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Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the US-Mexico Border

Karen Musalo[1]
University of California Hastings College of the Law
Center for Gender and Refugee Studies

Eunice Lee
University of California Hastings College of the Law
Center for Gender and Refugee Studies

Executive Summary[2]

In the early summer months of 2014, an increasing number of Central American children alone and with their parents began arriving at the US-Mexico border in search of safety and protection. The children and families by and large came from the Northern Triangle countries of El Salvador, Honduras, and Guatemala — three of the most dangerous countries in the world — to seek asylum and other humanitarian relief. Rampant violence and persecution within homes and communities, uncontrolled and unchecked by state authorities, compelled them to flee north for their lives.

On the scale of refugee crises worldwide, the numbers were not huge. For example, 24,481 and 38,833 unaccompanied children, respectively, were apprehended by US Border Patrol (USBP) in FY 2012 and FY 2013, while 68,631 children were apprehended in FY 2014 alone (USBP 2016a). In addition, apprehensions of "family units," or parents (primarily mothers) with children, also increased, from 15,056 families in FY 2013 to 68,684 in FY 2014 (USBP 2016b).[3] While these numbers may seem large and did represent a significant increase over prior years, they are nonetheless

1 The authors thank Katrina Myers for her excellent research support.

2 This article was drafted and sent into production prior to the November 2016 US presidential elections and the inauguration of President Donald J. Trump. As a result, the recent policy changes of the Trump administration are beyond the scope of this article. The authors continue to stand by their recommendations, rooted in the US government's international and domestic legal obligations towards refugees, as the proper course for the present day.

3 US Border Patrol (USBP) defines a "family unit" as an individual apprehended with one or more family members (USBP 2016b). Thus, each family unit consists of two or more individuals. For example, USBP will count as one "family unit" a mother apprehended together with her two children.

dwarfed by refugee inflows elsewhere; for example, Turkey was host to 1.15 million Syrian refugees by year end 2014 (UNHCR 2015a), and to 2.5 million by year end 2015 (UNHCR 2016) — reflecting an influx of almost 1.5 million refugees in the course of a single year.

Nevertheless, small though they are in comparison, the numbers of Central American women and children seeking asylum at our southern border, concentrated in the summer months of 2014, did reflect a jump from prior years. These increases drew heightened media attention, and both news outlets and official US government statements termed the flow a "surge" and a "crisis" (e.g., Basu 2014; Foley 2014; Negroponte 2014). The sense of crisis was heightened by the lack of preparedness by the federal government, in particular, to process and provide proper custody arrangements for unaccompanied children as required by federal law. Images of children crowded shoulder to shoulder in US Customs and Border Protection holding cells generated a sense of urgency across the political spectrum (e.g., Fraser-Chanpong 2014; Tobias 2014).

Responses to this "surge," and explanations for it, varied widely in policy, media, and government circles. Two competing narratives emerged, rooted in two very disparate views of the "crisis." One argues that "push" factors in the home countries of El Salvador, Honduras, and Guatemala drove children and families to flee as bona fide asylum seekers; the other asserted that "pull" factors drew these individuals to the United States. For those adopting the "push" factor outlook, the crisis is a humanitarian one, reflecting human rights violations and deprivations in the region, and the protection needs of refugees (UNHCR 2015b; UNHCR 2014; Musalo et al. 2015). While acknowledging that reasons for migration may be mixed, this view recognizes the seriousness of regional refugee protection needs. For those focusing on "pull" factors, the crisis has its roots in border enforcement policies that were perceived as lax by potential migrants, and that thereby acted as an inducement to migration (Harding 2014; Navarette, Jr. 2014).

Each narrative, in turn, suggests a very different response to the influx of women and children at US borders. If "push" factors predominately drive migration, then protective policies in accordance with international and domestic legal obligations toward refugees must predominately inform US reaction. Even apart from the legal and moral rightness of this approach, any long-term goal of lowering the number of Central American migrants at the US-Mexico border, practically speaking, would have to address the root causes of violence in their home countries. On the other hand, if "pull" factors are granted greater causal weight, it would seem that stringent enforcement policies that make coming to the US less attractive and profitable would be a more effective deterrent. In that latter case, tactics imposing human costs on migrants, such as detention, speedy return, or other harsh or cursory treatment — while perhaps not morally justified — would at least make logical sense.

Immediately upon the summer influx of 2014, the Obama administration unequivocally adopted the "pull" factor narrative and enacted a spate of hostile deterrence-based policies as a result. In July 2014, President Obama asked Congress to appropriate $3.7 billion in emergency funds to address the influx of Central American women and children crossing the border (Cohen 2014). The majority of funding focused on heightened enforcement at the border — including funding for 6,300 new beds to detain families (LIRS and WRC 2014, 5). The budget also included, in yet another demonstration of a "pull"-factor-based deterrence approach, money for State Department officials to counter the supposed "misinformation" spreading in Central America regarding the possibility of obtaining legal status in the United States. The US government also funded and encouraged the governments of Mexico, Guatemala, and Honduras to turn around Central American asylum seekers before they ever could reach US border (Frelick, Kysel, and Podkul 2016).

Each of these policies, among other harsh practices, continues to the present day. But, by and large they have not had a deterrent effect. Although the numbers of unaccompanied children and mothers with children dropped in early 2015, the numbers began climbing again in late 2015 and remained high through 2016, exceeding in August and September 2015 the unaccompanied child and "family unit" apprehension figures for those same months in 2014 (USBP 2016a; USBP 2016b). Moreover, that temporary drop in early 2015 likely reflects US interdiction policies rather than any "deterrent" effect of harsh policies at or within US own borders, as the drop in numbers of Central American women and children arriving at the US border in the early months of 2015 corresponded largely with a spike in deportations by Mexico (WOLA 2015). In all events, in 2015, UNCHR found that the number of individuals from the Northern Triangle requesting asylum in Mexico, Costa Rica, Nicaragua, and Panama had increased 13-fold since 2008 (UNCHR 2015b).

Thus, the Obama administration's harsh policies did not, in fact, deter Central American women and children from attempting to flee their countries. This, we argue, is because the "push" factor narrative is the correct one. The crisis we face is accordingly humanitarian in nature and regional in scope — and the migrant "surge" is undoubtedly a refugee flow. By refusing to acknowledge and address the reality of the violence and persecution in El Salvador, Honduras, and Guatemala, the US government has failed to lessen the refugee crisis in its own region. Nor do its actions comport with its domestic and international legal obligations towards refugees.

This article proceeds in four parts. In the first section, we examine and critique the administration's "pull"-factor-based policies during and after the 2014 summer surge, in particular through the expansion of family detention, accelerated procedures, raids, and interdiction. In section two,

we look to the true "push" factors behind the migration surge — namely, societal violence, violence in the home, and poverty and exclusion in El Salvador, Honduras, and Guatemala. Our analysis here includes an overview of the United States' responsibility for creating present conditions in these countries via decades of misguided foreign policy interventions. Our penultimate section explores the ways in which our current deterrence-based policies echo missteps of our past, particularly through constructive *refoulement* and the denial of protection to legitimate refugees. Finally, we conclude by offering recommendations to the US government for a more effective approach to the influx of Central American women and children at our border, one that addresses the real reasons for their flight and that furthers a sustainable solution consistent with US and international legal obligations and moral principles. Our overarching recommendation is that the US government immediately recognize the humanitarian crisis occurring in the Northern Triangle countries and the legitimate need of individuals from these countries for refugee protection. Flowing from that core recommendation are additional suggested measures, including the immediate cessation of hostile, deterrence-based policies such as raids, family detention, and interdiction; adherence to proper interpretations of asylum and refugee law; increased funding for long-term solutions to violence and poverty in these countries, and curtailment of funding for enforcement; and temporary measures to ensure that no refugees are returned to persecution in these countries.

I. The Obama Administration's Adoption of a "Pull" Factor Narrative

In response to the migration surge of Central American women and children in summer 2014, the Obama administration immediately took a harsh stance and adopted a raft of punitive policies rooted in its "pull" factor narrative. Despite the fact that heightened numbers of asylum-seeking women and children continue to cross the US-Mexico border even in the face of these policies, the US continued its deterrence-based approach.

The most immediately visible and hotly contested policy response was the rapid and unprecedented expansion of family detention along the southern border. Capacity for detaining families together — primarily mothers with their children — in US immigration custody expanded from less than a hundred beds in early 2014 to thousands by the end of the same year. A range of other deterrence-based policies also ensued, including the use of accelerated immigration proceedings for families and unaccompanied children in immigration courts, the increasing use of expedited removal of families, and raids of Central American asylum seekers carried out in January and the summer of 2016. Moreover, the United States has encouraged and funded the constructive *refoulement* of asylum seekers south of its own border, primarily through military and police funding for Mexican and Central American authorities, who turn back asylum seekers before they can reach the United States (Frelick, Kysel, and Podkul 2016). In addition, as discussed in section III below, the Obama administration restrictively interpreted substantive asylum law in

a continuing attempt to limit refugee protections, particularly with regard to the claims commonly made by individuals from the Northern Triangle of Central America.

1. Family Detention

At the beginning of 2014, a single 94-bed facility in Berks County, Pennsylvania was the only family immigration detention center in the United States. A larger family facility with 512 beds in Texas, the Don T. Hutto facility ("Hutto"), had operated from 2006-2009, but it closed down following heightened media scrutiny, a human rights investigation, and litigation (LIRS and WRC 2014, 5). Media and human rights reports examining the Texas facility criticized, in particular, the negative developmental effects of detention on children, many of whom suffered from depression and weight loss (ABA 2015, 14). A lawsuit filed in 2007 highlighted inhumane conditions for families at Hutto and alleged that the facility violated the terms of a 1997 settlement agreement in *Flores v. Reno*. That agreement required that children in immigration custody be held in the least restrictive setting possible, with a strong presumption favoring release to a parent or family member. The settlement also required state licensing for all US Immigration and Customs Enforcement (ICE) detention centers holding children. Hutto, a converted medium security prison that formerly held adult male inmates, was not licensed to provide child care and was decidedly restrictive, with children and families treated like prisoners. Restrictions included minimal freedom of movement, limited access to outdoor space, and an initial offering of only one hour of education a day for children (ABA 2015, 14). In response to the lawsuit, ICE agreed to make a number of changes to the facility in late 2007. Following an internal assessment in early 2009 that highlighted the special needs of families (Schriro 2009), the US Department of Homeland Security (DHS) ultimately closed the facility in September 2009, converting it into a detention center for adult women only.

Thus, from 2009 to 2014, the only family detention center in operation was a small facility in Berks County, which held both mothers and fathers with children. In response to the summer 2014 "surge" of families arriving at the US-Mexico border to seek asylum, however, DHS hastily opened a new facility in the remote town of Artesia, New Mexico — a 3.5-hour drive away from the nearest legal service providers (ABA 2015, 20). The 700-bed facility was originally a law enforcement training barracks that DHS quickly repurposed to house mothers with their children (ABA 2015, 19). The facility opened in June 2014 and ran as a "deportation mill" (Burnett 2014); within its first few weeks of operation, over 200 mothers and children were removed to the Northern Triangle (Hylton 2015). The makeshift facility in Artesia garnered criticism on a range of issues, including inadequate healthcare, social services, and access to counsel. In summer 2014, the ACLU and other groups sued, alleging that the facility violated the due process and other rights of detained mothers and children.[4] ICE closed the Artesia facility in December 2014, stating that it had been meant for temporary use. Following this closure, the *M.S.P.C.* lawsuit was voluntarily dismissed.[5]

The expansion of family detention did not end with the Artesia facility's closing. Rather, by August 2014, the private prison company GEO Group — the second-largest in America

4 *M.S.P.C. v. Johnson*, No. 14-01437 (Aug. 22, 2014).
5 *M.S.P.C. v. Johnson*, No. 14-01437 (Jan.30, 2015).

— had already begun to operate a large, 532-bed family detention center in Karnes City, Texas (ABA 2015, 22). In December 2014, ICE and GEO Group urged regulators to permit an expansion of the site of the prison, which increased the capacity of the Karnes facility to 1,158 beds. Meanwhile, in Dilley, Texas, the Corrections Corporation of America (CCA) — the largest private prison company in America — began operations at the "South Texas Family Residential Center" in December 2014. The 2,400-bed facility in Dilley consists largely of connected trailer structures and has been compared to World War II Japanese internment camps (Takei 2015). Both facilities hold mothers with children; only Berks detains fathers and mothers with children.

Overall, from 2014 to the present day, in direct response to the influx of Central American families and children seeking asylum, the government rapidly expanded the capacity for family detention from less than 100 beds to over 3,500. The administration was explicit in its deterrence-based rationale for this unprecedented expansion of prison bed space. In testimony before the Senate Committee on Appropriations in June 2014, DHS Secretary Jeh Johnson asserted, "[T]here are adults who brought their children with them. Again, our message to this group is simple: We will send you back . . . Last week we opened a detention facility in Artesia, New Mexico for this purpose" (Johnson 2014). So strong were its deterrence-based motives, in fact, the administration adopted a strict "no-release" policy toward families in detention. Pursuant to this policy, DHS generally refused to exercise its own discretion to release families locked away in Dilley, Karnes, and Berks even after they established a likelihood of asylum eligibility. DHS additionally opposed release for these same families in bond hearings before immigration judges. A federal lawsuit, brought by the ACLU, University of Texas Law School's Immigration Clinic, and the law firm Covington & Burling resulted in a preliminary injunction against the no-release policy. The court in that case, *R.I.L.R. v. Johnson*, reaffirmed the civil nature of immigration detention and the principle that blanket deterrence rationales — inherently punitive in nature — would likely violate long-standing constitutional principles on the permissible uses of civil detention.[6]

Following the issuance of the preliminary injunction, DHS backed down from its no-release policy and agreed to stop using blanket deterrence rationales in its own custody decisions as well as in bond hearings for asylum seeker families. However, DHS continues to detain large numbers of mothers with children in family detention centers. This failure to learn from the lessons of the past — and in particular, the negative impacts of its earlier operation of the Hutto facility — has drawn heavy criticism and ongoing litigation (ABA 2015). All three remaining family detention centers are the subject of lawsuits alleging violations of the 1997 *Flores* settlement, which governs treatment of children in immigration detention.[7] Its core provisions impose a strong presumption favoring release, and require that children who cannot be released be held in the least restrictive setting possible. The *Flores* settlement additionally sets forth a preferential list of appropriate release options for children, with release to a parent or legal guardian the first among them, followed by release to an adult relative or licensed program.

As in the Hutto case, counsel for the plaintiffs asserted that holding children in the family detention centers violated the *Flores* agreement due to the failure to apply the presumption

6 *R.I.L.R. v. Johnson*, 80 F.Supp.3d 164 (D.D.C. 2015).

7 *Flores v. Johnson*, No. 85-4544 (July 24, 2015).

of release for children, the restrictive nature of the facilities, and the lack of state licensing as a child care facility for Dilley and Karnes. Notably, similar to the children housed in the Hutto facility, the children detained in the South Texas facilities have exhibited wide-ranging negative impacts including anxiety, weight loss, chronic illness, breakdown of family structure, and other harms from even short periods of detention (CARA 2015b; CARA 2015c).

On July 24, 2015, district court judge Dolly Gee ruled that the family detention facilities violated the terms of the *Flores* settlement by failing to promptly release children and holding them in restrictive and unlicensed facilities.[8] Her ruling ordered the government to take a number of steps to comply with the *Flores* agreement, including prompt release of children along with their detained parent, in light of the agreement's first preference for release of a parent. The order also barred the government from holding children in secure facilities where their movements are restricted, as well as in unlicensed facilities. The government appealed Judge Gee's decision to the Ninth Circuit, where the case remains pending.

In the meantime, DHS took belated steps to seek child care licenses for its facilities, but unsurprisingly ran into difficulties in getting prison-like immigration detention centers licensed for the appropriate care of children. As with the Hutto facility, DHS failed to seek an appropriate license for provision of child care for either the Karnes or Dilley facility when they opened in 2014, and ran both facilities without a license for a year and a half. The Texas Department of Family and Protective Services (DFPS) eventually granted a license to Karnes via an ad hoc, emergency process in May 2016 (Preston 2016a). DHS pursued a license for Dilley as well, but in May 2016, a Texas state court issued a temporary injunction preventing DFPS from issuing a license to the facility.[9] The suit for an injunction, brought by Grassroots Leadership and others, alleged that the Texas DFPS lacked statutory authority under Texas law to grant licenses to the for-profit detention facilities under an emergency process. In Pennsylvania, the Berks family detention center — the lone facility among the three that operated with an appropriate license in 2014 and 2015 — lost its license in early 2016 after a concerted advocacy effort for non-renewal. DHS appealed the non-renewal to the state of Pennsylvania and continues to operate the facility, without a license, while that appeal remains pending (Constable 2016).

Beginning in the summer of 2014, the Obama administration insisted on not only entrenchment, but also expansion of family detention despite sustained criticism and multiple legal challenges. This scaling-up — accomplished through contracts with private prison companies — reflects a concerted effort to normalize family detention as a permissible for-profit enterprise. But, as described above, the continuing operation of these centers faces numerous legal obstacles, as well as organized and vocal opposition by faith leaders, medical professionals, human rights groups, and scholars (e.g., ABA 2015; LIRS and WRC 2014; Takei 2015). The Obama administration failed to persuade even members of its own political party as to the legality and wisdom of this practice; over 200 members of Congress have urged the president to end family detention (US Senate 2015; US House 2015).

8 Id.

9 *Grassroots Leadership v. Texas D.F.P.S.*, No. 15-004336 (May 4, 2016).

Indeed, DHS's own Advisory Committee on Family Residential Centers[10] recently released a comprehensive report calling for an immediate end to the widespread use of family detention (ACFRC 2016). The Committee, established on July 24, 2015 by DHS, is comprised of independent experts in education, detention reform and management, immigration and asylum law, social service provision, and physical and mental health. Chief among its recommendations was for DHS to limit the use of detention against families in almost all circumstances, with rare exceptions only for cases where individualized flight risk or danger cannot be mitigated by any conditions of release.

In one encouraging development, however, Secretary Johnson recently announced that DHS would review its use of private immigration detention centers, including those used for families (DHS 2016). His announcement followed the Department of Justice's decision to phase out federal private prisons due to their lesser efficacy and diminished standards (DOJ 2016). The Secretary's announcement provides a welcome opportunity for DHS to rethink its use of family detention, particularly in light of the recommendations of its own advisory committee.

2. Expedited Removal, Reinstatement of Removal, and Accelerated Proceedings

Concurrent and intertwined with the use of family detention, expedited removal of families has also increased dramatically since 2014. Most of the families who end up in the Dilley, Karnes, and Berks detention facilities do so while undergoing expedited removal, a fast-track proceeding established under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Both adults and families may be subject to expedited removal at DHS's discretion if apprehended at a port of entry or within 100 miles of a US border within 14 days of entry.[11]

Prior to 2014, however, asylum seeker families were generally not subject to this curtailed process. Rather, families were typically placed into removal proceedings before an immigration judge, in front of whom they could seek asylum (ABA 2015, 27). In these "normal" removal proceedings, individuals have the opportunity to obtain the assistance of counsel, present evidence in support of their claims, and cross-examine witnesses against them, as well as to appeal negative decisions to the Board of Immigration Appeals (BIA) and seek review in the federal courts of appeals.[12]

In contrast, expedited removal is a bare-bones, administrative process that permits few procedural protections, even to individuals raising asylum claims.[13] Under this extremely curtailed process, DHS removes people as quickly as possible, without providing them the benefit of a hearing on the merits of their claims before an immigration judge. Those who

10 Author Musalo is a member of said committee.

11 8 U.S.C. § 1225(b)(1)(A); 8 CFR § 1003.19 (h)(2)(i). Unaccompanied children arriving alone, however, are not placed into expedited removal. Instead, special screening procedures apply for children from Mexico and Canada; children from all other countries are transferred to the custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) within 72 hours of apprehension (8 U.S.C.A. § 1232(a)).

12 8 U.S.C. §§ 1229a(b), 1252(a)(1).

13 8 U.S.C. § 1225(b).

do not express a fear of return or an intention to apply for asylum immediately upon arrival are summarily returned to their home countries upon the simple issuance of an order by a DHS enforcement officer.

Individuals who do express a fear of persecution or intention to apply for asylum should be referred to an asylum officer for a curtailed screening known as a "credible fear interview" (CFI). The CFI assesses whether individuals have a "significant possibility" of establishing asylum eligibility; if they pass the CFI screening, they can then apply for asylum in the immigration courts.[14] In practice, however, both the initial referral process and CFI itself are riddled with errors and offer minimal protections, particularly for detained individuals. Human rights groups and scholars have documented numerous cases in which individuals who should have been referred for a CFI were in fact simply removed, often after failing to be apprised of their rights and sometimes even after expressing a fear of persecution (HRF 2015; HRW 2014; Pistone and Hoeffner 2006; USCIRF 2005). For example, Human Rights First documented a case in which DHS deported an indigenous-language-speaking family who had fled gang persecution without ever receiving a CFI. The father had told DHS officials about his fear of return to the country, but the officers did not speak his language and did not bother to secure an interpreter. Instead, DHS simply deported the entire family without inquiring into whether or not they were afraid to return (HRF 2015, 11-12).

Even when individuals do obtain a CFI, the interview fails to provide the due process protections of a full hearing, and suffers from erroneous determinations as a result. Access to counsel during a CFI is restricted; regulations provide that attorneys "*may* be present at the interview and *may be permitted, in the discretion of the asylum officer*, to present a statement at the end of the interview" (emphasis added).[15] As a result of this broad discretion, asylum officers often limit attorney participation to a minimum, refusing in some instances to even let the attorney correct interpretation errors or present argument at all. During the CFI, individuals do not have a right to review adverse evidence, present full evidence in support of their claims, or be told, except in cursory fashion, the basis of an officer's decision. Many of those in family detention, particularly in the Karnes facility, undergo credible fear interviews over the phone, and thus never have an opportunity to establish rapport, build trust, and convey credibility to an asylum officer face-to-face (IACHR 2015, 69). Moreover, asylum officers have conducted CFIs of mothers in detention in the presence of their children, impeding the ability of mothers to testify fully and to reveal traumatizing details such as death threats and sexual assault because they do not want to talk about such events in front of their children (LIRS and WRC 2014). Inadequate interpretation remains an issue for CFI interviews as well (ABA 2015, 44). In the immediate aftermath of the surge, CFI passage rates dropped nation-wide from around 80 percent in early 2014 to only 62 percent for June-September 2014 (USCIS 2014). In the Artesia, New Mexico family detention facility, CFI passage rates at one point dipped as low as 38 percent.[16] Although

14 8 U.S.C. § 1225(b)(1)(B)(ii), (v).

15 8 C.F.R. § 208.30(d)(4).

16 *M.S.P.C. v. Johnson*, No. 14-01437 (Aug. 22, 2014). The *M.S.P.C.* litigation, discussed in section I, specifically challenged many of the deficiencies in the CFI process at Artesia, arguing *inter alia*, that expedited removal procedures in the facility violated due process. As mentioned, DHS closed the much-criticized Artesia facility in December 2015, and the ongoing litigation was voluntarily dismissed (*M.S.P.C. v. Johnson*, No. 14-01437 (Aug. 22, 2014)). However, ACLU continues to litigate challenges to expedited removal proceedings at the Berks facility, representing habeas petitioners who received a negative CFI

the CFI passage rates at present are higher both nationally and in the Dilley, Karnes, and Berks facilities — at or above 80 percent nationwide and in each of the three facilities — the nature of CFIs remains curtailed (USCIS 2016a; USCIS 2016b). This raises concerns that the smaller fraction of individuals who do not pass their CFIs may nonetheless present legitimate asylum claims.

Moreover, review for all negative CFI determinations is extremely limited. Individuals can seek review of the asylum officer's CFI decision before an immigration judge, but this, too, differs vastly from the full evidentiary hearing a judge would normally conduct in immigration proceedings. Negative CFI reviews often take place via video conference or even telephone, and if the judge affirms the decision of the asylum officer, the individual has no right to appeal to BIA or to petition for review by the federal circuit courts. Nor can the individual cross-examine adverse witness or present full evidence. As in the CFI, the government limits the ability of attorneys to participate; a 1997 immigration court memorandum states that "there is no right to representation prior to or during the review," and immigration judges have curtailed attorneys' roles as a result (EOIR 1997, 10).

For families in which a parent has a prior removal order, the process poses even greater hurdles and fewer protections. Through a mechanism termed "reinstatement of removal," also created by IIRIRA,[17] DHS can simply reinstate the prior removal order with virtually no process at all.[18] If an individual with a reinstated order expresses a fear of persecution or torture, the government refers them for a "reasonable fear interview" (RFI), a screening interview in which applicants have to meet a higher standard than in a CFI. Individuals who establish reasonable fear are placed into "withholding-only" proceedings in which they may seek only withholding of removal or Convention Against Torture (CAT) relief — and not asylum. Although withholding of removal and CAT prohibit return to torture or persecution, they provide far fewer protections and benefits than asylum. Unlike asylees, these individuals cannot bring their spouse and children abroad to live in the United States, do not qualify for most federal benefits, have no path to citizenship, and can have protective status stripped away more easily. In addition, the RFI process itself is riddled with the same due process errors that plague CFIs, such as inadequate interpretation and few procedural protections (LIRS and WRC 2014; ABA 2015).

In addition to formal expedited removal and reinstatement of removal under the Immigration and Nationality Act, the Obama administration also accelerated the proceedings of children and families seeking asylum in other ways, in particular by "fast-tracking" their cases in the immigration courts and before the asylum office. In July 2014, the administration announced that immigration court dockets would prioritize the cases of "recent border crossers" (DOJ 2014). These priority dockets — referred to colloquially as "rocket dockets" — hear cases of unaccompanied children as well as families who recently crossed the border, including many released from family detention. The Executive Office for Immigration Review (EOIR) reassigned immigration judges in courts throughout the country to these new expedited dockets, shifting them from their regular dockets.

decision. The habeas petitions filed on behalf of mothers and children at Berks allege that expedited removal processes in family detention violate due process and statutory rights (ACLU 2016).

17 IIRIRA § 241(a)(5).

18 8 U.S.C. § 1231(a)(5).

The creation of these new priority dockets for children and families had a negative impact on these vulnerable populations, particularly on their ability to find and secure counsel to represent them in court. At first, immigration judges pursuant to the announced "fast-track" policy routinely granted only short continuances for respondents, departing from the prior practice of allowing longer continuances for *pro se* individuals to secure counsel (Srikantiah et al. 2014). Indeed, even the National Association of Immigration Judges (NAIJ) criticized the Administration's decision to mandate that children's cases leap ahead of other cases in the already-backlogged court system (Solis 2014). As the NAIJ noted, "We deal with cases that are often, in effect, death penalty cases. Immigration law enforcement must stand on its own and not be allowed to overshadow or to control the immigration judicial process" (ibid.). Within DHS, US Citizenship and Immigration Services (USCIS) also adjusted its scheduling to rush through child asylum cases over adult asylum cases, even for children without counsel (Langlois 2015).

These actions pose serious due process concerns. Among the most pernicious of the effects of expedited, curtailed, and accelerated procedures are barriers to counsel. The limited role and availability of counsel in CFI and RFI proceedings have led to serious errors in those decisions, as described above. In addition, numerous studies have underscored the importance of counsel in obtaining relief for children and survivors of trauma in formal immigration proceedings. Children with attorneys are five times more likely to obtain asylum or other humanitarian protection (TRAC 2015a). Adults with children with attorneys are *fourteen* times more likely to secure protection in these same proceedings (TRAC 2015b). At the same time, misinformation, lack of resources, and a lack of low-cost and free legal services impede the ability of many to find attorneys.

Notably, the Advisory Committee on Family Residential Centers recommended in its 2016 report that DHS cease placing asylum seeker families into expedited removal in light of many of the aforementioned concerns (ACFRC 2016). Instead, the Advisory Committee recommended that DHS return to its prior practice of simply issuing a Notice to Appear for regular immigration court proceedings and that it promptly release families.

3. Raids

In late December 2015, media reports began to circulate surrounding upcoming raids of Central American families and children planned by DHS (Markon and Nakamura 2015). DHS conducted home raids over the New Year's weekend around the country and confirmed, on January 4, 2016, that it had apprehended 121 individuals, including 71 children and 50 adults, mostly mothers (Johnson 2016b; NILC 2016). In its official statement on the raids, DHS was explicit in its desire to use aggressive enforcement tactics as a way to send a message to others. Secretary Johnson's opening words stated, "As I have said repeatedly, our borders are not open to illegal migration; if you come here illegally, we will send you back consistent with our laws and values" (Johnson 2016b). This statement fails to recognize the right of asylum seekers to seek protection from persecution under US and international law. Commenting on the raids later that spring, a senior DHS official reiterated, "We cannot send a message that once families with kids cross the border, they are here to stay. If many end up staying here indefinitely, the concern is that it will encourage further illegal immigration" (Constable 2016).

The invasive raids took place in the early morning hours, before dawn, with ICE agents storming the homes of mothers with children and waking up terrified families in the dark (Graybill and Cho 2016). According to a report on the raids in the Atlanta, Georgia region, DHS by and large failed to secure warrants to enter homes, in violation of longstanding constitutional principles, and also impeded the families' access to counsel after picking them up (ibid.). ICE also used false information in some cases to gain access to homes (ibid.; NILC 2016).

DHS transferred families subject to the raids to the Dilley family detention facility for deportation processing. Although the government portrayed the families subject to raids as ineligible for asylum, interviews by attorneys revealed that many of the families did in fact have valid claims, but were often simply unable to present those claims due to an inability to secure counsel or to understand the immigration court proceedings (Foley 2016). Indeed, fewer than half of the individuals subject to the January raids, including young children, had secured attorneys in their asylum cases (Preston 2016b). Pro bono attorneys with the CARA Project at Dilley attempted to meet with all families picked up during raids, but facility officials blocked access to most families. In the end, volunteer attorneys managed to represent 12 families and successfully secured stays of removal by the BIA for all 12, or over 33 individuals (AIC 2016). The fact that the BIA granted these stays speaks to the meritorious nature of the immigrants' underlying claims for protection — as courts considering a stay of removal must generally consider the likelihood of success on the merits of the underlying claim.[19]

The aggressive home raids traumatized mothers with their young children, caused widespread panic in immigrant communities, and drew a swift backlash of heavy criticism (Preston 2016b). More than 100 members of the House and Senate wrote President Obama to demand a cessation of raids (ibid.). The letter, however, had little effect. Three months later, on March 9, 2016, DHS Secretary Jeh Johnson revealed that ICE had been conducting home raids pursuant to "Operation Guardian Border" since January 2016. Johnson announced that this operation had led to raids resulting in the apprehension of 336 individuals, the majority of whom entered as unaccompanied children after January 1, 2014 but had since turned 18 years old (Johnson 2016a). Although ICE claimed it would not target churches, medical offices, or schools, 10th grader Kimberly Pineda Chavez was picked up on her way to school in Atlanta, Georgia, as were teenagers Yefri Sorto-Hernandez and Wildin David Guillen Acosta in North Carolina (Holpuch 2016; Lee 2016).

On May 12, 2016, Reuters reported yet another spate of raids planned for summer 2016 against hundreds of families and unaccompanied children (Edwards 2016). Within just two weeks, pro bono attorneys at the Dilley and Karnes facilities encountered 16 such families (CARA 2016). One mother and her 14-year-old daughter were deported during the night, even after their pro bono attorneys informed DHS officials of their intent to seek a stay of removal (ibid.).

The raids have sown terror in immigrant communities across the country. Teachers in the schools attended by Yefri and Wildin reported that numerous stellar immigrant students had begun missing school or even dropped out entirely over fear of being deported (Lee

19 *Nken v. Holder*, 556 US 418 (2009).

2016). In one Maryland high school with a high percentage of Latino and Central American students, attendance dropped by half following the January raids (United We Dream 2016a). In response, the Durham school system passed a resolution calling on the administration to end the raids (Durham School Board 2016), as did the National Education Association and the American Federation of Teachers (AFT et al. 2016). In addition to children dropping out of school, health care providers reported a stark decline in immigrant patient care in affected communities (NILC 2016; Hiemstra 2016).

4. Interdiction, or Constructive Refoulement

The US government's harsh, deterrent tactics against Central Americans also extended beyond its borders to Mexico and Central America, where it encouraged and funded strong enforcement measures to keep asylum seekers from reaching the US border. Following the 2014 surge, the United States worked with Mexico to increase efforts to interdict migrants along Mexico's southern border, and funded additional programs in Honduras and Guatemala to prevent would-be migrants from journeying north.

Since 2007, the United States has provided assistance to Mexico via the "Mérida Initiative" aid packages to fortify Mexico's southern border. This aid intensified after 2011 (Isacson et al. 2015, 5). Following the 2014 surge, US officials and congresspersons called on Mexico to do more to detain and deter migrants from Central America (ibid., 5). At a Senate hearing in July 2014, Ambassador Thomas Shannon stated that a key component of US strategy to stem the flow of unaccompanied children from Central America would be to shore up "the ability of Mexico and Guatemala to interdict migrants before they cross into Mexico" (Shannon 2014). According to Shannon, the United States pledged to spend $86 million in existing funds within the State Department's International Narcotics Control and Law Enforcement unit (ibid.). The Department of Defense provided significant funding as well, reporting $44.6 million dollars given to Mexican military and police officials for counter-drug efforts (DOD 2014).

With this infusion of cash, the Mexican government intensified its own border control efforts. On July 7, 2014, Mexican President Enrique Peña Nieto and Guatemalan President Otto Pérez Molina announced a joint "Southern Border Program" (*Programa Frontera Sur* (PFS)). Pursuant to this operation, the National Migration Institute (*Instituto Nacional de Migración* (INM)), Mexico's immigration enforcement agency, increased the number of agents on the Mexico-Guatemala border by 300 (Isacson et al. 2015, 6). Mexican federal police at the border increased as well (ibid., 10).

In the year following the 2014 "surge," Mexico's deportations of Central American migrants almost doubled, from 49,893 to 92,889 (WOLA 2015). The number of unaccompanied children apprehended by Mexico jumped from 9,594 in FY 2014 to 16,038 in FY 2015 (Isacson et al. 2015, 8). These increases in apprehensions at the Southern Mexico border correspond exactly with the decrease in apprehension of children and families at the Southern US border. The correlation strongly suggests that heightened enforcement in Mexico, and not diminishment of root causes of migration or US policies at or beyond the US border to deter arrival, led to the decrease in the number of children apprehended by US officials.

Mexico's asylum system, however, remained woefully inadequate to address the legitimate protection needs of Central Americans fleeing persecution. In 2014, Mexico detained over 107,000 migrants from Central America but recognized only 451 individuals as refugees (WOLA 2015). Moreover, Mexico's aggressive enforcement efforts, at the urging of the United States, have resulted in serious harm and human rights violations against migrants. Groups documented numerous instances of Central Americans suffering physical and sexual abuse by Mexican authorities, as well as due process failures and *refoulement* of refugees (Isacson et al. 2015, 25-27). In Mexico's detention centers, deplorable conditions include inadequate provision of food and medical care, as well as physical and sexual violence by prison officials against detainees (ibid., 27). Finally, intensified enforcement efforts have pushed migration routes through Mexico underground, making them deadlier as a result. In particular, as both private and public security officials began cracking down on migrants riding on the top of trains, desperate migrants have resorted to harsher, more remote, and dangerous routes. Along these routes, criminal groups have subjected them to robbery, sexual assault, disappearances, kidnapping, torture, and murder — at times working in tandem or with the acquiescence of Mexican authorities (Isacson et al. 2015, 28-29; Podkul and Kysel 2015, 11-12).

Law enforcement efforts in Central American countries also intensified due to US intervention and funding. In June 2014, Honduran law enforcement units, funded by the US State Department Bureau of International Narcotics and Law Enforcement, began a new operation to prevent children and families from crossing the Honduras and Guatemala border (Podkul and Kysel 2015, 9). These units received equipment and training from US law enforcement, including ICE and US Border Patrol (Carcamo 2014). In Guatemala, the United States provided $17 million in funding to Guatemalan army, police, and prosecutorial officials for the creation of two border initiatives, for both the Guatemala-Mexico border and the Guatemala-Honduras border.

In addition, while the United States government has implemented some in-country refugee processing options for refugees from Central America, these efforts remain woefully inadequate and do not excuse interdiction south of the US-Mexico border. The Central American Minors (CAM) program, for example, provides refugee processing for child refugees in El Salvador, Honduras, and Guatemala, but is limited in scope. As initially implemented, only children with parents who have lawful status in the United States were eligible to apply, and, as of April of 2016, the CAM program had admitted only 197 children (Hennessy-Fisk 2016). In July 2016, the administration announced an expansion of the CAM program to permit older siblings, biological parents, and caregivers of a qualifying child to accompany the child to the United States (Davis 2016). It also increased in-country refugee screening in each of the Northern Triangle countries, as well as a process — in collaboration with the government of Costa Rica, the UN High Commissioner for Refugees (UNCHR), and the International Organization for Migration (IOM) — for transferring pre-screened refugees in danger in their home countries to Costa Rica to await resettlement in the United States (ibid.). Although these reflect significant improvements, the CAM program remains limited to serving only the children and family members (or child caregivers) of parents with legal status in the United States. As a result, it addresses only a fraction of the need for refugee protection in the region. In contrast, US interdiction policies have negatively affected tens or even hundreds of thousands of asylum seekers from Central America.

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Taken together, the administration's actions amount to a multi-pronged, sustained attack on the ability of Central American refugees to secure protection. Its deterrence-based approach has led to aggressive measures not only at its own border but also extending south, to Mexico and Central America. These measures place refugees in harm's way in transit, upon arrival, and in too many cases, result in their illegal *refoulement*. As discussed in section III below, restrictive interpretations of refugee law seriously limit protection to bona fide asylum seekers as well, continuing past trends.

Deterrence tactics violate the United States' international obligations under the 1967 Refugee Protocol, incorporating the 1951 Refugee Convention, in multiple ways. Limiting access to its territory via interdiction — essentially externalizing the US southern border (Podkul and Kysel 2015) — results directly in the return of refugees to situations of persecution. However, aggressive tactics at and within its own borders lead to illegal *refoulement* as well. Faulty screening processes, detention of traumatized mothers and children, and raids capturing individuals who never had a chance to seek asylum before a judge all result directly or indirectly in erroneous outcomes, and interfere with the fundamental right of refugees to seek asylum under domestic and international law. At the same time, the due process failures of these same policies pose serious constitutional concerns.

The refusal to recognize Central Americans fleeing violence as a legitimate refugee population entirely ignores the reality of conditions in Guatemala, Honduras, and El Salvador — and is especially pernicious given the United States' role in creating the crisis south of its border. In section II below, we describe the root causes of migration, including the US government's historical actions.

II. The Real Reasons for Migration: "Push" Factors in the Northern Triangle

The migration surge from the Northern Triangle countries is explained by the dire conditions that prevail in El Salvador, Guatemala and Honduras. Violence plagues the region; the Northern Triangle countries have homicide rates that are among the highest in the world. Violence against women and girls, as well as gender-motivated killings — referred to as femicide/feminicides — also top global records.

Gangs and organized crime have proliferated, contributing to the skyrocketing levels of violence. Household violence, which disproportionately impacts women and children, is at epidemic proportions. Adding to this are conditions of extreme poverty and income inequality leading to social exclusion, and depriving large segments of the population of those minimal conditions necessary to survive.

Two recent UNHCR studies concur that country conditions in the Northern Triangle countries, rather than pull factors in the United States, have fueled the migration surge. Its 2014 study, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, found that 58 percent of child migrants left situations which presented "international protection concerns" fleeing violence, abuse,

and social exclusion (UNHCR 2014, 25), while its 2015 study, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* similarly found that the women fleeing those countries "present[ed] a clear need for international protection" (UNHCR 2015b, 2).

Assertions that the migration surge is the result of pull rather than push factors ignore the data to the contrary, including statistics documenting that other countries in the region (Mexico, Belize, Costa Rica, Nicaragua, and Panama) have experienced a 13-fold increase in asylum claims from those fleeing Northern Triangle countries (UNHCR 2015b). Although some individuals will have mixed reasons for migration, these numbers reflect the primacy and prevalence of protection-based needs (UNHCR 2014).

The recognition that a majority of migrants from El Salvador, Guatemala, and Honduras have international protection concerns, and may qualify as refugees, has implications for US policy. Punitive responses intended to deter the entry of bona fide asylum seekers — from any region of the world — are inconsistent with obligations pursuant to international norms as well as domestic law and are not consonant with US values and national identity.

However, in the case of the Northern Triangle countries, the United States has a moral obligation that flows not just from international and domestic norms, but arises from its tortured history with each one of the countries. In pursuing its own interests in the region, the United States engaged in policies and undertook actions that indisputably have contributed to the disastrous conditions that currently exist. An acknowledgement of this responsibility would be welcome as an exercise in truth and reconciliation, but beyond that, it would add to the moral heft of arguments that the United States can and should do better in its response to those suffering the violence, inequality, and social exclusion that prevail in El Salvador, Guatemala, and Honduras.

1. The History of US Involvement in the Region

The United States took actions and pursued policies in each of the Northern Triangle countries that strengthened authoritarian, anti-democratic elements, and contributed to the legacy of violence, poverty, and social exclusion that are root causes of the current migration surge. The United States viewed the region through a Cold War lens and justified its actions as fighting back the Communist threat in its "backyard." Towards that end, it supported murderous regimes in Guatemala and El Salvador, while it worked to force the leftist Sandinistas from power in Nicaragua. It drew Honduras into these regional conflicts and secured its compliant support by lavishing cash assistance on its repressive military. All of these actions have had negative consequences that continue to reverberate in the region. It is beyond the scope of this article to provide an extensively detailed description of US interventions, but the summaries below provide a distillation of undisputed facts regarding US involvement and their consequences.

Guatemala

Guatemala has "long had one of the most unequal distributions of resources and capital in the world" (InSight Crime Guatemala n.d.). Its indigenous Mayan population has been

"marginalized socially and politically" since the Spanish conquest, and Guatemala's treatment of its indigenous population has been compared to South Africa's apartheid (ibid.). Historically, efforts at reform have been met with unbridled repression.

US government involvement in Guatemala can be traced to 1954 when it orchestrated the overthrow of the democratically-elected Guatemalan President, Jacobo Arbenz Guzman (Gibney 1997). Arbenz had drawn the wrath of the US government for implementing a policy of agrarian reform in which the Guatemalan government "expropriate[d] unused land from large landholders" in exchange for government bonds (ibid., 83-84). The United Fruit Company, a US company, which had been operating in Guatemala since 1870 and reaping huge benefits,[20] was not pleased with the new land reform law. The United States subsequently cut off aid to Guatemala and then funded and trained a mercenary force to depose Arbenz (ibid., 82-85).

The overthrow of Arbenz started a "cycle of government-sponsored violence and repression" against Guatemalan citizens in which the United States was complicit (Rohter 1996). Guatemala was the first country in Latin America to experience death squads and disappearances, and "US military advisers were involved in the formation of the death squads, and the head of the US military mission publicly justified their operation" (Jonas 1996, 147).

The coup that unseated Arbenz, and the government repression that followed, were the precursors to the decades-long Guatemalan civil war. Guerrilla forces from the Guatemalan National Revolutionary Union (*Unidad Revolucionaría Nacional Guatemalteca* (URNG)) fought with the objective of transforming the economic, social, and political systems which had left the mostly indigenous population impoverished and virtually disenfranchised. During that conflict, government security forces committed massive human rights violations, including genocide against the indigenous population, who were perceived as supporting the URNG (Chamarbagwala and Morán 2008). Over 200,000 to 250,000 Guatemalans — many of them Mayan — were killed or disappeared, and more than a million people were displaced (Musalo et al. 2010, 181). State security forces used torture, sexual violence, and violence against women as a strategy of war (ibid., 181).

Beginning in 1966, the United States provided hundreds of millions of dollars in assistance to Guatemala. When reported human rights violations became so egregious that the US government could not openly continue to support the Guatemalan government, it continued its support clandestinely from 1977 to 1983 (Gibney 1997, 80).

When the conflict ended, the URNG was left with very little bargaining power, because the military had essentially won the war. There were no meaningful economic or social transformations, amnesty for war crimes was enacted, and the perpetrators of gross human rights violations during the conflict "remained in the communities and held powerful positions in the government" (Cruz 2011, 15). The failure to purge such violent actors during this transition is a contributing factor to the high levels of crime and corruption that exist today.

20 United Fruit had "unlimited use of much of the country's best land, complete access to Guatemala's resources, exemption from nearly all taxes and duties, and unlimited profit remittances" (Gibney 1997, 82).

The US role in undermining democracy by its orchestration of the coup against Arbenz and its support for the Guatemalan military are sobering realities. We do not purport to draw a straight line of causation between these interventions and current conditions of violence, inequality, and social exclusion that prevail in Guatemala. However, there is no doubt that US actions caused untold suffering and setbacks to the struggle for justice and democracy; one can only speculate what Guatemala would be like today if the US government had not forced Arbenz out of office or supported the repressive Guatemalan military during the country's civil war.

Writing in 1997, well before the current migrant surge, Gibney asked whether "the United States Government bears some responsibility for Guatemala's decades of horror, and whether American involvement . . . should prompt special measures to help the Guatemalan people achieve some measure of peace, security, and justice"(Gibney 1997, 79). His questions remain valid today, with a slight rewording: To what degree does the United States have a moral obligation to provide protection to those who flee the contemporary violence, inequality and deprivation in Guatemala — conditions which the US government helped create through its misguided and self-interested intervention?

El Salvador

El Salvador went through a brutal 12-year civil war that ended with the signing of peace accords in January 1992. The civil war was fought to throw off decades of economic inequality and exploitation suffered by the majority of the population at the hands of an elite oligarchy whose will was enforced by state security forces. During the conflict between the Farabundo Marti National Liberation Front (FMLN) and the government, at least 75,000 people were killed, 7,000 were disappeared, and 500,000 were displaced (Bejarano 2002, 128; Castellano 2015, 70-71). The majority of these abuses were committed by the Salvadoran state.

The United States — beginning with the Carter Administration, but then continuing at a higher level under the Reagan administration — funded the military, despite incontrovertible evidence that it committed wide-scale human rights violations and war crimes. Among the many atrocities committed by military or paramilitary forces were the assassination of Archbishop Oscar Romero, the kidnapping, rape, and murder of four US churchwomen, and the killing of seven Jesuits, their housekeeper, and her daughter at the José Simeón Cañas Central American University (*Universidad Centroamericana Simeon Cañas)*.

Violence during the war was extremely high; by late 1980, it was reported that 200 individuals were killed a week, and in early 1981 that number had jumped to 300 to 500 weekly. Notwithstanding its egregious human rights record, the US government continued to provide military assistance to the Salvadoran government, which by the end of the war had received more than five billion US dollars. The United States finally ended its support in 1989 following a change in US policy and a campaign led by Senator Joseph Moakley protesting human rights abuses in El Salvador (Howard 2007, 93-94).

The Salvadoran civil war ended in a stalemate between the FMLN and the military, with a negotiated peace accord. For the most part, the accords failed to address the economic

inequalities that had led to the conflict. Instead, pressure was in the opposite direction: elite Salvadoran interests, supported by the United States, successfully pushed for the adoption of neoliberal economic policies that led to greater poverty and marginalization among the Salvadoran population. These policies included "eliminating price controls, deregulating interest rates, and cutting public spending, especially in public services such as education and health care"(Moodie 2011, 42). The social exclusion resulting from economic inequality is a driver of migration, and, as discussed further below, is also a factor making youth more susceptible to recruitment into gangs and organized crime syndicates.

Although the accords did not address economic equality in a meaningful manner, they were "ambitious" in terms of reforms and democratization (Cruz 2011, 10-11). However, they fell short in implementation on these issues. As had occurred in Guatemala, a broad amnesty was enacted that prevented the prosecution of gross human rights violators. And as in Guatemala, individuals associated with military or paramilitary groups were able to incorporate into new institutions created after the accords, compromising the integrity of these bodies. The corruption and complicity of state security forces in criminal violence today can be partially explained by the infiltration of human rights violators and criminals into these institutions.

US intervention in El Salvador, and its virtually unwavering support for a brutal military, brings with it a considerable measure of moral culpability. Salvadoran society still bears the scars inflicted by the death and destruction of the conflict, and some have commented that the brutality and loss of life during the civil war normalized violence in the society and contributes to contemporary levels of violence.

US complicity in human rights violations is compounded by US pressure and advocacy for economic policies that denied the majority of Salvadorans an opportunity for self-determination and thwarted the creation of new social and economic arrangements. Twenty years after the end of the conflict, the evidence indicates that poverty, inequality, and resulting social exclusion continue to be the status quo. Acknowledgement of the US role in El Salvador, and its contribution to current conditions would be a constructive step in reconsidering US policies towards Salvadoran migrants.

Honduras

When Ronald Reagan assumed the US presidency in the early 1980s, the leftist Sandinistas in Nicaragua had forced from power dictator Anastasio Somoza, and the leftist FMLN was battling the Salvadoran state to determine the destiny of the country. The incoming Reagan administration, with an anti-Communist fervor, was determined to see the FMLN defeated and to "rollback" the revolution in Nicaragua (Shepherd 1984, 112).

Honduras, with its strategic location at the northern border of Nicaragua, became the "launchpad" for the US military intervention in the region (Shepherd 1984, 113). Based in and operated from Honduras, the United States recruited, trained, and funded "contra" forces to attempt to destabilize Nicaragua (ibid., 114-15). The United States also drew Honduras into the conflict in El Salvador; US military advisors trained Salvadoran military troops in Honduras. Through these and other measures, Honduras became central to "US counterrevolutionary strategy in Central America" (ibid., 115).

In exchange for undertaking this role, US military aid to Honduras "increased more than tenfold" under the Reagan administration (Shepherd 1984, 116). So intent was the United States on fighting "what it considered a burgeoning communist threat" that it paid a known international drug trafficker, Juan Ramon Matta Ballesteros, to use his "air fleet to get aid and weapons to the Contras" (InSight Crime Honduras n.d.). US policy, and its strengthening of the Honduran military, had an economically harmful and politically destabilizing impact on Honduras. "[D]emocratic institutions and practices [were] undermined" (Shepherd 1984, 135), and there was an "enormous increase in military influence" (Cruz 2011, 11). This rise in influence was "problematic" given that, by the "mid-1980s, the military [in Honduras] were not only responsible for human rights abuses; they were also involved in the growing drug-trafficking rings" (ibid., 17-18).

Subsequent efforts to remove these criminal elements from security institutions had limited success, and similar to what occurred in Guatemala and El Salvador, the criminal elements remained in state institutions where they have had a corrupting influence and continue to contribute to the violence and criminality Honduras is experiencing today. Honduras' police force is considered one of the most corrupt in the region (InSight Crime Honduras n.d.). Reports have documented the "existence of death squads within the police" (Cruz 2011, 22) as well as the murder of "hundreds of street children and suspected gang members" by so-called "cleansing groups associated with the police" (ibid., 23).

Honduras experienced a coup in 2009. Its democratically elected president, Manual Zelaya, was forced out of office and into exile (Meyer 2013, 3-4). Roberto Micheletti was named by the Honduran Congress to complete Zelaya's term (ibid., 2). Although US policy in the aftermath of the coup that forcibly removed Zelaya was initially appropriate with condemnation and a series of sanctions, it ultimately softened (ibid., 9-10). Some commentators have attributed this shift to the influence of the US Republican Party which aggressively took up Micheletti's cause, with 17 Republican senators sending a letter to then Secretary of State Hilary Clinton urging the administration to "overhaul its position on Honduras" (Legler 2010, 609-10). [21]

The human rights situation in Honduras worsened after the coup. The Inter-American Commission on Human Rights found "serious violations of human rights" during Micheletti's rule (Meyer 2013, 4). There was also an increase in violence against "journalists and political and social activists" (ibid., 18) that continued into the term of President Porfirio Lobo Sosa in 2013 (ibid., 2). The "exacerbated" instability in the country had other negative consequences; "Colombian drug trafficking gangs changed their routes to Honduras . . . just days after the coup and turned it into the principal handover point for cocaine to Mexican cartels" (InSight Crime Honduras n.d.).

As with Guatemala and El Salvador, US interventions in Honduras have been less frequently motivated by lofty ideals, than by shortsighted self-interest. The strengthening of a repressive and corrupt military in Honduras, and the softening of opposition to the 2009 coup have directly contributed to the current situation in Honduras. US responsibility

21 As described by Legler, "Republican senators and congressmen undertook three separate trips to Tegucigalpa to meet with Micheletti in defiance of the Obama government's position of diplomatic isolation. They also held up senatorial approval of two key Obama diplomatic appointments in the Americas" (Legler 2010, 610).

for its past actions should inform its response to those who suffer the consequences. But instead of recognizing that, and acting accordingly, the United States has instead contributed training and funding to Honduras Special Forces to prevent the children who are victims of the current circumstances from migrating to safety (Musalo et al. 2015, 125). Although these operations to stop migration have been presented as child protection measures, they are "in reality . . . migration control" measures (ibid., 125). By militarizing the Honduran border, they have made children more vulnerable, and have "obscure[d] the structural causes [behind] migration of children and adolescents" (ibid., 125).

2. Recent History and Its Implications for Criminal Violence

The section above discusses the recent history of the Northern Triangle countries to expose the role of the United States in contributing to the conditions that exist in the region and to raise questions regarding the concomitant US moral responsibilities. An examination of the recent history — with a focus on post-conflict transitions — also sheds light on why El Salvador, Guatemala, and Honduras have been especially fertile ground for the explosion of criminal violence — while a country like Nicaragua has not.

In two compelling articles, Jose Miguel Cruz has pointed to a key distinction between the Northern Triangle countries and Nicaragua (Cruz 2011; Cruz 2015). The four countries have a lot of similarities; all four countries experienced civil conflict and/or repressive military regimes and currently experience high levels of poverty and inequality. Despite these similarities, what distinguishes the Northern Triangle countries from Nicaragua is their post-conflict/post-military regime transitions. In El Salvador, Guatemala, and Honduras, the post-conflict transitions did not remove corrupt and violent state actors or effectively prevent them from incorporating into newly formed "democratic" institutions (Cruz 2011, 14-18). In stark contrast, in Nicaragua, violent state actors were never incorporated into post-conflict state institutions. There was an effective purging of those elements from the dictatorial Somoza regime.

The flawed transitions of the Northern Triangle countries prevented the new security institutions from fulfilling their intended role of strengthening the rule of law. The incorporation of violent and/or criminal holdovers — "violent entrepreneurs" as Cruz calls them — undermined the institutions and contributed to the high levels of corruption and complicity with criminal enterprises which characterize the governments of all three Northern Triangle countries. The strong presence of these unsavory elements from prior regimes has had a secondary — but equally pernicious effect: namely that citizens in the Northern Triangle countries lack trust in the police and related security forces. They do not report crime, which, among other factors, contributes to the perpetuation of impunity.

Nicaragua stands in stark contrast to El Salvador, Guatemala, and Honduras.[22] As a result of the Sandinista revolution and its aftermath, the repressive elements of the prior Somoza regime were more fully rooted out (Cruz 2011, 19-21). Although Nicaragua is the second

22 Although the authors note that Nicaragua has not faced the same level of violence country-wide, this does not mean that individuals from Nicaragua do not raise protection needs. Rather, individuals from Nicaragua do continue to raise meritorious refugee and asylum claims when targeted on account of protected grounds in specific situations.

poorest country in the hemisphere (second only to Haiti), it has not been plagued by high levels of violent crime; its homicide rate has been relatively low compared to the Northern Triangle countries, and gangs and organized crime have not established themselves there. Furthermore, in Nicaragua, where efforts to remove violent and corrupt elements were more successful, citizens have notably greater confidence in their country's law enforcement and are more likely to report crime, both of which contribute to significantly lower rates of criminal violence.[23]

Contrasting the situation in Nicaragua with those in El Salvador, Guatemala, and Honduras, helps illustrate how decades of US policy helped produce the current conditions that force migrants to flee from Northern Triangle countries.

Additionally, the United States undoubtedly bears significant responsibility for the dramatic spike in violence in the region via its deportation policies from the 1990s onward (Cruz 2011, 6-7). Notwithstanding the volatile and destabilized circumstances in each of the three Northern Triangle countries, the United States dramatically increased its deportations of gang members who had been raised in the United States — and became initiated into gangs while there — to Guatemala, Honduras, and El Salvador. These deportations directly "fe[d] into the burgeoning gang infrastructure simultaneously surfacing in Northern Triangle countries," and led to the expansion and deep entrenchment of the transnational gangs there (de Waegh 2015).

3. The Push Factors

Numerous reports and articles detail the conditions in the Northern Triangle countries that drive migration. The following discussion is a brief overview of factors that are at the root cause of the migrant surge. Often, these will be intertwined, as vulnerable segments of society disproportionately suffer from multiple forms of violence and other social ills.

Societal Violence

Societal violence, including high levels of homicides, is a primary cause of migration. In its 2013 publication, the UN Office of Drugs and Crime reported Honduras as having the highest homicide rate globally (90.4 killings per 100,000), El Salvador the fourth highest (41.2 per 100,000), and Guatemala the fifth (39.9 per 100,000) (UNODC 2013, 24). The numbers have shifted since then, with El Salvador gaining the unenviable first place slot for highest homicide rate globally (Watts 2015). UNHCR found that 48 percent of children (UNHCR 2014, 6) and 60 percent of women cited societal violence as a principal reason for fleeing their home countries (UNHCR 2015b, 19). The data for Honduras and Guatemala show that the highest rates of migration are from the departments with the most elevated homicide rates.[24]

23 When asked whether the police protect against crime or are involved in crime, "65.9 percent of Guatemalans, 48.8 percent of Salvadorans and 47.2 percent of Hondurans said that the police were implicated in criminal activities. In Nicaragua…only 25.1 percent of people saw their police as involved in crime" (Cruz 2011, 24-25).

24 For Honduras those departments are Cortés, Francisco Morazán, Atlantida, Yoro, Comayagua, Olancho, Colón, Copán, and Choluteca (Musalo et al. 2015, 89-90), while in Guatemala they are Guatemala, San Marcos, Huehuetenango, Quetzaltenango, and Jutiapa (ibid., 135).

Children and adolescents often make up a disproportionate number of homicide victims. In El Salvador, over the past ten years, the murder rate for young people between 18 and 30 has been twice the national level, and those most affected by violence are 15 to 19 years old (Musalo et al. 2015, 175). In Honduras, the homicide rate among males between the ages of 20 and 34 was triple the national level, topping 300 per 100,000 (InSight Crime Honduras n.d.).

The killings of women, including gender-motivated killings, or "femicides/feminicides" has also been extraordinarily high in the Northern Triangle countries. From 2007 to 2012, El Salvador was ranked number one, Honduras number two, and Guatemala number four (GDAVD 2015, 94).

The growth of gangs has been a significant contributing factor to increased levels of violence (GAO 2015, 4). The UN Office on Drugs and Crime estimates that there are 54,000 gang members in the Northern Triangle countries, with 20,000 in El Salvador, 12,000 in Honduras, and 22,000 in Guatemala (UNODC 2012, 29). Given that El Salvador's population is substantially smaller, in relation to the other two countries, at 20,000 gang members, El Salvador had "the highest concentration, with some 323 *mareros* (gang members) for every 100,000 citizens, double the level of Guatemala and Honduras" (Seelke 2014, 3).

Organized crime networks have also penetrated the region, adding to the levels of violence. The Northern Triangle countries have the "misfortune" of being situated in the route "connecting the world's largest drug-producing countries in South America with the world's largest consumer of illicit drugs, the United States" (Stinchcomb and Hershberger 2014, 23). Moreover, anti-drug trafficking initiatives in Colombia and Mexico have caused drug traffickers to change their routes. These route changes have had a disastrous impact on the Northern Triangle countries as Mexican and Colombian drug cartels are now fighting for control of "land and maritime routes and enlisting, to varying degrees, the support of less sophisticated street gangs" (ibid., 23).

As discussed in section II above, flawed transitions which allowed the incorporation of corrupt state actors into new state institutions have contributed greatly to the criminality and levels of violence in the Northern Triangle countries. State actors have been found to support the gangs or to be complicit in their actions. As a consequence, it is extremely difficult for victims to find recourse against criminal elements through reporting to the police force or government of their own countries. When unable to find safety within their home countries, victims are migrating to countries where they believe they will be safe. An additional factor — one also linked to US policy — was the large-scale deportation of gang members from the United States to Northern Triangle countries, as discussed above.

Violence within the Home

In addition to societal violence, there are high levels of violence against women and children within the home. Domestic violence is prevalent and widely tolerated. Although rates are difficult to discern due to rampant underreporting and the failure of governments to collect data, there is no doubt the numbers are high (Hermansdorfer 2012; Cárcomo 2011; Bayona 2013; Nájera 2012). In Honduras, for example, three-quarters of over 16,000 violence

against women complaints filed were based on intimate partner and familial violence (Manjoo 2015). The United Nations, moreover, has estimated that around 50 percent of femicides/feminicides are the result of escalating intimate partner violence (UNODC 2012). While all three countries have enacted laws[25] to prevent and punish violence against women, implementation and enforcement of these laws has been limited, and they have yet to bring down the prevalence of violence or the impunity enjoyed by its perpetrators.

Children are also victims of violence within the home. Corporal punishment is accepted, and often takes the form of brutal physical abuse (Musalo et al. 2015, 66-69, 81, 135, 161). Incest is also extremely common and generally underreported; among other ills, it has contributed to high levels of adolescent pregnancies (Musalo et al. 2015, iii, viii, 179).

Children are also subjected to forced labor, or trafficked for sexual exploitation. Many are abandoned by parents or extended family that do not have the means to care for them. All three Northern Triangle countries have enacted extensive child protection laws.[26] However,

25 In El Salvador there is a body of law "aimed at guaranteeing the right to a life free from violence for women. Notable among these laws are: the Law Against Intra-Family Violence; the Penal Code; the Procedural Penal Code; the Special and Comprehensive Law for a Life Free from Violence for Women; the Law for the Integral Protection of Children and Adolescents; the Law to Establish the Salvadoran Institute for the Development of Women; and the Law for Equality, Equity and the Eradication of Discrimination Against Women" (Musalo et al. 2015, 176). In Honduras, the Domestic Violence Act is a preventive mechanism to combat domestic violence. Penalties of one to three years, and up to four years in aggravated cases, are set under article 179 (a) and (b) of the Criminal Code. A law against trafficking in persons was passed in April 2012. The law also sets out the structure and role of the Inter-Agency Commission to Combat Commercial Sexual Exploitation and Trafficking in Persons (art. 7). Honduras also has a national plan on violence against women that was adopted in 2014 for the period covering 2014–2022 (Human Rights Council 2015, ¶¶60-61). Additionally, article 118-A of the Criminal Code criminalizes femicide. In Guatemala, the Law against Femicide and Other Forms of Violence against Women (*Ley contra el Femicidio y otras Formas de Violencia contra la Mujer*) was approved in April 2008. Prior to this law, the 1996 Law to Prevent, Punish, and Eradicate Family Violence (*Ley para Prevenir, Sancionar y Erradicar la Violencia Intrafamiliar*) addressed violence against women (Immigration and Refugee Board of Canada 2012).

26 In El Salvador, a variety of national laws advocates for children in different ways, "among them: The General Education Law (1996); the Law Against Intrafamilial Violence (1996); the Penal Code (2007); the Juvenile Penal Code (1994); the Law for Access to Public Information (2010); the General Medicine Law (2012); the Vaccine Law (2012); the General Youth Law (2012); the Special and Comprehensive Law for a Life Free from Violence (2010); the Law for Equality, Equity and the Eradication of Discrimination Against Women (2011); the Organic Laws of the PGR (*Procuraduria General de la República*, Procurator General of the Republic), FGR (*Fiscal General de la República*, General Prosecutor of the Republic), and PNC (*Policía Nacional Civil*, National Civil Police); the PDDH Law; the Organic Judicial Law; and the Law on Breastfeeding (2013); and Law for the Integral Protection of Children and Adolescents (LEPINA) (2009). In addition, regulations of the protection system were established in 2012 for CONNA, the courts for the Protection of Children and Adolescents, and the Shared Protection Network (*Red de Atención Campartida* (RAC))" (Musalo et al. 2015, 184). In 2003, Guatemala passed the PINA (*Protección Integral de la Niñez y Adolescencia*) Law. According to article 1, "the law is a legal instrument for family integration and social promotion that seeks the comprehensive and sustainable development of Guatemalan children and adolescents within a democratic framework and with unrestricted respect for human rights" (ibid., 150). Honduras also has a significant legal framework for the protection of children, which are "set out in a range of instruments, including: The Code for the Protection of Children and Youth (*Código de la Niñez y la Adolescencia de Honduras*, 1996); The Law for the Protection of Honduran Migrants and their Families (*Ley de Protección de los Hondureños Migrantes y sus Familiares*, 2013); The Organic Law of the Honduran Institute for Children and Families (*Orgánica del Instituto Hondureño de la Niñez y Familia*, IHNFA 1997); The Protocol for the Repatriation of Children and Adolescent Victims of or Vulnerable to Trafficking in Persons, (*Protocolo para*

as is the situation with laws addressing violence against women, there is a wide breach between what the laws provide for, and what they have actually accomplished in terms of protecting children from harm or punishing those who violate the rights of children (see Musalo et al. 2015, 116, 150-52,169-70).

Poverty, Inequality and the Resulting Social Exclusion

The Northern Triangle countries have some of the highest levels of poverty in the Western Hemisphere (Stinchcomb and Hershberger 2014, 16). In 2011, the World Bank reported that "more than 60 percent of Hondurans, more than 50 percent of Guatemalans, and 30 percent of Salvadorans live below the poverty line" (GAO 2015, 2). The poverty is combined with extreme economic inequalities (GAO 2015, 2-3). The top 20 percent of the population of the three countries receives more than 50 percent of the income (GAO 2015, 3).

History provides some explanation for these extreme levels of poverty and inequality; they are — to some degree — the "legacies of centuries old oligarchic rule [and] decades of civil war[,]" as described in section II above (Stinchcomb and Hershberger 2014, 16). In the Northern Triangle countries hurricanes, earthquakes, floods, volcanic eruptions, and landslides add to the poverty and economic inequalities that traverse the region (see Wisner et al. 2004).[27]

Recent reports focusing on child migration from the Northern Triangle countries and its root causes have noted that social exclusion[28] deprives children of the most basic necessities, such as access to housing, education, food, and health care (Musalo et al. 2015, 80-81; 129-130; 169-170). Certain segments of the population may be more affected by the deep poverty; for example, in Guatemala almost 42 percent of children suffer from chronic malnutrition, but in the northwest highlands, which has a large indigenous population, the malnutrition rate is almost 65 percent (ibid., 13). This desperate poverty prompts many children to migrate in search of a home where they might have their basic needs met.

III. A Repeat of the Past: US Policy towards Salvadorans and Guatemalans in the 1980s

In the 1980s when many Salvadorans and Guatemalans were fleeing their countries' brutal civil wars, the United States did its best to prevent them from reaching our borders. The US government's response to those who did manage to arrive was to discourage them from

la Repatriación de Niños, Niñas y Adolescentes Victimas o Vulnerables a la Trata de Personas, 2006); The Executive Decree for the Creation of the Department on Children and Families (*Decreto Ejecutivo para la creación de la Dirección de Niñez, Adolescencia y Familia*, DINAF, 2014" (ibid., 95-96).

27 Following a series of natural disasters between 1998 and 2001, the United States granted temporary protected status (TPS) to Honduran nationals (extended to January 5, 2018) and Salvadoran nationals (extended to September 9, 2016), granting nationals of these countries the opportunity to live and work legally in the United States (Stinchcomb and Hershberger 2014, 10-11).

28 The term "social exclusion" is used to describe the situation which arises when poverty and gross inequalities are combined with "scarce jobs and the absence of state institutions" that could supply "minimal resources or services" (Wisner et al. 2004, 17). Individuals are "estrange[ed] from both labor markets and state services which is far more destructive than poverty or inequality per se" (ibid., 17).

making claims to asylum, and when asylum applications were filed, to deny the claims at record rates. This was later rectified after litigation. Now, instead of learning from them, the US policies of the past appear to be the script for its current policies.

1. Constructive Refoulement

As discussed in section I, the United States has engaged in constructive *refoulement* by pressuring the Mexican government to prevent Central American asylum seekers from reaching the southern border with Mexico. As the statistics demonstrate, Mexico has complied, showing a substantial increase in its deportation of migrants from Central America.

This approach is a page from US policy during the Central American refugee crisis of the 1980s. As detailed in Bill Frelick's seminal article, "Running the Gauntlet: The Central American Journey in Mexico," the United States engaged in constructive *refoulement* during that earlier period too, by engaging in policies intended to "interdict Central Americans before they ever reached the US border" (Frelick 1991, 211).

Frelick's article quotes from an internal Immigration and Naturalization Service (INS) memo, which details how it would "[p]ress the State Department and . . . INS liaison to secure the assistance of Mexico and Central American countries to slow down the flow of illegal aliens into the United States" (Frelick 1991, 211). In addition to the INS and State Department, the Central Intelligence Agency (CIA) and the Defense Intelligence Agency were also involved. Interdiction of fleeing Central Americans was accomplished through shared intelligence and increased enforcement along the migration corridor.

Statistics demonstrated the relative "success" of this strategy, with parallels to the present day. The numbers of Salvadorans, Guatemalans, and Hondurans apprehended in the United States went down, while the number of apprehensions and deportations in Mexico went up. Between January 1989 and July 1990 Mexico summarily deported 165,000 Central American migrants, pushing them over the border to Guatemala. At this time the United States could not even hide behind the pretense that the migrants had been given the opportunity to seek protection in Mexico because Mexico was not yet a signatory to the 1951 Refugee Convention or its 1967 Protocol, and "[t]he status of refugee, as defined in international agreements, [did] not exist under Mexican law" (Friedland and Rodriguez y Rodriguez 1987, 53-55).

2. Deter and Discourage

Deterrence policies of today also mirror those implemented in the 1980s and 1990s. For example, the 1989 INS initiative dubbed "Operation Hold the Line," which consisted of increased border enforcement and expedited proceedings had as its objective "detention and quick deportation[.]" One of its explicit objectives was to deter Central American migration (Frelick 1991, 210-211). Similarly, the current policy of detaining women and children in remote detention facilities — not easily accessible to attorneys — coupled with

policies that accelerate their court proceedings[29] are intended to deter other migrants from coming to the United States.

Policies implemented in that time period went beyond deterring arrival; similar to what we see in the failures of expedited removal, discussed in section I, the legacy INS of the 1980s also engaged in actions intended to prevent the filing of claims for asylum for those who had reached the United States. These coercive INS policies were successfully challenged in a class action lawsuit on behalf of Salvadoran asylum seekers. The result was the issuance of a permanent injunction, under which the US Immigration and Naturalization Service (INS) was enjoined from forcing detainees to sign voluntary departure agreements, required to notify detainees of their rights to political asylum and to representation by counsel, and enjoined from transferring detainees who had secured attorneys to different detention centers.[30] The injunction was renewed in 2007 and 2009, and was more recently invoked on behalf of Salvadoran children who are part of the migrant surge.

3. Deny Protection

Salvadorans and Guatemalans seeking asylum in the 1980s were fleeing brutal civil wars in which — as has been documented — the clear majority of the human rights violations were committed by state actors rather than the guerrilla forces. In the case of Guatemala, the state engaged in genocide against its indigenous population. The killings, disappearances, and torture perpetrated by the governments of El Salvador and Guatemala were not random, but were targeted against actual (or perceived) political opponents — arguably bringing the individuals fleeing these practices within the ambit of the 1980 Refugee Act's protection. Notwithstanding the horrific level of abuses, and the apparent nexus between the acts of persecution and the victims' political opinions, the asylum grant rates for Salvadorans and Guatemalan during that time period were abysmally low, hovering below three percent (Gzesh 2006).

One need not look far for a number of explanations for these shamefully low grant rates. Perhaps foremost is the fact that the United States was a major supporter of the Salvadoran and Guatemalan governments, and it would not look good to implicitly admit — through the granting of asylum -- that US allies' military efforts, which we were funding, resulted in persecution of their citizenry. Secondarily, the proximity of these countries to the United States via a land route most likely raised fears of that if protection were awarded to some, others would follow.

The clear appearance of adjudicatory bias against Salvadorans and Guatemalans in the 1980s, demonstrated by the persistently low asylum grant rates, led to a nationwide class action lawsuit against the then-INS. *American Baptist Churches v. Thornburgh* (ABC) alleged a pattern and practice of discrimination in the adjudication of Salvadoran and Guatemalan claims for asylum and withholding of removal. The plaintiffs were engaged in extensive discovery when the INS chose to settle the case rather than to go forward with

29 These kind of expedited proceedings have been used against other disfavored nationality groups; the so-called "Haitian program" of 1978 was "designed specifically to adjudicate, and to deny as quickly as possible the asylum claims of Haitians" (Little 1983, 273).

30 *Orantes-Hernandez v. Thornburgh*, 919 F. 2d 549 (9th Cir. 1990).

litigation. A central aspect of the settlement was the INS's agreement to re-adjudicate the asylum and withholding of removal claims of every Salvadoran and Guatemalan class member whose case had been denied.

The settlement agreement is instructive in its core admissions. It states in relevant part:

> [F]oreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the fact that an individual is from a country whose government the United States supports is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; whether or not the United States Government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant has a well-founded fear of persecution; the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadoran and Guatemalans as applies to all other nationalities.[31]

Although the contemporary rejection of claims from Salvadorans, Guatemalans, and Hondurans lacks the clear foreign policy motivations that led to *ABC v. Thornburgh,* there are several parallels between the experiences of Central Americans during the 1980s and today that are worth noting.

First, during both time periods, the levels of violence and human suffering in the region have been indisputable. Second, efforts to deter rather than protect bona fide asylum seekers have characterized the policies undertaken. Third, and perhaps most significantly, there have been dramatically divergent views on the proper interpretation of the refugee definition.

During the 1980s, asylum advocates argued that interpretations of the law should be informed more by humanitarian ideals than by restrictionist objectives. Whether it was around issues of burden of proof,[32] or the meaning of "political opinion," they argued against rigid constructions and formalisms that would result in a denial of protection to those at great risk. Although asylum advocates won many cases, they were unable to prevent interpretations of the refugee definition that have had an extremely limiting impact on the parameters of protection.[33]

These limiting interpretations have continued, and — as in earlier times — appear to be less motivated by principled decision-making than by a desire to shut the door on certain kinds of claims, such as gender-based claims and claims arising from Central America. For instance, it has long been recognized that the "particular social group" ground in the refugee definition can be applied to protect persecuted groups not covered by the other four

31 *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Ca 1991).

32 *I.N.S. v. Stevic*, 467 US 407 (1983); *I.N.S. v. Cardoza-Fonseca*, 480 US 421(1987).

33 It is beyond the scope of this article to discuss the many junctures at which US law adopted definitions which diverged from international norms and severely limited protection. One example would be the US Supreme Court's ruling that "on account of" requires proof of persecutor's motivation (*I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992)). Another example would be the US Supreme Court's ruling that the risk and severity of persecution need not be balanced against the gravity of a crime committed, when applying the "serious non-political crime" bar to asylum and withholding (*I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

protected grounds. In a departure from prior precedent, as well as international guidance — the requirements for establishing a cognizable particular social group (PSG) have been modified, making it much more difficult to prove these claims.[34]

The majority of claims from the Northern Triangle countries are based on the PSG ground of the refugee definition. Protection in these cases has been greatly restricted as a result of the social distinction and particularity requirements.[35]

Until recently, a restrictive interpretive approach also characterized decision-making around claims for asylum based on domestic violence. The jurisprudence took a wrong turn back in 1999, with the BIA reversing an IJ's grant of asylum to a Guatemalan woman who had fled brutal domestic violence.[36] At that time, the outgoing Clinton administration attempted to set the law on the right track, proposing positive regulations in 2000, and vacating the *R-A-* decision in 2001 (Musalo 2010). Notwithstanding these measures, it took a legal battle of more than 15 years to obtain a precedent decision, *Matter of A-R-C-G-*, establishing that women fleeing domestic violence come within the refugee definition.[37] Adjudicators continue to resist the application of this precedent, which has resulted in arbitrary and inconsistent decision-making (Bookey 2016, 19). Although the domestic violence claims are not unique to Central America, they make up a significant percentage of the surge cases. It is one bright spot in a somewhat bleak landscape that there is positive jurisprudence applicable to these claims, given their prevalence among Central American claims.

IV. Recommendations for US Policy

The Obama Administration's deterrence-based approach to Central American refugees ignored the reality of the humanitarian crisis south of the US-Mexico border and violates US international and domestic legal obligations. Aggressive deterrence tactics have failed to address the root causes of migration — as reflected in heightened numbers of women and children from the Northern Triangle who continue to arrive — while leading to serious human rights abuses against bona fide asylum seekers. This faulty response also

34 *Matter of Acosta*, the landmark 1985 ruling defining particular social group (PSG), required that the characteristics defining the group be "immutable or fundamental." Beginning in 2006, and without explanation, the BIA imposed the additional requirements of "social visibility" and "particularity" which made claims based on PSG much more difficult to establish (Musalo et al. 2011, 616-617). The incorporation of these new requirements has been frequently criticized (see Nestrud 2012), but the BIA position has been upheld by many circuit courts of appeals (*Castillo-Arias v. US Atty'y Gen*., 445 F.3d 1190 (11th Cir. 2006); *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012)).

35 *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (holding that neither youth who refused recruitment into a gang nor their family members constitute a particular social group); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) (holding that membership in a criminal gang cannot constitute membership in a particular social group); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (holding that an "immutable characteristic" must meet the requirement of "particularity" and "social distinction" to ensure that the proposed social group is perceived as a distinct and discrete group by society, although this does not require literal or "ocular" visibility); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) (holding that former members of a particular gang who have renounced their gang membership does not qualify as a particular social group because the designation lacks particularity and is also too broad and subjective).

36 *Matter of R-A-,* 22 I. & N. Dec. 906 (BIA 1999)

37 *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

contravenes the United States' moral duty to address its historical role in the Northern Triangle's humanitarian crisis, as well as its moral leadership in refugee and human rights protection. We recommend that the United States immediately take the following steps:

- **Recognize the humanitarian crisis occurring within the Northern Triangle countries and the legitimate need of individuals from these countries for refugee protection.** The United States should immediately recognize those fleeing from El Salvador, Honduras, and Guatemala as a refugee population and tailor all policies in accordance with a protection-based approach, informed by humanitarian principles and domestic and international refugee obligations. Failure to do so has led to a raft of misinformed, abusive policies by US authorities as well as law enforcement officials in Mexico and Central America. Taken together, such policies violate myriad rights of refugees, including their fundamental right to *non-refoulement*. US government action must reflect rather than contravene the internationally- and domestically-recognized right of individuals to seek asylum.

- **Cease funding enforcement efforts aimed at stopping the flow of refugees through Mexico and the Northern Triangle countries, and shift funding to protection efforts.** The US government should immediately cease funding, training, and encouraging the governments of Mexico, Honduras, El Salvador, and Guatemala to interdict asylum seekers. Aggressive enforcement action preventing refugees from journeying north to seek protection risks the return of migrant children and families to persecution or torture. Funding that promotes military and police action against bona fide asylum seekers should end entirely. Funding for immigration authorities should shift to support the capacity of Mexico and other countries to screen migrants for protection needs and vulnerabilities and to strengthen countries' asylum systems, including the provision of full due process protections.

- **End family detention.** DHS must immediately cease its inhumane and misguided deterrence strategy of locking away asylum seeker children and their parents in family detention. There is simply no humane way to incarcerate refugee children. Depriving children of their liberty in remote, for-profit, prison-like detention centers is both morally repugnant and illegal. Numerous studies have shown alternatives to detention to be effective in ensuring appearance at court hearings (Noferi 2015; MRS USCCB and CMS 2015).[38] Family detention serves no legitimate purpose — it has not in fact deterred refugee families from fleeing for their lives — and has caused direct harm to children's mental, emotional, and physical wellbeing.

- **End raids of Central American families and children.** Raids of Central American families and children have terrorized immigrant communities, spreading fear, misinformation, and trauma. As a result of raids, immigrant children and trauma survivors have even ceased seeking medical treatment and attending school. The raids raise serious constitutional concerns and have also resulted in the return of bona fide

38 Alternatives to detention programs have extremely high rates of compliance. One study found that, from 2011 to 2013, 95 percent of participants in the "full-service" program offered by the ICE Intensive Supervision Appearance Program (ISAP) appeared at their scheduled removal hearings (Noferi 2015, 2). Additionally, a 2000 study by the Vera Institute of Justice found an 83 percent rate of full court appearance among asylum seekers found to have a credible fear via the expedited removal process (Noferi 2015).

asylum seekers who never had a chance to present their claims in court. DHS should cease these raids and focus limited law enforcement resources on more appropriate priorities for removal — not vulnerable mothers and children fleeing persecution.

- **End the use of expedited removal and reinstatement of removal against asylum seekers from Central America.** DHS should immediately cease using both expedited removal and reinstatement proceedings for all asylum seekers from Central America. Curtailed procedures are neither appropriate nor necessary in light of the humanitarian crisis in the region and the bona fide nature of asylum claims arising from El Salvador, Honduras, and Guatemala. Credible fear and reasonable fear screening processes are too flawed to permit meaningful screening for women and children fleeing persecution and thus using these processes results in *refoulement* of refugees in violation of law. To the extent that individuals lack meritorious claims, normal immigration procedures in immigration court can ensure removal of those with no relief. In particular, DHS should never subject children to expedited screening, even when they arrive with families. Child cases require an appropriate setting, adequate time, and heightened safeguards to ensure correct outcomes. Expedited removal of children arriving with families, by its very nature, provides none of these necessary protections.

- **Cease to accelerate immigration proceedings for unaccompanied children and adults with children, including asylum interviews of children.** Accelerating cases of vulnerable asylum seekers, and in particular families and unaccompanied children, places them at risk of removal to persecution and harm. "Rocket dockets" create serious barriers to obtaining counsel, particularly since many of the lawyers are representing clients on a pro bono basis, and impede the ability of those fortunate enough to find attorneys to adequately prepare their cases. The Executive Office for Immigration Review (EOIR) should cease to accelerate the initial court hearings of children and families and ensure that immigration judges grant appropriate continuances to individuals seeking counsel. In addition, US Citizenship and Immigration Services should not accelerate the asylum interviews of unaccompanied children unless requested to do so by the applicant (USCIS 2015). Children's cases require careful development over time, as attorneys need to establish rapport and build trust, particularly with children who have suffered trauma or gender-based violence and are reluctant to reveal abuse to people they do not know well.

- **Analyze asylum claims in a manner consistent with international law and guidance on the proper definition of a refugee.** The United States should immediately and publicly clarify that claims based on violence by gangs and organized criminal syndicates may be a basis for asylum, and should cease adopting contrary positions before the federal courts and within its own agencies. As a matter of law, asylum determinations must be made on a case-by-case basis, and numerous courts have granted claims based on violence at the hands of criminal gangs. In addition, the administration should adopt positions in litigation and/or issue regulations that clarify asylum standards consistent with international law and guidance. This should include clarifying that membership in a particular social group requires only that members share an immutable or fundamental characteristic.

- **Expand and fund access to counsel for asylum seekers, and in particular Central American children and families.** The administration should expand funding for counsel for asylum seekers in general, and in particular for Central American children and families. Studies have shown that counsel is critical to the outcomes of asylum cases. Unaccompanied children with counsel are five times more likely to obtain asylum or other relief than unrepresented children; and families with counsel are *fourteen* times more likely to prevail than unrepresented families (TRAC 2015a; TRAC 2015b). Although we commend the Obama administration for having provided funding for many unaccompanied children in removal proceedings, the United States should increase the scope and scale of funded representation. Children, both unaccompanied and with families, should never be forced to defend themselves without counsel against a government attorney. In addition, in light of the complexity of asylum law, the defensive nature of immigration court proceedings, and the bona fide nature of claims from the region, the government should expand funding for asylum seekers from Central America in general.

- **Fund programs that address root causes of migration in El Salvador, Honduras, and Guatemala, and in particular those that ameliorate the social exclusion, lack of social support, and risk factors underlying violence and persecution.** Funding for the Northern Triangle countries has largely focused on law enforcement and military backing, such as through the Central America Regional Security Initiative (CARSI). This approach raises significant concerns due to well-documented human rights abuses committed by military and police. Moreover, security-based approaches by and large fail in the long-term because they address only the symptoms rather than the underlying conditions that allow violence and persecution to flourish. Funding should instead focus on diminishing poverty and its resulting social exclusion; increasing employment and educational opportunities; ameliorating existing societal inequality and discrimination; building community-based resources; strengthening child welfare protection systems; and improving judicial capacity and governmental transparency.

- **Improve, expand, and strengthen in-country refugee processing for individuals in Guatemala, Honduras, and El Salvador.** The United States should expand in-country processing for both adults and children in need of refugee protections in the Northern Triangle countries. In particular, it should expand the CAM Program to include any child who would meet the definition of a refugee, including children who do not have parents with legal status in the United States. All children in need of refugee protection — irrespective of their parents' status — are vulnerable to serious abuse in the increasingly dangerous journey north through irregular channels. By excluding many of these children based on the immigration status of their parents, the CAM Program fails to address the protection needs of children in El Salvador, Honduras, and Guatemala. In addition, in-country processing for adults and families should be expanded. The recent expansion of the CAM Program and the collaborations with the government of Costa Rica, UNHCR, and IOM are encouraging developments; however, the US government should broaden refugee processing and protection in the region further.

- **Grant temporary protected status to individuals from Guatemala, Honduras, and El Salvador.** Although we urge the full recognition and protection of those fleeing persecution from the Northern Triangle as refugees through the above measures, DHS

should also enact temporary protections to ensure that no individuals are deported back to persecution. Specifically, the United States should designate the nationals of Guatemala, Honduras, and El Salvador for temporary protected status (TPS). TPS provides relief from the risk of immediate deportation as well as work authorization (although it does not provide a path to more permanent protection and benefits, as does asylum).[39] Currently, some nationals of Honduras and El Salvador hold TPS, but only if they entered before 1999 and 2001, respectively. The administration should designate all three Northern Triangle countries for TPS status, including for recent entrants.

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39 DHS may designate a foreign country for TPS when civil strife or the effects of a natural disaster make it unsafe for nationals to return home. Once a person from a designated country has been granted TPS, he or she cannot be detained by DHS on the basis of his or her immigration status. A person with TPS may also obtain an employment authorization document and may be granted travel authorization. However, TPS is a temporary benefit that does not lead to lawful permanent resident status or provide any other immigration status. Once DHS deems the country conditions safe again the TPS will expire. See 8 U.S.C. 1254a.

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