survivors of domestic violence.¹⁶⁹

In *Matter of A-R-C-G-*, the BIA granted asylum based on membership in the PSG “married women in Guatemala who are unable to leave their relationship.”¹⁷⁰ The PSG was comprised of the immutable characteristics of gender, nationality, and marital status¹⁷¹ and the case proved a watershed moment in furthering protections for victims of domestic violence.¹⁷² However, due to the lack of guidance provided by the BIA in its opinion, similar cases have reached opposite outcomes.¹⁷³ *Matter of A-R-C-G-* was overruled just four years later by *Matter of A-B-*.¹⁷⁴ In *A-B-*, then Attorney General, Jeff Sessions, overruled *Matter of A-R-C-G-* on procedural grounds while also suggesting gender-based violence claims, such as domestic violence, should be rejected.¹⁷⁵ While *Matter of A-B-* was recently vacated by the current Attorney General,¹⁷⁶ Merrick Garland, gender-based asylum may receive inconsistent treatment moving forward due to the overall lack of guidance by the BIA.

Taken as a whole, what do these asylum claims tell us? First, they suggest that trafficking survivors have the odds stacked against them when seeking asylum. It is nearly impossible to demonstrate past persecution and difficult to show fear of future persecution in trafficking-based asylum claims. As previously discussed, because U.S. asylum law requires an applicant to demonstrate retaliation from their trafficker or persecutor this can lead to potential re-trafficking.¹⁷⁷ Second, if a trafficking survivor chooses not to define their PSG in terms of trafficking, but rather in terms of opposing gang-

¹⁶⁸ See *In re A-R-C-G-*, 26 I&N Dec. 388, 388 (B.I.A. 2014); Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT’L L. 1, 13–14 (2016).

¹⁶⁹ Bookey, *supra* note 168; compare *In re A-R-C-G-*, 26 I&N Dec. 388, 388 (B.I.A. 2014) with *In re A-B-*, 27 I&N Dec. 316 (A.G. 2018).

¹⁷⁰ *In re A-R-C-G-*, 26 I&N Dec. at 388. The case was originally overruled by *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), however, *Matter of A-B-* was vacated on June 16, 2021, reestablishing *Matter of A-R-C-G-* as precedential. *In re A-B-*, 28 I&N Dec. 307, 307 (A.G. 2021).

¹⁷¹ *In re A-R-C-G-*, 26 I&N Dec. at 392–93.

¹⁷² See Bookey, *supra* note 168, at 5.

¹⁷³ *Id.*

¹⁷⁴ *In re A-B-*, 27 I&N Dec. 316 (A.G. 2018) vacated, *In re A-B-*, 28 I&N Dec. 307 (A.G. 2021).

¹⁷⁵ See, e.g., *In re A-B-*, 27 I&N Dec. at 320 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

¹⁷⁶ *In re A-B-*, 28 I&N Dec. at 307.

¹⁷⁷ See, e.g., *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 350 (3d Cir. 2008).

recruitment, they will still likely be unable to establish a viable social group.¹⁷⁸ Third, if a trafficking survivor seeks to define their group in terms of domestic or sexual violence, their chance of success will likely be determined by the political climate at the time, as evidenced by the contradictory stance on domestic violence claims taken by the Attorneys General following *A-R-C-G-*¹⁷⁹.

Further, given the gendered component of gang-based and domestic violence claims, female victims may have a better chance of attaining asylum over males.¹⁸⁰ While the rise of gender-based asylum claims, including domestic violence, are associated with female asylum seekers, gang-recruitment cases are generally associated with young males.¹⁸¹ Thus, female trafficking victims may be at an advantage when establishing a social group based on sexual or domestic violence. This discrepancy will produce uneven results that do not reflect the purpose of the Trafficking Protocol since trafficked men may be unfairly denied relief.¹⁸²

Lastly, survivors who were trafficked en route to the United States, or who experienced trafficking within a state of which they are not a national, will not

¹⁷⁸ See, e.g., *In re S-E-G-*, 24 I&N Dec. 579, 590 (B.I.A. 2008); *In re E-A-G-*, 24 I&N Dec. 591, 591 (B.I.A. 2008).

¹⁷⁹ *In re A-R-C-G-*, 26 I&N Dec. 388, 388 (B.I.A. 2014); see *In re A-B-*, 27 I&N Dec. 316 (A.G. 2018), *vacated In re A-B-*, 28 I&N Dec. 307, 307 (A.G. 2021).

¹⁸⁰ Historically gender-based asylum claims were not recognized as cognizable PSG under U.S. asylum law. See Nancy C. Ciampa, *United States Asylum Law: the Failure of the United States To Accommodate Women's Gender-Based Asylum Claims*, 2 ILSA J. INT'L L. & COMP. L. 493, 502 (1996) (providing a history of denying gender-based asylum claims in the U.S.); see also Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 121 (2007). However, in light of the revival of *A-R-C-G-*, gender-based domestic violence claims may be approved.

¹⁸¹ See Boerman & Golob, *supra* note 145, at 251 (discussing the gendered aspects of gang recruitment); see also U.N. HIGH COMM'R FOR REFUGEES, *supra* note 166, at 19–27 (finding that the majority of unaccompanied minors fleeing Central America are young males who are ultimately applying for asylum in the United States and noting that among the reasons for fleeing their home country is gang-related violence).

¹⁸² Men constitute an increasingly large percent of human trafficking victims in the United States. The Polaris Project found that 40% of all labor trafficking cases involve men. See POLARIS PROJECT, HUMAN TRAFFICKING TRENDS IN THE US: NATIONAL HUMAN TRAFFICKING RESOURCE CENTER (2007-2012) 5 (2013), <https://polarisproject.org/resources/human-trafficking-trends-2007-2012/>. Males were also found to account for 3% of sex trafficking cases in the US. *Id.* Globally, the U.N. Office on Drugs and Crime report that 20% of detected trafficking cases involved male victims. While most trafficking cases involving men were for forced labor the U.N. has found “significant share of detected men were trafficked for sexual exploitation or for other forms of exploitation.” U.N. OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS, at 32, U.N. Sales No. E.20.IV.3 (2020).

be eligible for relief under asylum.¹⁸³ For example, in the case of the Indian minor who was trafficked in Mexico, discussed in Section II.B,¹⁸⁴ he would not be able to bring an asylum claim in the United States based on having been trafficked in Mexico unless he can show he had Mexican nationality, or was stateless.¹⁸⁵ For victims like him, neither a T-visa nor asylum would offer any protections or relief, leaving them vulnerable to retaliation and re-trafficking. In comparison, the Nepalese victim of sex trafficking, also discussed in Section II.B may have a cognizable trafficking-based claim of future persecution but would have to establish not only a cognizable PSG, but also demonstrate her trafficker is motivated to retaliate against her.¹⁸⁶

As discussed in this Part, asylum does not provide adequate relief for victims of trafficking. Because the TVPA is meant to protect trafficking survivors, and already includes the language of extraterritoriality, lawmakers should reconsider extraterritorial trafficking and decouple it from prosecutorial outcomes, thereby furthering protections for survivors.

IV. EXTENDING PROTECTIONS UNDER THE TVPA

The TVPA and the Trafficking Protocol advance a framework of prosecution, protection, and prevention towards combatting human trafficking.¹⁸⁷ However, in practice, both legal frameworks primarily focus on prosecution to the detriment of protecting victims.¹⁸⁸ In the context of the TVPA's T-visa, the preoccupation with prosecution is evident in the physical presence requirement. While in practice the TVPA is largely focused on prosecution, the intent behind it, including immigration relief for survivors, was to protect trafficking victims, regardless of where the trafficking occurred.¹⁸⁹ This is evidenced by the legislative history of the TVPA, in which Congress acknowledged the global and transnational nature of trafficking.¹⁹⁰ The global monitoring mechanism

¹⁸³ 8 C.F.R. § 208.13(b)(1) (2011) (stating that to be eligible for asylum an applicants persecution must have occurred in “applicant’s country of nationality or, if stateless, in his or her country of last habitual residence”).

¹⁸⁴ See discussion *supra* Part II; Applicant, 2013 WL 5176183 (INS), at *3 (Apr. 30, 2013).

¹⁸⁵ See 8 C.F.R. § 208.13(b)(1) (2011).

¹⁸⁶ See discussion *supra* Part II; 11258500, 2021 WL 4708462 (DHS) (July 28, 2021) (non-precedent decision).

¹⁸⁷ See Loftus, *supra* note 28, at 159.

¹⁸⁸ See Chacón, *supra* note 26, at 3017, 3020–23; Chacón, *supra* note 35, at 1625; Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brother: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 341 (2007); Loftus, *supra* note 28, at 159.

¹⁸⁹ See 22 U.S.C. § 7101(b) (2000) (acknowledging that slavery and trafficking exists throughout the world, and explaining that “[t]rafficking in persons is not limited to the sex industry . . . [t]his growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide”).

¹⁹⁰ *Id.*

established by the TVPA was a result of Congress' intent to address trafficking abroad.¹⁹¹ Further, in subsequent reauthorizations, the TVPA expanded its extraterritorial reach by imposing criminal penalties to trafficking offenses committed abroad.¹⁹² Given Congress's intent to address extraterritorial trafficking the physical presence requirement should be expanded.

Extending physical presence will advance the 3-Ps of the TVPA. Recall that the guiding framework of both the TVPA and the Trafficking Protocol is a focus on prosecution, protection, and prevention.¹⁹³ In this model, victim protection is central to the efforts to combat human trafficking and modern-day slavery. "Effective victim protection entails identifying victims, providing referrals for a comprehensive array of services, directly providing or funding NGOs to provide those services, and supporting these individuals as they rebuild their lives."¹⁹⁴ Identifying victims and implementing safeguards are key to protecting victims who may be at risk of intimidation or retaliation from traffickers.¹⁹⁵ In the case of victims who have fled a trafficking situation for the United States, or who have been trafficked during their migration to the United States, extending protections to them in the form of immigration relief would not only protect them from their traffickers, but also provide access to services to prevent re-trafficking.¹⁹⁶

¹⁹¹ See 22 U.S.C. § 7103(d)(4) (2019).

¹⁹² Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3358 (2005) (extending criminal penalties for extraterritorial trafficking offenses to civilian US government personnel); Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5071 (2008) (extending extraterritorial jurisdiction over trafficking offenses committed by a US national, US legal permanent resident, or alleged offender present in the US regardless of nationality).

¹⁹³ Recognizing the importance of partnerships and collaboration with NGO's to combat trafficking, there have been calls to change the 3P's approach to the 4P paradigm: Prevention, Protection, Prosecution, and Partnership. See Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 445 (2012).

¹⁹⁴ 3Ps: Prosecution, Protection, and Prevention, U.S. DEP'T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> (last visited Jan. 21, 2022).

¹⁹⁵ See T.K. Logan et al., *Understanding Human Trafficking in the United States*, 10 TRAUMA, VIOLENCE, & ABUSE 3, 13 (2009) (discussing how victim fear of retaliation is a factor in trafficking and is related to the underidentification of victims).

¹⁹⁶ The TVPA provides for federal benefits and services for survivors of trafficking. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1474. In order to qualify for benefits and services a trafficking victim must be certified by the U.S. Department of Health and Human Services. See *Fact Sheet: Victim Assistance (English)*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/ort/fact-sheet/fact-sheet-victim-assistance-english> (last visited Jan. 21, 2022) (explaining certification process, benefits and services eligible for certified victims of trafficking); see also Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing on the Lens of the Human Rights of Victims*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 23, 29 (2007) (discussing how

Further, protecting victims—irrespective of their value to law enforcement endeavors—may advance the prosecution element of the 3-Ps.¹⁹⁷ Under the frameworks set forth in both the Palermo Protocol and the TVPA, “effective law enforcement action is an indispensable element of government efforts to fight human trafficking.”¹⁹⁸ Currently, survivors of extraterritorial trafficking only qualify for a T-visa if the survivor has entered the United States upon invitation from law enforcement.¹⁹⁹ Extending protections to survivors who are not currently working with law enforcement can bring new cases to attention, giving insight and information to potentially complex trafficking networks and operations. Lastly, prevention efforts in the 3-P paradigm include the dissemination of accurate information to communities and at-risk populations, as well as strategic intervention via policies.²⁰⁰ Extending protections to extraterritorial trafficking survivors will allow for better data gathering which can aid in informing strategic initiatives to combat trafficking.

Objectors to this proposal might argue that decoupling extraterritorial trafficking from law enforcement would open the proverbial floodgates for trafficked immigrants.²⁰¹ However, given the lack of data on the number of victims globally there is no factual basis for this fear.²⁰² Rather, extending protections to extraterritorial trafficking victims might allow for more comprehensive data given that immigration authorities would be able to track

identifying victims is among largest hurdle in accessing protections and services relief under the TVPA).

¹⁹⁷ 3Ps: *Prosecution, Protection, and Prevention*, *supra* note 194.

¹⁹⁸ *Id.*

¹⁹⁹ 8 C.F.R. § 214.11(b) (2021).

²⁰⁰ 3Ps: *Prosecution, Protection, and Prevention*, *supra* note 194.

²⁰¹ Mainly brought up in the context of asylum, the “floodgate” metaphor reflects a strong opposition to recognizing certain cognizable PGS for fear that it will inundate the U.S. with asylum seekers. *See* Musalo, *supra* note 180, at 132 (discussing how the floodgates argument was used in gender-based asylum claim of female gender mutilation, and how after the “floodgates” were opened, the prediction of increased number of women applicants never materialized).

²⁰² *See* Jo Goodey, *Human Trafficking: Sketchy Data and Policy Responses*, 8 CRIMINOLOGY & CRIM. JUST. 421, 424–25 (2008) (discussing that accurate data on human trafficking does not exist due to factors such as victims scared to report trafficking); Kristina Kangaspunta, *Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data*, in MEASURING HUMAN TRAFFICKING 27 (E.U. Savona & S. Stefanizzi eds., 2007) (discussing the unreliability of human trafficking data and data sources); Amy Ferrell & Jessica Reichert, *Using U.S. Law-Enforcement Data: Promise and Limits in Measuring Human Trafficking*, 3 J. HUM. TRAFFICKING 39, 41–44 (2017) (discussing the U.S. efforts in standardizing collection of data and the challenges associated with law-enforcement based data collection); Benjamin Harkins, *Constraints to a Robust Evidence Base for Anti-Trafficking Interventions*, 8 ANTI-TRAFFICKING REV. 113, 113 (2017) (discussing how the lack of data collection and data analysis has led to trafficking has led to limited effective interventions and initiative to combat trafficking).

how many victims are trafficked abroad, at the border, and within the U.S.²⁰³ It would also further the research mandate on trafficking as established in the TVPA.²⁰⁴

CONCLUSION

The United States has played a dominant role in efforts to combat trafficking in persons globally. As previous Ambassador-at-large to and Director of the Office to Monitor and Combat Trafficking in Persons, Mark P. Lagon, has stated, “the United States has a moral stake in fighting trafficking . . . as the global power most capable of catalyzing global action.”²⁰⁵ Because the United States is able to advance anti-trafficking efforts that have a global implication for trafficking, an “[a]nti-TIP policy should therefore not privilege some victims over others.”²⁰⁶ As currently structured, a subset of trafficking survivors are unable to access the protection of the United States. Survivors who experienced extraterritorial trafficking and make it to the United States are largely ineligible for a T-visa, while asylum proves to be an untenable option for them. Therefore, this Article calls for removing the limitations for extraterritorial trafficking survivors to access the protection of a T-visa. This will ultimately provide equity to victims of human trafficking while advancing not only the objectives of the TVPA but also the Trafficking Protocol.

²⁰³ The United States currently does not have comprehensive trafficking data on the scope of trafficking in the United States. See U.S. DEP’T OF HEALTH AND HUM. SERVS., OFF. OF THE ASSISTANT SEC’Y FOR PLANNING AND EVALUATION, HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE (2009), <https://aspe.hhs.gov/reports/human-trafficking-within-united-states-review-literature-0>. Similarly, the number of foreign national victims eligible for a T-visa is unknown. See KRISTIN FINKLEA & ABIGAIL F. KOLKER, IMMIGRATION RELIEF FOR VICTIMS OF TRAFFICKING, CONG. RSCH. SERV., R46584, at 2 (Oct. 28, 2000). Data collected come from the National Human Trafficking Hotline which includes data on potential trafficking situations, but does not consistently collect demographic information. *Id.*

²⁰⁴ 22 U.S.C. § 7109(a) (2000). The Human Smuggling and Trafficking Center, housed within Immigration and Customs Enforcement serves as a clearinghouse for all information related to human smuggling and trafficking. See *Human Smuggling and Trafficking Center*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/investigations/human-smuggling-trafficking-center> (last visited Jan. 21, 2022).

²⁰⁵ Mark P. Lagon, *The Global Abolition of Human Trafficking: The Indispensable Role of the United States*, 12 GEO. J. INT’L AFFS. 89, 92 (2011).

²⁰⁶ *Id.* at 91.