

# IS THERE A SAFE HAVEN FOR ASYLEES ELSEWHERE? ASSESSING THE INTERNATIONAL LEGAL IMPLICATIONS OF TRUMP-ERA REMOVAL PRACTICES

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## ABSTRACT

*Since its emergence following the end of the Second World War, the principle of non-refoulement has served as a critical guiding authority for both international and domestic immigration practices, by requiring that no person be removed to a country where they are likely to be persecuted or tortured on the basis of certain legally protected grounds. The principle of non-refoulement—as embodied in several international agreements and as crystalized in customary international law—creates a legal right of nonreturn for millions of forcibly displaced persons. It also establishes certain responsibilities for countries to ensure the protection of these individuals. The United States has recognized these rights and responsibilities by signing various international agreements and codifying the principle of non-refoulement in domestic immigration statutes.*

*Despite the decades-long practice of the United States to prevent the refoulement of asylees, the Trump administration took critical steps to restrict the codified right of nonreturn for Central and Southern American migrants arriving at the border. Most notably, the Justice Department and Department of Homeland Security established Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador and issued the Third Country Asylum Rule. Both policies made the prospect of refoulement increasingly likely for the thousands of asylees waiting at the U.S. border. This Note argues that U.S. courts should evaluate the Third Country Asylum Rule and the Central American Asylum Cooperative Agreements in light of international legal sources, including the rich history of interpretation by international jurists and scholars. Such consideration would ensure the continued preservation of the principle of non-refoulement as Congress expressly intended with passing the Refugee Act of 1980 and the Foreign Affairs Reform and Restructuring Act of 1998. While both policies, as implemented by the federal agencies of the Trump administration, violated domestic and international law, the Executive Branch maintains the authority to restrict the right to claim asylum so long as the regulatory policy would not violate the principle of non-refoulement.*

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## INTRODUCTION

The United States has long been revered in the international community as a safe “haven for immigrants”<sup>1</sup> by providing security and legal guarantees to migrants forced to flee from countries around the world.<sup>2</sup> Under American jurisprudence, the right to claim asylum is generally available to any foreign national who is physically present in the United States or who arrives at a U.S. port of entry, and who has suffered past persecution or has a “well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>3</sup>

Despite being a nation shaped by immigrants, the U.S. immigration system has come under scrutiny in recent years. In particular, the Trump administration took steps to expedite U.S. removal proceedings without full consideration of the potential international implications such actions would have, including the return of individuals to countries where they can be tortured or otherwise persecuted.<sup>4</sup> This Note examines two Trump-era policies—the Central American Asylum Cooperative Agreements and the Third Country Asylum Rule—that are each likely to result in violations of established principles of international law if they are re-implemented moving forward.<sup>5</sup>

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<sup>1</sup> See Paul Wickham Schmidt, *An Overview and Critique of US Immigration and Asylum Policies in the Trump Era*, 7 J. ON MIGRATION & HUM. SEC. 92, 92 (2019).

<sup>2</sup> See generally THOMAS ALEINIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 793–94 (8th ed. 2016) (providing a general history of asylum in the United States).

<sup>3</sup> Immigration and Nationality Act (INA), 8 U.S.C. § 1158(a)(1); 8 C.F.R. § 208.13(b)(1) (2021) (providing that a finding of past persecution establishes a rebuttable presumption that the applicant would face a future threat of persecution).

<sup>4</sup> See Schmidt, *supra* note 1, at 92–93; see, e.g., Caitlin Dickerson, *Migrant Families Were Confused When U.S. Expelled Children Into Mexico*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/11/03/us/migrant-children-expulsions.html>, archived at <https://perma.cc/52FL-8UW5> (describing how the removal practice of the United States violates its diplomatic agreement with Mexico not to expel unaccompanied minors into Mexico). The Biden administration has taken steps to reverse Trump-era immigration restrictions, including rescinding the two policies at issue in this Note. See Jens Manuel Krogstad & Ana Gonzalez, *Key Facts about U.S. Immigration Policies and Biden's Proposed Changes*, PEW RESEARCH CENTER (Jan. 11, 2022), <https://www.pewresearch.org/fact-tank/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/>, archived at <https://perma.cc/2E58-QBRL>. Although the Biden administration planned an overhaul of the U.S. immigration system, the politics of the U.S.-Mexico border “have clouded many of its immigration decisions,” leaving the administration’s stance on ensuring long-term humanitarian relief for migrants unclear. See Rafael Bernal & Rebecca Beitsch, *Rift Grows Between Biden and Immigration Advocates*, THE HILL (Jan. 20, 2022), <https://thehill.com/latino/590492-rift-grows-between-biden-and-immigration-advocates>, archived at <https://perma.cc/CR9C-Z5C2>.

<sup>5</sup> See, e.g., Press Release, Inter-Am. Comm’n H.R., *infra* note 144. Each policy has since been terminated under the Biden administration, but it “could take months, or even many years,” for the U.S. immigration system to fully account for these retractions in the adjudication of applications for asylum in the United States. See Alan Gomez & Daniel Gonzalez, *Biden might need years to reverse Trump's immigration policies on DACA, asylum, family separation, ICE raids, private detention and more*, USA TODAY (Nov. 13, 2020), <https://www.usatoday.com/story/news/nation/2020/11/12/how-biden-reverse-trump-immigration-policies/6228892002/>, archived at <https://perma.cc/FW45-PKB9> (“You can come in on day one

First, under the Immigration and Nationality Act (INA), the Attorney General (AG)<sup>6</sup> and the Secretary of Homeland Security (Secretary)<sup>7</sup> each possess long-standing authority to remove noncitizens to a “safe third country” that is a party to an existing bilateral agreement—a Safe Third Country Agreement or Asylum Cooperative Agreement (ACA)<sup>8</sup>—with the United States.<sup>9</sup> The United States has previously established agreements with four countries: Canada,<sup>10</sup> Guatemala,<sup>11</sup> Honduras,<sup>12</sup> and El Salvador.<sup>13</sup> In 2020, a Canadian Federal Court enjoined Canadian agencies from enforcing the bilateral 2004 ACA with the United States due to U.S. policies that have created “risks in the form of detention, *refoulement*, and other violations of [noncitizens’] rights.”<sup>14</sup> Despite the fact that nationals from Guatemala,

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and . . . issue memos that will reset the world . . . But . . . [c]an you undo the damage?”). *But see* Rodríguez, *infra* note 24 (noting the Biden State Department’s decision to suspend and terminate the Central American ACAs, notwithstanding the fact that the Guatemala ACA had already been implemented for several months). Lingering uncertainty remains regarding how, and to what extent, the Biden administration may respond to immigration issues in the immediate future, in part because of court rulings affirming positions taken by the Trump administration and the slim party majority in Congress which is insufficient to secure necessary, long-term immigration reform. *See* Maria Sacchetti, *Administration’s Contradictions on Immigration Overshadow His Achievements*, WASH. POST (Jan. 19, 2022), [https://www.washingtonpost.com/national-security/biden-border-policy/2022/01/19/8b75ccf2-7932-11ec-83e1-eaef0fe4b8c9\\_story.html](https://www.washingtonpost.com/national-security/biden-border-policy/2022/01/19/8b75ccf2-7932-11ec-83e1-eaef0fe4b8c9_story.html), archived at <https://perma.cc/CQ6L-J9ZA>.

<sup>6</sup> 8 U.S.C. § 1158(a)(2)(A) (providing authority for the Attorney General to make determinations regarding removals to a designated “safe third country”); *see generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codifying the “Safe Third Country” exceptions under the INA).

<sup>7</sup> 8 U.S.C. § 1103(a)(1) (defining the Secretary’s authority to administer and enforce federal immigration laws as it pertains to “all questions of law” but noting that the Attorney General’s determinations “shall be controlling”).

<sup>8</sup> Although both prohibit removal to the migrant’s country of origin or of last habitual residence, ACAs differ from the Third Country Asylum Rule as the former excludes unaccompanied minors and applicants engaging in fraud or willful representation related to a visa from its coverage. *See* Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994, 63996 n.4, 63998 n.6 (Nov. 19, 2019) [hereinafter Implementing ACAs].

<sup>9</sup> 8 U.S.C. § 1158(a)(2)(A).

<sup>10</sup> *See* Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69480 (Nov. 29, 2004) [hereinafter Canada ACA].

<sup>11</sup> *See* Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation in the Examination of Protection Claims, 84 Fed. Reg. 64095 (Nov. 20, 2019) [hereinafter Guatemala ACA].

<sup>12</sup> *See* Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 25462 (May 1, 2020) [hereinafter Honduras ACA].

<sup>13</sup> *See* Agreement Between the Government of the United States and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 83597 (Dec. 22, 2020) [hereinafter El Salvador ACA].

<sup>14</sup> *See* Canadian Council for Refugees v. Canada [2020] F.C. 770. Shortly after the federal court’s decision, the Canadian government filed an appeal that remains under review at the time of this publication. The agreement between Canada and the United States remains in effect pending the Canadian federal court’s disposition of the appeal. *See* CANADA-U.S. SAFE THIRD COUNTRY AGREEMENT, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html>, archived at <https://perma.cc/CC2R-W433>.

Honduras, and El Salvador represent most individuals encountered at the U.S. southern border, the Trump administration established ACAs with the three Central American countries.<sup>15</sup> Several international human rights organizations have described the demographics at the border as signs of the “concerning realities” that each “safe third country” lacked long-term safety and institutional capacity to handle the projected influx of removable persons under U.S. asylum policies.<sup>16</sup>

Ultimately, the Biden administration announced the suspension and termination of the Central American ACAs on February 6, 2021, with the intent of working with the three countries’ governments to “establish a cooperative, mutually respectful approach to managing migration across the region.”<sup>17</sup> While these agreements are no longer in effect, the ACAs have left an everlasting impact on noncitizens who have already been removed from the United States.<sup>18</sup> Furthermore, future administrations could reimplement this statutory mechanism, especially because there is no existing case law to constrain an ACA’s scope or to dispute an agreement’s legality.<sup>19</sup>

Second, on July 16, 2019, the U.S. Department of Justice (DOJ) and the Department of Homeland Security (DHS) issued a joint Interim Final Rule, which created an additional restriction on asylum eligibility.<sup>20</sup> This Third

<sup>15</sup> *Unprecedented Migration at the U.S. Southern Border: The Year in Review, Hearing Before the S. Comm. on Homeland Sec. & Gov’t Aff.*, 116th Cong. 4 (2019) (statement of Mark Morgan, Acting Comm’r, U.S. Customs & Border Prot.).

<sup>16</sup> AM. FED’N OF LAB. & CONG. OF INDUS. ORGS., ET AL., FORCED RETURN TO DANGER: CIVIL SOCIETY CONCERNS WITH THE AGREEMENTS BETWEEN THE UNITED STATES AND GUATEMALA, HONDURAS, AND EL SALVADOR 4 (2019); see, e.g., Sharyn Alfonsi, “*Our whole economy is in shatters*”: *El Salvador’s President Nayib Bukele on the problems facing his country*, CBS N??s (Dec. 15, 2019) [hereinafter Salvadoran President’s interview], <https://www.cbsnews.com/news/el-salvador-president-nayib-bukele-the-60-minutes-interview-2019-12-15/>, archived at <https://perma.cc/PG7J-GV6X> (responding to whether his country is prepared to accept asylees removed pursuant to El Salvador’s ACA with the United States, President Bukele responded that they do not have asylum capabilities and that current standards do not provide asylum capacity). But see Nick Miroff, *El Salvador ready to accept asylum seekers sent from U.S. border, DHS says*, N.Y. TIMES (Dec. 16, 2020), [https://www.washingtonpost.com/immigration/el-salvador-asylum-us-border/2020/12/15/2a1f682a-3f2a-11eb-a402-fba110db3b42\\_story.html](https://www.washingtonpost.com/immigration/el-salvador-asylum-us-border/2020/12/15/2a1f682a-3f2a-11eb-a402-fba110db3b42_story.html), archived at <https://perma.cc/N98C-MAQD>.

<sup>17</sup> Press Release, U.S. Dep’t of State, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021), <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>, archived at <https://perma.cc/MES9-2T6R>.

<sup>18</sup> See Kevin Sieff & Mary Beth Sheridan, *The U.S. sent Central American asylum seekers to Guatemala to seek refuge. None were granted asylum, report says.*, N.Y. TIMES (Jan. 16, 2021), [https://www.washingtonpost.com/world/the-americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207\\_story.html](https://www.washingtonpost.com/world/the-americas/asylum-migrants-trump-guatemala/2021/01/15/aeae4b84-56bc-11eb-a08b-f1381ef3d207_story.html), archived at <https://perma.cc/WM96-849N> (highlighting the removal of at least 945 asylum seekers, mostly from El Salvador and Honduras, to Guatemala as of January 2021 and the fewer than 40 who even bothered to try seeking asylum in Guatemala due to major backlogs in adjudicating protection claims and ongoing security concerns in the country).

<sup>19</sup> See generally 8 U.S.C.A. § 1158 (a)(2)(A) (West) (providing the framework for concluding an asylum cooperative agreement with a “safe third country”).

<sup>20</sup> See Asylum Eligibility and Procedural Modification, 84 Fed. Reg. 33829 (July 16, 2019) (to be codified at 8 C.F.R. 208) [hereinafter Asylum Eligibility].

Country Asylum Rule (Rule) establishes a general prohibition on migrants who enter or attempt to enter the United States unless the individual first applied for legal protection in a transit third country during their journey to reach the U.S. border.<sup>21</sup> The Rule is applicable even if the individual can establish a “well-founded fear of persecution” on account of a protected ground.<sup>22</sup> Despite legal challenges to enjoin its enforcement,<sup>23</sup> the Rule continued to be in effect during the Trump Administration while litigation over its lawfulness proceeded.<sup>24</sup>

Federal trial and appellate courts primarily evaluated whether the Rule comported with domestic law, particularly the Administrative Procedures Act (APA).<sup>25</sup> Despite the substantial deference normally afforded to agency decisions,<sup>26</sup> federal courts struck down the Rule because the agencies failed to provide a reasonable basis for their “methodology of determining that a third country is safe and asylum relief is sufficiently available, such that the failure to seek asylum there casts doubt on the validity of an applicant’s

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<sup>21</sup> *Id.* at 33840.

<sup>22</sup> *Id.* at 33837.

<sup>23</sup> Human rights organizations immediately challenged the rule in U.S. federal court. *See, e.g.,* Cap. Area Immigrants’ Rts. Coal. v. Trump, 471 F. Supp. 3d 25, at 31–32 (D.D.C. 2020); East Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 838 (9th Cir. 2020), *aff’d* 385 F. Supp. 3d 922, 951 (N.D. Cal. 2019). The District Court for the Northern District of California issued a nationwide preliminary injunction to prevent its enforcement. *See* East Bay Sanctuary Covenant, 385 F. Supp. 3d at 929–31. The U.S. Court of Appeals for the Ninth Circuit later upheld the lower court’s ruling but narrowed the injunction’s scope to the region covered under the Circuit’s jurisdiction. *Id.* The Supreme Court of the United States ultimately stayed the injunction while the appellate court considered whether to review the case. *See* Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019).

<sup>24</sup> *See* BEN HARRINGTON, CONG. RSCH. SERV., LSB10402, SAFE THIRD COUNTRY AGREEMENTS WITH NORTHERN TRIANGLE COUNTRIES: BACKGROUND AND LEGAL ISSUES 1 (2020); *accord* Kevin Sieff, *The U.S. is putting asylum seekers on planes to Guatemala—often without telling them where they’re going*, WASH. POST (Jan. 14, 2020), [https://www.washingtonpost.com/world/the\\_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala-often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-1ff-e48c1d59a4a1\\_story.html](https://www.washingtonpost.com/world/the_americas/the-us-is-putting-asylum-seekers-on-planes-to-guatemala-often-without-telling-them-where-theyre-going/2020/01/13/0f89a93a-3576-11ea-1ff-e48c1d59a4a1_story.html), *archived at* <https://perma.cc/2PBE-BZ45>; *see also* Miroff, *supra* note 16. *But see* Sabrina Rodriguez, *Biden administration takes steps to dismantle Trump-Era asylum agreements*, POLITICO (Feb. 6, 2021), <https://www.politico.com/news/2021/02/06/biden-dismantle-trump-era-asylum-agreements-466565>, *archived at* <https://perma.cc/949A-2PMS> (“The announcement [by the Biden Administration] means the termination of the three asylum cooperative agreements . . . [but] the agreement with Guatemala [has] already [been put] in effect”).

<sup>25</sup> *See* East Bay Sanctuary Covenant, 964 F.3d at 838, *aff’d*, 385 F. Supp. 3d at 951; *see also* Cap. Area Immigrants’ Rts. Coal., 471 F. Supp. 3d at 51 (reviewing the Executive’s foreign affairs function under the APA). The Ninth Circuit Motion’s Panel recognized potential international legal implications of the rule’s implementation, suggesting such action would be “unreasonable” based on existing multilateral treaties of the United States. *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1274–75 (9th Cir. 2020). The Panel does not, however, offer any legal basis for its conclusion; thus, this Note considers the treaty-based obligations of the United States to evaluate how the legal rights of a migrant claimant would be affected in light of the two policies at issue.

<sup>26</sup> *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation[s] . . . [that] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”).

claim.”<sup>27</sup> In line with federal courts recommendations, the Biden Justice Department formally rescinded the Rule on May 14, 2021.<sup>28</sup>

While reviewing the agencies’ basis for implementing the Rule and ACAs, federal courts did not assess their legality, in light of the nation’s international obligations to avoid committing refoulement.<sup>29</sup> This judicial practice reflects the deeply embedded dualist notion that sources of international law, such as international treaties or norms of customary international law,<sup>30</sup> are generally not binding on domestic courts unless the specific provision is per se enforceable as part of a self-executing treaty<sup>31</sup> or is codified under an implementing statute.<sup>32</sup> This phenomenon is exemplified in the United States’ treatment of its non-refoulement obligations as acceded to in the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol)<sup>33</sup> and as ratified in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>34</sup>

This Note argues that the Trump Executive Branch infringed upon the codified right of non-refoulement by implementing the Central American ACAs and the Third Country Asylum Rule because the federal agencies failed to ensure that persons removed to a third country would be safe to seek legal protection there. In reaching this conclusion, this Note advocates for international law to have a greater role in U.S. courts’ evaluation of immigration policies implicating the nation’s treaty-based obligations.

This Note begins with a brief overview of the nation’s international obligations regarding asylum and the general right to claim asylum in the United States. Most countries, including the United States, give particular consideration to the international principle of non-refoulement, which Con-

<sup>27</sup> See *East Bay Sanctuary Covenant*, 385 F. Supp. 3d at 951–52; see also *Cap. Area Migrants’ Rts. Coal.*, 471 F. Supp. 3d at 48.

<sup>28</sup> See Memorandum, Acting Dir. Jean C. King, EOIR, *Cancellation of Policy Memorandum 19-12* (May 14, 2021), <https://www.justice.gov/eoir/book/file/1394356/download>, archived at <https://perma.cc/KXF2-UWYA>.

<sup>29</sup> See *East Bay Sanctuary Covenant*, 964 F.3d at 859–60 (Miller, J., concurring in part) (reviewing the international principle of non-refoulement only as it pertains to the necessary factual determinations for the arbitrary and capricious analysis under the APA). *But see East Bay Sanctuary Covenant*, 950 F.3d at 1274–75 (preventing enforcement of the rule on the basis of APA violations while noting the concerns of the United Nations High Commissioner of Refugees that “the Rule runs afoul of three codified rules,” including the right to seek asylum and the principle of non-refoulement).

<sup>30</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 551 (2004) (demonstrating the Supreme Court’s inability to review claims regarding the extent of a claimant’s rights under “customary usages of war” or international treaties that are non-self-executing).

<sup>31</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (referring to the Convention Against Torture as a non-self-executing treaty because it required implementing legislation to have legal effect).

<sup>32</sup> *Id.*; see generally RESTATEMENT (THIRD) OF FOREIGN REL. L. OF THE U.S. § 111(4)(c) (AM. L. INST. 1987) (An international agreement is “non-self-executing” if “implementing legislation is constitutionally required”).

<sup>33</sup> See United Nations Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter “Refugee Protocol”].

<sup>34</sup> United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, June 26, 1987, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 [hereinafter “CAT”].

gress codified into legislation to ensure that U.S. law provides victims of persecution and torture an avenue to seek protection in the United States.<sup>35</sup> This Note additionally considers how U.S. courts have interpreted the extent of the Executive's congressionally delegated authority in the immigration arena with a specific focus on the authority of the AG and the Secretary.

Given Congress's intent to bring U.S. asylum policy into conformity with the country's international obligations,<sup>36</sup> this Note further argues that U.S. courts should increasingly review the DOJ's and DHS's joint authority, and actions taken thereof, in light of certain international legal principles—drawing on customary international law, international court rulings, and legal scholarly works—to assess the extent to which the federal agencies have complied with the United States' international responsibilities.<sup>37</sup>

This Note concludes that, while the Central American ACAs violated the United States' obligations to prevent refoulement, the AG and the Secretary retain the authority to restrict the right to claim asylum by establishing ACAs with bona fide "safe third countries" that are able and willing to provide the security and legal safeguards required under both the INA and international law.<sup>38</sup> Further, with respect to the Third Country Asylum Rule, this Note argues that the AG and the Secretary may only promulgate such restrictive rules on the basis of factually-supported assurances that asylum seekers are unlikely to continue being persecuted and/or tortured if removed to the transit third country.<sup>39</sup> Finally, this Note considers a hypothetical claim by a Salvadorian national challenging the agencies' finding of removability to Guatemala pursuant to each immigration policy to apply this Note's framework and predict the success of non-refoulement violation in a U.S. court.<sup>40</sup>

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<sup>35</sup> See ALEINIKOFF, *supra* note 2, at 793; see also The Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, 112 Stat. 2681 (1988) (hereinafter "FARRA"); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (hereinafter "Refugee Act").

<sup>36</sup> See, e.g., ALEINIKOFF, *supra* note 2, at 794 (asserting that the Refugee Act was meant to bring the United States into line with its non-refoulement obligation as a party to the 1967 Refugee Protocol).

<sup>37</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) ("If one thing is clear from the . . . 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees"); FARRA, Pub. L. No. 105-227 at 2681-822 (directing the "appropriate agencies" to prescribe regulations to implement the non-refoulement obligations of the United States under Article 3 of CAT).

<sup>38</sup> 8 U.S.C. § 1158(a)(2)(A) (providing for a noncitizen's removal "pursuant to a bilateral or multilateral agreement" with a designated "safe third country"); cf. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (holding the agency's decision to eliminate the Deferred Action for Childhood Arrivals program could not stand because the process by which the agency reached its decision was arbitrary and capricious, although it is within the agency's authority to eliminate the immigration program).

<sup>39</sup> See 8 U.S.C. § 1158(a)(2)(A).

<sup>40</sup> See *Implementing ACAs*, 84 Fed. Reg. at 63997; see also *Asylum Eligibility*, 84 Fed. Reg. at 33829, 33840.

## I. BACKGROUND

In the United States, noncitizens may invoke the right of nonreturn in an effort to avoid their removal if the AG or the Secretary of Homeland Security decides that the noncitizen's "life or freedom would be threatened in that country" due to their "race, religion, nationality, membership in a particular social group, or political opinion."<sup>41</sup> This legal practice is rooted in the international principle of *non-refoulement*,<sup>42</sup> meaning not to "repeal," "drive back," or "expel."<sup>43</sup> As "the cornerstone of international refugee protection," the principle of non-refoulement has evolved into a customary norm that has become "binding on all States, including those which have not yet become a party to the . . . 1967 [Refugee] Protocol."<sup>44</sup>

The Executive Branch possesses the authority to administer and enforce all laws relating to the immigration and naturalization of noncitizens.<sup>45</sup> In particular, it has the authority to decide the extent to which it applies the right against refoulement, whether narrowly or broadly.<sup>46</sup> Despite this discretion, the Executive Branch has generally construed this right narrowly. The following sections discuss the emergence of non-refoulement as an international duty of the United States; the ways in which the U.S. Supreme Court has defined the international obligation in shaping domestic immigration practice; the general right to claim asylum in the United States; the Trump administration's attempts to restrict this right by implementing ACAs and the Third Country Asylum Rule; and the role international legal sources should have in assessing the legitimacy of "safe third country" determinations by executive agencies.

A. *The United States is bound by its international obligation of non-refoulement when restricting the right to claim asylum.*

Two international treaties have played a critical role in shaping asylee rights in the United States: (1) the United Nations Protocol Relating to the Status of Refugees<sup>47</sup> and (2) the United Nations Convention against Torture

<sup>41</sup> See 8 U.S.C.S. § 1231(b)(3)(A) (2005); accord 8 U.S.C. § 1103(a)(1). Although non-refoulement is a general form of relief, Congress has amended the INA several times to narrow the applicant pool by adding bars to asylum eligibility that include, for example, noncitizens convicted of an "aggravated felony," as defined under 8 U.S.C. § 1101(a)(43)(b).

<sup>42</sup> See ALEINIKOFF ET AL., *supra* note 2, at 793.

<sup>43</sup> *Sale*, 509 U.S. at 181.

<sup>44</sup> See U.N. High Comm'r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, para. 2, 15 (2007), <https://www.unhcr.org/4d9486929.pdf>, archived at <https://perma.cc/Q75W-UZ8P>.

<sup>45</sup> 8 U.S.C. §§ 1103(a)(1), (g)(1); see generally *Sale*, 509 U.S. at 171.

<sup>46</sup> See Schmidt, *supra* note 1, at 92, 95–96, 100 (describing the Executive Branch's "discretionary power" over immigration, including its ability to "revoke executive protections granted by previous administrations . . . and [to] step up arrests, detentions, and removals").

<sup>47</sup> See Refugee Protocol, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577.



and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>48</sup> Beyond providing the customary definition of “refugee,”<sup>49</sup> both treaties have an obligation of non-refoulement, which requires contracting states to prevent the removal of persons to a country where they would face persecution or torture.<sup>50</sup> The United States has consistently treated these treaties as “non-self-executing,” meaning that neither treaty itself gives rise to “domestically enforceable federal law” . . . [unless] implementing legislation [is] passed by Congress.”<sup>51</sup> As such, Congress enacted the Refugee Act of 1980<sup>52</sup> and The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)<sup>53</sup> shortly after each respective treaty was signed to ensure the nation’s conformity with its international obligations under each treaty. Given such clear congressional intent, the U.S. Executive Branch must abide by the treaty-based principle of non-refoulement when conducting removal proceedings.<sup>54</sup> The principle has not only guided congressional legislation and domestic immigration policies, but also gradually attained the character of customary international law.<sup>55</sup>

1. As a signatory of the 1967 Protocol relating to the Status of Refugees and the Convention against Torture, the United States has acceded to the international obligation of non-refoulement.

The INA did not include any provisions regarding refugees or asylees when the statute was initially enacted in 1952.<sup>56</sup> The United States only established a notable presence in shaping international refugee law in the years

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<sup>48</sup> See CAT, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85.

<sup>49</sup> 8 U.S.C. 1101(a)(42) adopted the definition of “refugee” as set forth in the Refugee Convention, and as incorporated by reference in the Refugee Protocol, including the five enumerated grounds for humanitarian protection. H.R. Rep. No. 96-608, at 9 (1979). Although both forms of relief require claimants to satisfy the definition of “refugee,” a primary difference between refugee and asylum status is that the former is conferred outside of the United States while the latter is claimed upon the individual’s arrival in the United States or at a U.S. port of entry. See CONG. RSCH. SERV., R45539, Immigration: U.S. Asylum Policy 2 (2019).

<sup>50</sup> See Refugee Protocol, *supra* note 33, at art. 1 (incorporating by reference Articles 2 through 34 of the Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176); *accord* CAT, *supra* note 34, at art. 3.

<sup>51</sup> See *Medellin v. Texas*, 552 U.S. at 491, n. 2 (2008); *id.* (describing CAT as a non-self-executing treaty); see also *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 155, 167 (1993) (referring to the Refugee Protocol as non-self-executing).

<sup>52</sup> Refugee Act Pub. L. No. 96-212, 94 Stat. 102.

<sup>53</sup> FARRA, Pub. L. No. 105–227, 112 Stat. 2681.

<sup>54</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1967) (highlighting Congress’s intent in passing the Refugee Act of 1980); *accord* FARRA § 2242, 112 Stat. at 2681–822 (describing the congressional directive to the agencies charged with implementing the non-refoulement provision of CAT); *accord* U.N. High Comm’r for Refugees, *supra* note 44, at para. 2, 15; see also 8 U.S.C. §§ 1158(a)(1), 1231(b)(3)(A).

<sup>55</sup> 8 U.S.C. § 1231 (2005). Although the United States has narrowly upheld the right against refoulement, it clearly codified the right in 8 U.S.C. § 1231, demonstrating the country’s adherence to its legal obligation and contributing to general state practice.

<sup>56</sup> See CONG. RSCH. SERV., *supra* note 49, at 8.

after the United Nations Convention relating to the Status of Refugees.<sup>57</sup> Following the end of the Second World War, the United States acceded to the Refugee Protocol, taking the first step in its commitment to prevent refoulement as a “fundamental asylum concept” in response to the widespread concern of displaced migrants.<sup>58</sup> By incorporating Article 33 of the Refugee Convention in the Refugee Protocol, as a signatory to the latter, the United States assumed the obligation not to expel or return a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>59</sup>

As the right to claim asylum grew in prominence across the world, the United States faced another pressing objective in the global campaign to “ensure the protection of human rights”—the issue of torture.<sup>60</sup> Members of the international community took legislative action to outlaw and prevent acts of torture in a series of international and regional agreements, culminating with the United Nations’ enactment of CAT.<sup>61</sup> Upon receiving senatorial advice and consent, the United States ratified the treaty, subject to certain reservations.<sup>62</sup> Article 3 of CAT requires signatory states not to expel, return or extradite a person to another state where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>63</sup> Ultimately, the United States accepted this obligation by signing onto both treaties and subsequently enacted legislation to codify an individual right of non-refoulement.<sup>64</sup>

2. Congress has implemented legislation to codify the non-self-executing right against refoulement and to ensure U.S. domestic law conforms with the nation’s obligations under international law.

Despite signing both the Refugee Protocol and CAT, the United States has not treated either treaty as “self-executing.”<sup>65</sup> Following the ratification

<sup>57</sup> See ALEINIKOFF ET AL., *supra* note 2, at 793–94.

<sup>58</sup> *Id.*; see also CONG. RSCH. SERV., *supra* note 49, at 8–20.

<sup>59</sup> See Refugee Protocol, *supra* note 33, at 6276; *accord INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (noting that the Protocol “incorporates by reference” Articles 2 through 34 of the Convention).

<sup>60</sup> David Weissbrodt, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343, 348 (2011).

<sup>61</sup> See *id.* at 347–48.

<sup>62</sup> See 136 CONG. REC. S36, 198–99 (1990) (U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

<sup>63</sup> See CAT, *supra* note 34, at art. 3 ¶ 1, 1465 U.N.T.S. at 85.

<sup>64</sup> See Refugee Act, § 203(e); see also FARRA, § 1242(a).

<sup>65</sup> See *Medellin v. Texas*, 552 U.S. 491, 520; see also *Sale*, 509 U.S. at 155, 167. Whether a treaty is self-executing will rely on various factors, including the treaty’s language, *Foster v. Neilson*, 27 U.S. 253, 314–15 (1829); its manifested intent, see RESTATEMENT (THIRD) OF FOREIGN REL. L. OF THE U.S. § 111(4)(c) (AM. L. INST. 1987); as well as whether the treaty itself creates a private cause of action. See *Medellin*, 552 U.S. at 506, n.3.

of the Refugee Protocol, Congress enacted the Refugee Act with the explicit purpose of developing domestic asylum law in accordance with the nation's international obligation to prevent refoulement of individuals who would suffer from persecution or torture in their home country.<sup>66</sup> Congress later enacted FARRA with the similar purpose of aligning U.S. asylum law with the nation's responsibilities under CAT.<sup>67</sup> In passing each statute, Congress elected to give the treaty-based obligation of non-refoulement "wholesale effect."<sup>68</sup> Today, the principle has been largely preserved as the Executive Branch "may not remove an alien to a country if the AG [or Secretary] decides that the alien's life or freedom would be threatened" on the basis of a legally protected ground.<sup>69</sup>

*B. Although certain legal issues remain unsettled, U.S. courts have generally construed the nation's obligation of non-refoulement to apply only after the person arrives in the United States, which includes individuals at the U.S. border.*

Because Congress expressed its intent clearly when enacting the Refugee Act and FARRA, the judiciary in this case is the final authority on issues of statutory construction and will "reject administrative constructions which are contrary to clear congressional intent."<sup>70</sup> Consequently, the U.S. Supreme Court has specified that the treaty-based obligation of non-refoulement should be construed as having been codified in the INA.<sup>71</sup> U.S. courts and agencies have principally relied on the Supreme Court's construction of this obligation in *Sale v. Haitian Centers Council, Inc.*<sup>72</sup> In its decision, the *Sale* Court held that the protections under the Refugee Protocol, including the right against refoulement, do *not* apply "outside the United States bor-

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<sup>66</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424-25 (1987); accord 8 U.S.C. § 1158, 8 U.S.C. § 1231(b)(3).

<sup>67</sup> See § 2242, 112 Stat. 2681-822 (directing the "appropriate agencies" to "prescribe regulations to implement the obligations of the United States under Article 3" of CAT).

<sup>68</sup> *Medellin*, 552 U.S. at 520.

<sup>69</sup> See 8 U.S.C. § 1231(b)(3)(A); see also 8 C.F.R. § 1208.16 (2000) (providing the qualifications for statutory withholding of removal and protection under CAT).

<sup>70</sup> See *Chevron, U.S.A., Inc. v. Nat. Rex. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984).

<sup>71</sup> See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 157 (1993); accord INA 8 U.S.C. § 1231(b)(3).

<sup>72</sup> *Sale*, 509 U.S. at 155-58 (finding that the right against non-refoulement does not extend to all persons, particularly where the U.S. Coast Guard forcibly returned Haitian nationals interdicted in international waters without first determining whether they statutorily qualify as refugees, because they had not yet reached the U.S. Border or were not otherwise brought to the United States to seek asylum). In reaching its decision, the *Sale* Court did not review any *Chevron*-related issues, as the case did not arise from administrative removal proceedings, which would require application of the APA. See *Farbenblum, infra* note 107, at 1116 n.312. Scholars have criticized the Court's decision as "willfully interpreting [the non-refoulement obligation] erroneously to allow the forced repatriation of large numbers of Haitian asylum seekers interdicted at sea." *Id.* at 1116.

ders” based on Congress’s desire to “avoid conflict with the laws of other nations.”<sup>73</sup> However, almost a decade later, the Court recognized that certain rights in fact extend to all “persons” upon their arrival in the United States which cannot be extinguished by the Executive Branch.<sup>74</sup>

Although the Supreme Court concluded that the right of non-refoulement does not extend to international waters, the Court has not explicitly ruled on whether its holding in *Sale* would extend to persons at the U.S. border who are seeking to apply for asylum.<sup>75</sup> With specific regard to the extraterritorial reach of U.S. law, the Court has found time and time again that its laws may apply within a foreign country’s territory.<sup>76</sup> The Court has refrained, however, from directly recognizing such a grant of jurisdiction over the high seas likely because international waters traditionally have been considered a *mare liberum*: open to all with no particular nation possessing jurisdiction.<sup>77</sup>

In line with the Supreme Court’s decision in *Sale*, DHS—the agency charged with receiving and, in certain cases, adjudicating immigration benefit applications—has acknowledged that the right to claim asylum applies to persons attempting to enter the United States border.<sup>78</sup> In particular, persons who meet “the definition of refugee and [are] already present in the United States or [are] seeking admission at a port of entry” may claim asylum.<sup>79</sup>

<sup>73</sup> *Sale*, 509 U.S. at 173, 187 (“We do not read [the Refugee Convention and Protocols] text to apply to aliens *interdicted on the high seas.*”) (emphasis added).

<sup>74</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (“Once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”) (internal citation omitted); see also *Hamdi*, 542 U.S. at 528 (describing the right of all persons to not be detained “at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law”).

<sup>75</sup> But see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 121 (2013) (citing to *Sale* as an example where “[t]his Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application”).

<sup>76</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 40 (1956) (finding that constitutional guarantees apply to U.S. citizens being tried by U.S. military tribunals located abroad); *accord Boumediene v. Bush*, 553 U.S. 723, 764 (2008) (reviewing jurisdictional grants given to the U.S. Judiciary and the extraterritorial application of the nation’s laws based on “objective factors and practical concerns, not formalism”).

<sup>77</sup> See LORI F. DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 1311 (7th ed. 2019). Although the right of coastal states to exercise jurisdiction over contiguous zones vis-à-vis its territorial waters to prevent the infringement of its immigration laws has become a customary norm of general international law, this right is only discussed in this Note as it pertains to domestic U.S. immigration legislation. *Id.* at 1338. 8 U.S.C. § 1158 refines the right to claim asylum by including persons “brought to the United States after having been interdicted in international or [domestic territorial] waters” but does not impose a positive right on all noncitizens interdicted at sea. See generally *Sale*, 509 U.S. at 187.

<sup>78</sup> DEP’T OF HOMELAND SEC., *REFUGEES AND ASYLEES* (2020), <https://www.dhs.gov/immigration-statistics/refugees-asylees>, archived at <https://perma.cc/NH5C-ZEUA>.

<sup>79</sup> *Id.* (emphasis added).

The process for requesting asylum at the border became more difficult with DHS's implementation of the Migrant Protection Protocols.<sup>80</sup> Under these guidelines, DHS continued to accept applications of arriving asylees, but it required that asylees wait on the Mexican side of the U.S. border during their immigration proceedings.<sup>81</sup> During the Trump administration, the Ninth Circuit rejected the Migrant Protection Protocols, not only because they are inconsistent with the INA—insofar as the policy attempts to improperly invoke delegated enforcement authority to require the return of asylum applicants inside the territory of the United States to the U.S.-Mexico border—but also because the policy's implementation would result in a breach of the nation's treaty-based obligation to prevent refoulement.<sup>82</sup>

The Supreme Court has agreed to review the Migrant Protection Protocols, which may finally clarify the reach of international law within U.S. immigration practice.<sup>83</sup> If the Court concludes that the Protocols would constitute a breach of the United States' obligation of non-refoulement, the Executive Branch would be limited in its ability to arbitrarily remove migrants under an ACA, the Third Country Asylum Rule, or other policies that would violate the principle of non-refoulement. A ruling that the policy is lawful, however, would contribute to the Executive Branch's growing authority to regulate U.S. immigration practices and could make such policies more likely to resurface in subsequent presidential administrations.

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<sup>80</sup> See Notice of Availability for Policy Guidance Related to Implementation of the Migrant Protection Protocols, 84 Fed. Reg. 6811 (Feb. 28, 2019) [hereinafter "Migrant Protection Protocols"].

<sup>81</sup> See Dickerson, *supra* note 4.

<sup>82</sup> See *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1081–82, 1087 (9th Cir. 2020).

<sup>83</sup> On October 19, 2020, the Supreme Court granted the Government's petition to review the legality of the Protocols. *Wolf v. Innovation Law Lab*, 141 S. Ct. 617, 208 L. Es. 2d 227 (2020). The Court stayed the injunction against the policy's enforcement pending the disposition of this appeal. *Id.* The Court's decision to review the policy guidelines suggests the possibility that existing ACAs and the Third Country Asylum Rule may be addressed in this case or in subsequent litigation. On January 20, 2021, the Biden administration temporarily suspended new enrollment of migrants in the Migrant Protection Protocols. See Memorandum from David Pekoske, Acting Sec'y, Dep't of Homeland Sec., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities 1* (Jan. 20, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf), archived at <https://perma.cc/3VKE-D8D5> [hereinafter "Biden Administration's Review of Immigration Policies Memorandum"]. However, the Biden administration reinstated the policy in December 2021 amid surging number of migrant encounters at the U.S.-Mexico border. See Nick Miroff & Kevin Sieff, *U.S., and Mexico Reach Deal to Restart Trump-Era 'Remain in Mexico' Program along Border*, WASH. POST (December 2, 2021), [https://www.washingtonpost.com/national/us-and-mexico-reach-deal-to-restart-trump-era-remain-in-mexico-program-along-border/2021/12/01/381a4190-5318-11ec-8ad5-b5c50c1fb4d9\\_story.html](https://www.washingtonpost.com/national/us-and-mexico-reach-deal-to-restart-trump-era-remain-in-mexico-program-along-border/2021/12/01/381a4190-5318-11ec-8ad5-b5c50c1fb4d9_story.html), archived at <https://perma.cc/5GZ2-NYPG>. The Migrant Protection Protocols will only be discussed, however, within the context of the two policies at issue in this Note.

- C. *The general right to claim asylum is available to persons physically present in the United States or who arrive at a designated port of entry, yet they must go through a rigorous review process.*

Noncitizens have been able to claim asylum upon their arrival in the United States since the first federal immigration law passed in 1875.<sup>84</sup> From its inception, the American immigration system has recognized “special exemptions . . . for otherwise inadmissible or deportable noncitizens who have become political enemies of [their] government.”<sup>85</sup> Over time, U.S. courts have come to recognize asylum claims from individuals who flee their home country because of gangs and drug cartels the government cannot control.<sup>86</sup>

The INA generally provides that the U.S. government may grant asylum to any noncitizen who is “physically present in the United States *or who arrives* in the United States (*whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters*),” regardless of such noncitizen’s status.<sup>87</sup> However, this broad grant has several limitations. For example, the government must reject an asylum application if the applicant does not meet certain procedural requirements.<sup>88</sup> Additionally, the Act delegates to the AG or Secretary the authority to further restrict asylum eligibility to maintain national security interests and to ensure an efficient immigration system that only offers humanitarian relief to the most “meritorious” claims.<sup>89</sup> Further, even if an applicant is not precluded by an exception under the INA, the AG or the Secretary may impose additional restrictions for asylum eligibility by federal regulation, as they attempted to do by promulgating the ACAs with Guatemala, Honduras, El Salvador, and the Third Country Asylum Rule.<sup>90</sup>

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<sup>84</sup> See ALEINKOFF ET AL., *supra* note 2, at 793.

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., *Ayala v. Holder*, 683 F.3d 15, 17 (1st Cir. 2012) (internal citation omitted) (“Persecution normally involves severe mistreatment at the hands of [a petitioner’s] own government, but it may also arise where non-governmental actors . . . are in league with the government or are not controllable by the government”); accord Maria Sacchetti, ‘Death is waiting for him’, WASH. POST (Dec. 6, 2018), <https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/>, archived at <https://perma.cc/4HCZ-S42T>.

<sup>87</sup> 8 U.S.C. § 1158(a)(1) (emphasis added).

<sup>88</sup> See, e.g., 8 U.S.C. § 1158(a)(2)(B) (establishing a deadline to apply for asylum within one year of their arrival in the United States); 8 U.S.C. § 1158(a)(2)(C) (establishing ineligibility for asylum where the noncitizen has previously had an asylum application denied).

<sup>89</sup> See, e.g., Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532–3 (June 26, 2020) (“DHS proposed amendments . . . to (1) reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization”); 8 U.S.C. § 1158(b)(2)(C).

<sup>90</sup> See, e.g., Asylum Eligibility, 84 Fed. Reg. at 33834; Implementing ACAs, 84 Fed. Reg. at 63997; see 8 U.S.C. § 11588(d)(5)(B) (providing regulatory authority to implement “any other conditions or limitations on the consideration of an application for asylum not inconsistent with the Act”); accord 8 U.S.C. § 1158(b)(2)(C). Congress has additionally exercised its own authority to modify the statutory grounds for claiming asylum, e.g., by adding the one-year filing deadline for asylum applications. See 8 U.S.C. § 1158(a)(2)(B).

Assuming that applicants do not fall under a statutory or regulatory exception that would bar them from claiming relief from removal, asylees still face an extensive and rigorous review process to demonstrate that their application for protection is meritorious and not frivolous.<sup>91</sup> In addition to applying for asylum, applicants also often seek various forms of relief, including withholding of removal and protection under CAT. However, only asylum provides a permanent form of legal protection with a path to legal residency, and citizenship thereafter.<sup>92</sup> In presenting their case, applicants bear the burden of establishing that they satisfy the definition of “refugee”—a person who was previously persecuted or possesses a “well-founded fear” of being persecuted, on the basis of a protected trait, that if returned to their country of origin or of last habitual residence believes they will suffer persecution on account of a protected ground.<sup>93</sup>

The noncitizen’s application and corroborating evidence will be reviewed by a designated fact-finder in one of three possible proceedings: defensive asylum, affirmative asylum, or expedited removal proceedings. Which proceeding is used will depend primarily “on whether the applicant is currently in removal proceedings.”<sup>94</sup> Noncitizens who are not in removal proceedings are expected to apply for affirmative asylum within one year of their arrival in the United States,<sup>95</sup> and their claim is reviewed by an asylum officer in one of eight asylum offices in the United States.<sup>96</sup> After interviewing the applicant, the officer will either grant the application for asylum or, if the officer finds that the applicant has not met the standard for receiving asylum, will refer the case to an immigration judge (IJ) to review *de novo*.<sup>97</sup>

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<sup>91</sup> 8 U.S.C. § 1158(d)(4)(A) requires the AG to advise the noncitizen of “knowingly filing a frivolous application for asylum,” which would permanently bar the person from any immigrant benefits under the Act.

<sup>92</sup> See ALENIKOFF, *supra* note 2, at 794–95; *accord* INS v. Stevic, 467 U.S. 407, 429–30 (1984) (describing the relatively high evidentiary threshold required to show persecution is “more likely than not” to occur if removed).

<sup>93</sup> See 8 U.S.C. § 1101(a)(42)(A); *see also* 8 U.S.C. § 1158(b). The applicant’s burden may be satisfied by their “uncorroborated,” yet “credible” testimony. 8 U.S.C. § 1158(b)(1)(B)(ii); *see, e.g.,* Duran-Rodriguez v. Barr, 918 F.3d 1025, 1028 (9th Cir. 2019) (holding that the applicant bears the burden of proving eligibility for asylum). While an applicant’s testimony will not be presumed to be credible, a finding of past persecution establishes a rebuttable presumption that the individual would likely face persecution if removed. 8 C.F.R. § 208.13(b)(1) (2021). The government may rebut this presumption by showing a fundamental change in circumstances occurred such that the applicant no longer has a “well-founded fear of persecution” or that they “could avoid prospective persecution by relocating to another part of their country” 8 C.F.R. § 208.13(b)(1)(i)(A)–(B).

<sup>94</sup> See ALENIKOFF, *supra* note 2, at 795. These offices are located in cities that have high concentrations of asylum applicants, but officers may travel to hear claims at other locations based on the applicant’s location. *Id.*

<sup>95</sup> See 8 U.S.C. § 1158(a)(2)(B). This deadline also applies to defensive claims. *Id.* Applicants may still qualify for asylum after this deadline only if there was a change of circumstances which “materially” affected their eligibility for asylum or “extraordinary circumstances relating to the delay in filing” their application. 8 U.S.C. § 1158(a)(2)(D).

<sup>96</sup> See ALENIKOFF, *supra* note 2, at 796; *see also* 8 C.F.R. 208.1(b) (2021).

<sup>97</sup> See 8 C.F.R. §§ 208.14(b)–(c) (2021).

Defensive asylum claims are raised before an immigration judge after the individual has been placed in removal proceedings.<sup>98</sup>

Expedited removal is an exception to the two traditional forms of seeking asylum, where certain migrants may be removed “on the order of an immigration officer, not an immigration judge, if found inadmissible” under the INA.<sup>99</sup> If an arriving noncitizen either demonstrates a fear of persecution or indicates their intent to apply for asylum, they shall be referred to an asylum officer who will determine whether the person possesses a “credible fear of persecution.”<sup>100</sup> There must be a “significant possibility” that the noncitizen could establish eligibility for asylum in removal proceedings.<sup>101</sup> If deemed credible, their claim may be heard on the merits as a defensive claim before an IJ.<sup>102</sup>

Although other forms of relief from removal are mandatory, asylum is inherently discretionary.<sup>103</sup> Irrespective of the specific underlying procedure, the individual fact-finder will determine whether to grant or deny the asylum application by considering a variety of factors based on “the totality of the circumstances and actions” of a noncitizen in their flight from the country where they fear persecution.<sup>104</sup> The fact-finder will ultimately decide “whether a favorable exercise of discretion is warranted.”<sup>105</sup>

If an IJ denies a noncitizen’s asylum claim, the applicant may appeal the decision to the Board of Immigration Appeals (BIA or Board), an administrative body within the DOJ’s Executive Office of Immigration Review, by pleading the presence of a factual or legal error that contributed to the

<sup>98</sup> See generally 8 U.S.C. § 1225(b)(1)(B)(ii); accord 8 C.F.R. § 208.2(b) (2021). Defensive asylum claims can arise as a result of a referral from the asylum office, an apprehension at the U.S. border and referral following a credible fear interview, or an entry into the United States without being formerly inspected and admitted. 8 U.S.C. § 1225(b)(1)(B)(v) (“‘credible fear of persecution’ means that there is a significant possibility . . . that the alien could establish eligibility for asylum” on the basis of past persecution or a well-founded fear of future persecution).

<sup>99</sup> See ALENIKOFF, *supra* note 2, at 799; accord 8 U.S.C. § 1225(b)(1)(A)(i). From its inception, the practice of expedited removal has been highly contested due to the “significant questions concerning the relationship between the federal government’s broad power over the entry and removal of immigrants and the due process rights of immigrants located within the United States.” See Letter from Joaquin Castro, Chair, Cong. Hispanic Caucus, to Chad F. Wolf, Acting Sec’y, Dep’t of Homeland Sec. (Oct. 28, 2020).

<sup>100</sup> 8 U.S.C. § 1225(b)(1)(B)(v).

<sup>101</sup> *Id.*

<sup>102</sup> 8 C.F.R. 208.1(b) (2021).

<sup>103</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987) (citing 8 U.S.C. § 1158(a)). If the IJ does not find a well-founded fear of persecution, the applicant may still obtain humanitarian asylum by demonstrating a compelling reason the applicant is unable or unwilling to return because of severe past persecution. 8 C.F.R. § 208.13(b)(1)(iii)(A) (2021). As described in Section III, certain forms of relief are mandatory, such as withholding of removal, but are temporary, offer less legal protections, and do not offer a path to permanent residency or naturalization. See ALENIKOFF, *supra* note 2, at 794.

<sup>104</sup> *Matter of Pula*, 19 I. & N. Dec. 467, 473–74 (BIA 1987).

<sup>105</sup> *Id.* at 473; *Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996) (determining that the claimant bears the burden of proving that a favorable exercise of discretion for granting asylum is warranted, but the “danger of persecution will outweigh all but the most egregious adverse factors”).



claim's rejection.<sup>106</sup> If the Board affirms the IJ's denial, the noncitizen may file a petition for review in the U.S. Circuit Court of Appeal with jurisdiction over the case to review and determine whether the BIA's administrative decision passes muster under the APA.<sup>107</sup> As an administrative agency, the Board is afforded substantial deference by federal courts, who will only reverse a BIA decision that is "arbitrary, capricious, or manifestly contrary" to the authorizing statute.<sup>108</sup>

*D. While the Executive Branch may restrict asylum eligibility, it must act in accordance with the Immigration and Nationality Act and clearly established congressional intent.*

Asylum is generally available to individuals unable or unwilling to return to their home country because of past persecution or a well-founded fear of future persecution on account of a protected ground as enumerated under INA § 101(a)(42)(A).<sup>109</sup> However, an asylum seeker may be statutorily barred from such relief,<sup>110</sup> or the AG and the Secretary "may by regulation establish additional limitations and conditions" under which a noncitizen would be ineligible for asylum.<sup>111</sup> Additionally, under the Trump administration, the DOJ and DHS jointly invoked their regulatory authority to issue ACAs and the Third Country Asylum Rule as a means of streamlining the U.S. asylum application process.<sup>112</sup> Over time, Congress has delegated regulatory authority to the AG and the Secretary to impose additional procedural

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<sup>106</sup> 8 C.F.R. § 1003.1(b)(9) (2021). The Board may review an immigration judge's factual findings only to determine whether they were "clearly erroneous," but it may "review questions of law, discretion, and judgment and all other issues in appeals from decisions of the judge *de novo*." § 1003.1(d)(3)(i)–(ii).

<sup>107</sup> See *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1964); INA §242(a)(2)(B)(ii) (retaining the jurisdiction to review discretionary decisions pertaining to grants of relief under section 208(a)). Applying the APA framework, the federal appellate court will evaluate whether the BIA's administrative decision is at odds with Congress's intention in enacting asylum legislation or, if the agency is exercising a congressionally delegated authority, whether the agency acted in accordance with a required "intelligible principle." See *Chevron*, 467 U.S. at 843–44; see also *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928) (establishing the "intelligible principle" requirement). For an in-depth discussion of appellate jurisdiction over BIA decisions under the APA framework, see Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths through and beyond Chevron*, 60 DUKE L.J. 1059, 1078–1103 (2011).

<sup>108</sup> See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (recognizing that principles of *Chevron* deference are applicable to the BIA and its statutory scheme); see e.g., *Cardoza-Fonseca*, 480 U.S. at 453 (rejecting the agency's interpretation of the INA's "well-founded fear" standard for asylum eligibility because it was "clearly inconsistent with the plain meaning of that phrase and the structure of the Act"); see also *Chevron*, 467 U.S. at 844.

<sup>109</sup> 8 U.S.C. § 208(a)(1).

<sup>110</sup> 8 U.S.C. §§ 208(a)(2)(A)–(D), (b)(2)(A)–(B).

<sup>111</sup> 8 U.S.C. § 1158(b)(2)(C).

<sup>112</sup> See CONG. RSCH. SERV., LSB10402, SAFE THIRD COUNTRY AGREEMENT WITH NORTHERN TRIANGLE COUNTRIES: BACKGROUND AND LEGAL ISSUES I (2020); see also Implementing ACAs, 84 Fed. Reg. at 63995; see also Asylum Eligibility, 84 Fed. Reg. at 33830–31.

and eligibility requirements for asylum applicants.<sup>113</sup> However, neither Agency head can promulgate policies or act in a manner inconsistent with the INA<sup>114</sup> or otherwise “contrary to clear congressional intent.”<sup>115</sup>

1. The Department of Justice and Department of Homeland Security implemented the Central American Asylum Cooperative Agreements pursuant to their joint authority under the INA.

Among efforts of the Trump administration to mitigate asylum claims, the INA’s “Safe Third Country” exception was invoked when establishing ACAs with Guatemala, Honduras, and El Salvador; when taken together, the three Agreements limit asylum claims of a majority of nationals currently seeking protection or otherwise undergoing removal proceedings from the southern border.<sup>116</sup> Following diplomatic negotiations with these nations, the AG and the Secretary issued a regulation explaining that the Central American ACAs were designed to redistribute “the burden of processing the protection claims” of migrants entering or attempting to enter the United States.<sup>117</sup> Despite their stated purpose to promote mutual cooperation, each agreement would result in the foreign country “bear[ing] the [sole] responsibility for processing the asylum claims of refugees subject to the terms of the ACA.”<sup>118</sup>

Under the INA’s “Safe Third Country” exception to asylum eligibility, the AG or the Secretary may remove noncitizens to a country that is a signatory to an existing ACA with the United States if the country can ensure that: (1) the noncitizen’s “life or freedom would not be threatened” on one of the five legally protected bases, and (2) the noncitizen “would have access to a full and fair procedure” when their claim for “asylum or equivalent temporary protection” is adjudicated in the third country.<sup>119</sup> If a person is removable pursuant to an existing ACA, they may apply for asylum in the United States only if the AG or the Secretary finds that such process would be “in the public interest.”<sup>120</sup> Although federal regulations provide that such excep-

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<sup>113</sup> See ALEINIKOFF, *supra* note 2, at 793–95, 822–23; see also CONG. RSCH. SERV., *supra* note 49, at 8–20.

<sup>114</sup> 8 U.S.C. § 1158(d)(5)(B).

<sup>115</sup> See *Chevron, U.S.A., Ind. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1964).

<sup>116</sup> See Morgan, *supra* note 15.

<sup>117</sup> See Implementing ACAs, 84 Fed. Reg. at 63997. Human rights groups have publicly speculated that the Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador were products of coercive bargaining by the Executive Branch, which had terminated foreign aid to the Central American Countries “after Trump expressed unhappiness with . . . their immigration policies.” See Lesley Wroughton & Patricia Zengerle, *As promised, Trump slashes aid to Central America over migrants*, REUTERS (June 17, 2019), <https://www.reuters.com/article/us-usa-immigration-trump/as-promised-trump-slashes-aid-to-central-america-over-migrants-idUSKCN1T2C7>, archived at <https://perma.cc/5GA3-Y322>.

<sup>118</sup> Implementing ACAs, 84 Fed. Reg. at 63999.

<sup>119</sup> See 8 U.S.C. § 1158(a)(2)(A); accord Implementing ACAs, 84 Fed. Reg. at 63994.

<sup>120</sup> 8 U.S.C. § 1158(a)(2)(A).

tion to the enforcement of an ACA should be considered “on a case-by-case basis,”<sup>121</sup> the “public interest” exception has not been formally defined by statute, regulation, or judicial precedent.<sup>122</sup> This has left practitioners without a meaningful standard with which to argue or evaluate whether the adjudication of an individual’s asylum claim in the United States is in the public interest.

2. The Department of Justice and Department of Homeland Security promulgated the Third Country Asylum Rule pursuant to their regulatory authority as provided under the INA.

In addition to the Asylum Cooperative Agreements, the Trump administration further restricted the right to claim asylum in the United States by implementing the Third Country Asylum Rule.<sup>123</sup> Unlike ACAs, which are each predicated on a categorical factual finding that the particular country has the capacity to provide security and judicial safeguards to noncitizens removed from the United States,<sup>124</sup> this separate rule permanently barred any noncitizen who traveled through a third country “en route to the United States” unless the person first applied for protection from persecution or torture while in that country.<sup>125</sup>

The Trump Executive Branch applied this categorical determination to any person who did not “apply for protection at the first available opportunity, and instead wait[ed] for the more preferred destination of the United States,” and was thus less likely to possess a legitimate and serious need for legal protection.<sup>126</sup> Specifically, the agencies imposed a countervailing presumption on migrants traveling through a third country that—unless they “applied for and received a final judgment denying protection in at least one third country” on their way to the United States—their asylum claim raises questions about its “validity and urgency,” and therefore such a claim is “less likely to be successful” and meritorious.<sup>127</sup>

<sup>121</sup> See Implementing ACAs, 84 Fed. Reg. at 63994.

<sup>122</sup> To date, research has not turned up cases in which an applicant subject to an ACA has been allowed to claim asylum in the United States, on the basis that asylum is “in the public interest.” See 8 U.S.C. § 1158(a)(2)(A).

<sup>123</sup> See Asylum Eligibility, 84 Fed. Reg. at 33829–30.

<sup>124</sup> See Implementing ACAs, 84 Fed. Reg. at 63997 (“Prior to implementation of an ACA, the Attorney General and the Secretary of Homeland Security . . . will evaluate and make a categorical determination whether a country to which aliens would be removed under such an agreement provides ‘access to a full and fair procedure for determining a claim to asylum. . . .’”).

<sup>125</sup> See Asylum Eligibility, 84 Fed. Reg. at 33829, 33834–35.

<sup>126</sup> *Id.* at 33839. The Biden Administration has since rescinded the Third Country Asylum Rule. See Memorandum, Acting Dir. Jean C. King, EOIR, *Cancellation of Policy Memorandum 19-12* (May 14, 2021), <https://www.justice.gov/eoir/book/file/1394356/download>, archived at <https://perma.cc/4YYY-WJEY>.

<sup>127</sup> *Id.* at 33831, 33839. Although there are a limited number of additional exceptions to this rule, most migrants would not qualify. Besides the exception for persons denied protection in a transit country, the applicant may only overcome the rule’s application by establishing that they were a “‘victim of a severe form of trafficking in persons’ [as] provided in 8 C.F.R.

*E. U.S. courts have previously considered judgments of the Inter-American Court on Human Rights and commentaries of international jurists and organizations to determine how procedural and substantive mechanisms inherent in the INA should be applied in domestic immigration practice.*

While U.S. courts generally rely exclusively upon domestic law to resolve legal questions, they have occasionally recognized and applied customary international law to resolve a myriad of legal issues and to enforce international legal rules, where Congress or the Executive have provided a basis for the judicial application of the specific principle.<sup>128</sup> Courts have identified international legal principles by referring to treaties and, significantly, the interpretations of said treaties by international jurists and scholars, “not for the speculation of their author[ity] concerning what the law ought to be, but for trustworthy evidence of what the law really is.”<sup>129</sup>

The Supreme Court has consistently recognized the persuasive potential of international legal sources to establish “substantive principles” that can be applied as a part of U.S. law “in appropriate circumstances,”<sup>130</sup> especially when the source has contributed to the formulation or implementation of domestic statutes or principles.<sup>131</sup> One way U.S. Courts invoke international law is by referencing judgments issued by international courts and tribunals that reflect the “opinion of the world community”<sup>132</sup> and by applying the

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§ 214.11” or had traveled through a country that is not a party to the Refugee Convention, Refugee Protocol, or CAT. *Id.* at 33835. “All seven countries in Central America plus Mexico are parties to both the Refugee Convention and the Refugee Protocol” and thus are not covered by this exception. *Id.* at 33839.

<sup>128</sup> See *Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that international law is part of U.S. law, and must be “ascertained and administered” by the courts of appropriate jurisdiction); see, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (applying customary international human rights law principles to determine that the plaintiff did not suffer from “prolonged arbitrary detention”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (invoking the “law of nations” in holding that torture “violates established norms of the international law of human rights”); *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012) (recognizing the treaty-based definition of “piracy” as customary international law that is binding on U.S. courts).

<sup>129</sup> *Paquete*, 175 U.S. at 700. Domestic litigation has relied to some degree on sources of international law, but U.S. courts remain hesitant to apply them consistently as a legal authority. See Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1416–19 (1999).

<sup>130</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964).

<sup>131</sup> See *id.* at 422 (considering the traditional view of international law as to determine the reach of the act of state doctrine); see e.g., *Bond v. United States*, 572 U.S. 844, 849, 856 (2014) (reviewing the objective and purpose of the International Convention on Chemical Weapons to ascertain the scope of the implementing legislation vis-à-vis domestic chemical-use cases); *accord Blackledge v. Blackledge*, 866 F.3d 169, 177 (3d Cir. 2017) (considering the purpose and intent of the Hague Convention on the Civil Aspects of International Child Abduction to establish the burden-of-proof requirement for claims brought under domestic law).

<sup>132</sup> See generally *Roper v. Simmons*, 543 U.S. 551, 578 (considering foreign and international authorities to demonstrate near-universal support of a customary policy when interpret-

“international enforcement structure mandated by . . . multilateral agreements to which the United States is a party.”<sup>133</sup> Congress’s decision to enact the Refugee Act of 1980 and FARRA only reinforces the persuasive nature of international judgments as well as customary norms and international treaties—based on the “rich history of interpretation in international law and scholarly commentaries”—on the federal government’s actions.<sup>134</sup> Congress incorporated the treaty-based prohibition of refoulement and protections against torture through the Refugee Act and FARRA.<sup>135</sup>

In 2004, the Executive Branch exercised its “safe third country”<sup>136</sup> authority to establish an ACA between the United States and Canada, but these agreements have only recently engendered concerns of refoulement due to the ACAs created during the Trump administration with Guatemala, Honduras, and El Salvador.<sup>137</sup> Given that the INA requires “safe third countries” to provide “a full and fair procedure” for determining a claim to asylum, the fact that international legal institutions and human rights groups challenged the legitimacy of the Central American ACAs due to their “weak or inexistent state of institutions” that inhibit access to “international protection, reintegration services, or justice” for asylees sent to these countries, should bring their status as “safe third countries” into question.<sup>138</sup>

For example, in *Velásquez-Rodríguez v. Honduras*, the Inter-American Court on Human Rights (IACHR)<sup>139</sup> noted the absence of effective judicial

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ing domestic constitutional text because, while it is not controlling, it does “provide respected and significant confirmation for our own conclusions.”)

<sup>133</sup> See *Najim v. CACI Premier Tech., Inc.* 368 F. Supp. 3d 935, 960 (E.D. Va. 2019) (citing the IACHR decision in *Velásquez-Rodríguez v. Honduras* to establish the enforcement mechanism for applying principles of CAT).

<sup>134</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 451 (1987) (Blackmun, J., concurring) (emphasizing the Court’s directive to the BIA to construe the Refugee Act’s amendments to the INA in light of the Refugee Protocol). *But see* Farberblum, *supra* note 107, at 1080 (noting the routine deference given to the BIA’s interpretation of the INA).

<sup>135</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (determining that acts of torture violate customary international law as established under treaty-based state practice); see U.N. High Comm’r for Refugees, *supra* note 46, at ¶ 5.

<sup>136</sup> Canada ACA, 69 Fed. Reg. at 69493. Although the Canada ACA is not encompassed in the policy at issue in this Note, Implementing ACAs, 84 Fed. Reg. at 63994, it is worth highlighting that the agreement was struck down by a Canadian court because the United States had exposed noncitizens to “risks in the form of detention, *refoulement*, and other violations of their rights contrary to the 1951 *Convention Relating to the Status of Refugees*” and contrary to the CAT. *Canadian Council for Refugees v. Canada*, [2020] F.C. 770 (Can. Fed. Ct.).

<sup>137</sup> See Nicole Narea, *Trump’s agreements in Central America are dismantling the asylum system as we know it*, Vox (Nov. 20, 2019), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained>, archived at <https://perma.cc/V68L-3S88>.

<sup>138</sup> AM. FED’N OF LAB. & CONG. OF INDUS. ORGS., ET AL., *supra* note 16, at 4; accord Salvadoran President’s interview, *supra* note 16. In finding that the agreements are likely to violate U.S. and international refugee law, several international organizations have emphasized that these countries cannot guarantee that asylum seekers will be “protected against *refoulement*,” “have access to basic services and human rights commensurate under the 1951 Convention,” receive fair and efficient processing for refugee determination,” and be “able to enjoy asylum.” *Id.* at 3.

<sup>139</sup> A list of all cases tried before the Inter-American Court on Human Rights can be found at <https://iachr.ils.edu/>, archived at <https://perma.cc/M7PK-E2GG>.

procedures and domestic legal remedies for victims of persecution or torture in Honduras.<sup>140</sup> The court emphasized that Honduran court proceedings were generally drawn out by law enforcement and acknowledged that the authorities often ignored, threatened, imprisoned, or physically mistreated both counsel representing the victim and the judge presiding over the case for attempting to investigate violations of international human rights law.<sup>141</sup> In the years following this decision, the IACHR handed down decisions that found a lack of due process, inaccessibility to a fair trial, and lack of legal guarantees in Guatemala<sup>142</sup> and El Salvador.<sup>143</sup> The IACHR handed out these decisions because both Guatemala and El Salvador failed to investigate human rights abuses happening within their own borders.

The IACHR rulings exhibit salient issues of pervasive government corruption and inadequate judicial protections that have persisted over time within the region, demonstrating the critical conditions in these three Central American countries.<sup>144</sup> The U.S. State Department has likewise recognized patterns of unceasing judicial and legal deficiencies in its annual Country Reports on Human Rights Practices for each country.<sup>145</sup> The findings made

<sup>140</sup> *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 147, 178 (July 29, 1988) [hereinafter *Velásquez-Rodríguez*] (“the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to carry out an investigation of the disappearance” of 100 to 150 individuals between 1981 and 1984).

<sup>141</sup> *Id.* at ¶ 118 (“The judges named by the Courts of Justice to execute the writs did not enjoy all the necessary guarantees. Moreover, they feared reprisals because they were often threatened. Judges were imprisoned on more than one occasion and some of them were physically mistreated by the authorities. Law professors and lawyers who defended political prisoners were pressured not to act in cases of human rights violations”).

<sup>142</sup> *“Las Dos Erres” Massacre v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 111, 152, 153, 310(1) (Nov. 24, 2009) [hereinafter *“Las Dos Erres” Massacre*] (recognizing the lack of judicial remedies for extrajudicial killings and the national government’s failure to prosecute and punish severe violations of human rights in a timely manner).

<sup>143</sup> *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 1, 162, 170, 243 (Oct. 25, 2012) [hereinafter *Massacres of El Mozote*] (finding that hundreds of Salvadoran civilians were deprived of their due process rights to a “fair trial” and to “judicial protection” and that the national government breached its obligation “to investigate and to punish human rights violations” carried out within the country).

<sup>144</sup> See generally Press Release, Inter-Am. Comm’n H.R., IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America (July 23, 2019) (on file with the Organization of American States), [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/180.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/180.asp), archived at <https://perma.cc/KZ2A-ABX4> (considering the factors that prevent Central American countries from upholding “the human right to seek and receive asylum, the protection from *refoulement* and contravenes international . . . norms and standards”).

<sup>145</sup> U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HONDURAS (2019), at 7 [hereinafter *Country Conditions for Honduras*] (“the [Honduran] justice system was poorly funded and staffed, inadequately equipped, often ineffective, and subject to intimidation, corruption, politicization, and patronage.”); see also U.S. DEPT OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA (2019), at 6–7 [hereinafter *Country Conditions for Guatemala*] (“The [Guatemalan] judicial system generally failed to provide fair or timely trials due to inefficiency, corruption, and intimidation of judges, prose-

by the IACHR and international human rights organizations should be a source for U.S. courts to consider when evaluating the executive agencies' compliance with the INA in promulgating both immigration policies, as the international legal findings offer insight as to each country's asylum capabilities or lack thereof.

While some countries face greater challenges in offering due process than others, the hardships that force many asylum seekers to flee their home country typically transcend territorial borders.<sup>146</sup> IACHR has stressed several systemic factors, including violence and human rights violations, that contribute to a neighboring country's inability to comply with the statutory conditions that a "safe third country" must guarantee to victims of persecution or torture, including severe acts of criminal and delinquent violence, human rights abuses, widespread government corruption, and denial of due process to victims.<sup>147</sup>

## II. ANALYSIS

### A. *The Executive Branch has violated domestic asylum law and the nation's obligation of non-refoulement by sending Central American migrants to countries that are not in fact "safe third countries."*

The implementation of the Central American ACAs and the Third Country Rule fails to satisfy domestic statutory requirements and contradicts the United States' treaty-based obligation to prevent refoulement because the agency-designated "safe third countries" lack the requisite safety and legal safeguards envisaged in international law and required under the INA.<sup>148</sup> Congress intended to codify the obligation of non-refoulement under the

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cutors, and witnesses. Judges, prosecutors, plaintiffs, and witnesses continued to report threats, intimidation, and surveillance, most often from drug trafficking organizations."); *see also* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR (2019), at 8 [hereinafter Country Conditions for El Salvador] ("Although the constitution provides for an independent judiciary, the government did not always respect judicial independence, and the judiciary was burdened by inefficiency and corruption.") For a list of the State Department's annual Country Reports on Human Rights Practices, please visit <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>, archived at <https://perma.cc/76ZE-5QVD>.

<sup>146</sup> AM. FED'N OF LAB. & CONG. OF INDUS. ORGS., ET AL., *supra* note 16, at 4. For example, a person who is persecuted on "account of . . . membership in a particular social group"—a designation that requires the person to be "socially distinct" as a recognizable member of that group—is more likely to be identified by their persecutors if sent to a country in close proximity to where the person was being persecuted, especially when the persecutors are a part of criminal organizations, such as drug trafficking rings and gangs, who have cells spread across Central and Southern America. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 240–41 (BIA 2014) (establishing the "social distinction" requirement for asylees seeking asylum based on their membership in a particular social group).

<sup>147</sup> Press Release, Inter-Am. Comm'n H.R., *supra* note 144.

<sup>148</sup> *Id.*

Refugee Act and FARRA, and the principle has gradually become embedded within customary international law; therefore, the treaty-based obligation must be fully enforced in U.S. immigration practice.<sup>149</sup>

Congress enacted the Refugee Act and FARRA to ensure that the individual factfinders adjudicating asylum claims do so in accordance with the international obligations of the United States.<sup>150</sup> For this reason, asylum officers, for example, are required to receive “special training in international human rights law” and in “international refugee laws and principles” to ensure a proper, holistic decision is reached in each case.<sup>151</sup> Courts should consult international legal sources to determine whether the administrative agencies’ policies are lawful under the APA legal framework, as Congress did when crafting the Refugee Act and FARRA.

The Supreme Court specifically addressed the extent of the nation’s obligation to prevent refoulement in *Sale v. Haitian Center Council, Inc.*<sup>152</sup> In this case, the Supreme Court reviewed an Executive Order that, in accordance with a separate bilateral agreement with Haiti, authorized the U.S. Coast Guard to intercept vessels coming from Haiti and send undocumented persons back to Haiti “without first determining whether they may qualify as refugees.”<sup>153</sup> In its decision, the Supreme Court clarified that protections under the INA only extend to persons who “reside in or *have arrived at the border* of the United States.”<sup>154</sup> Noncitizens who arrive at the U.S.-Mexican border thus possess the general right to claim asylum as explicitly provided under the INA.<sup>155</sup> More importantly, *Sale* involved the return of migrants interdicted on the high seas—an area that does not fall under the jurisdiction of any single country—prior to their arrival in the United States or at a U.S. port of entry.<sup>156</sup>

*Sale*’s geographical limitations on non-refoulement—providing for the consideration of asylum claims from only those who have reached the United States—cannot presumptively be extended to persons traveling

<sup>149</sup> See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 451 (1987) accord FARRA § 2242, 112 Stat. at 2681–822.

<sup>150</sup> See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188–89 (Blackmun, J., dissenting) (describing how Congress amended U.S. immigration law to reflect the “Protocol’s directives” which includes a clear “duty of nonreturn”); I.N.S. v. Stevic, 467 U.S. 407, 421 (“Section 203(e) of the Refugee Act of 1980 amended the language, of [the INA] . . . basically conforming it to the language of [the non-refoulement provision] . . . of the United Nations [Refugee] Protocol”). See also Cardoza-Fonseca, 480 U.S. at 434 (“Congress added the ‘well-founded’ language only because that was the language incorporated by the United Nations Protocol to which Congress sought to conform.”).

<sup>151</sup> 8 C.F.R. § 208.1(b).

<sup>152</sup> 509 U.S. at 157 (1993).

<sup>153</sup> *Id.* at 158.

<sup>154</sup> *Id.* at 160 (emphasis added).

<sup>155</sup> 8 U.S.C. § 1158(a)(1).

<sup>156</sup> See DAMROSCH & MURPHY, *supra* note 77, at 1311; see generally *Sale*, 509 U.S. at 160; accord 8 U.S.C. § 1158(a)(1) (providing the right to claim asylum to everyone who arrives in the United States “whether or not at a designated port of arrival and including [those] who [are] brought to the United States after having been interdicted in international or United States waters”).



through a foreign country to arrive at the U.S. border. Unlike migrants who are interdicted at sea but returned to their country, the right to claim asylum is available to immigrant arrivals who seek admission at a U.S. port of entry as described by the Executive Branch itself.<sup>157</sup> Even when implementing the Migrant Protection Protocols, the United States continued to accept asylum applications from noncitizens undergoing immigration proceedings at the U.S. border in Mexico.<sup>158</sup>

Congress has empowered the Executive Branch to regulate the immigration process, but the Executive Branch may not act in any way that would be inconsistent with the INA or a “clearly expressed congressional intent.”<sup>159</sup> Pursuant to their authority, the executive agencies restricted asylum eligibility by implementing ACA agreements with Guatemala, Honduras,

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<sup>157</sup> REFUGEES AND ASYLEES, DEP’T OF HOMELAND SEC., *supra* note 78. The Court’s determination regarding the extraterritorial application of U.S. laws reflects “an indispensable mechanism for monitoring the separation of powers” between Congress and the Executive that cannot “be subject to manipulation by those whose power [the judiciary’s authority] is designed to restrain.” *See, e.g., Reid*, 354 U.S. at 40–41 (recognizing the constitutional rights to a jury trial and due process for U.S. citizens being prosecuted in U.S. military tribunals abroad); *accord Boumediene*, 553 U.S. at 765–66 (extending the constitutional privilege of writs of habeas corpus to noncitizens detained at Guantanamo Bay by the United States).

<sup>158</sup> *See* Joshua Partlow & Nick Miroff, *Deal with Mexico paves way for asylum overhaul at U.S. Border*, WASH. POST (Nov. 24, 2018), [https://www.washingtonpost.com/world/national-security/deal-with-mexico-paves-way-for-asylum-overhaul-at-us-border/2018/11/24/87b9570a-ef74-11e8-9236-bb94154151d2\\_story.html](https://www.washingtonpost.com/world/national-security/deal-with-mexico-paves-way-for-asylum-overhaul-at-us-border/2018/11/24/87b9570a-ef74-11e8-9236-bb94154151d2_story.html), archived at <https://perma.cc/UH69-JSHL>. *See also* Migrant Protection Protocols, 84 Fed. Reg. at 6811. In receiving applications from asylees at the southern border, the Trump administration confirmed by practice that individuals at the border have a right to claim asylum. Unlike migrants who are interdicted at sea but are not brought to the United States afterward to determine whether they qualify for asylum status under 8 U.S.C. § 1158(a)(1), new immigrant arrivals at the territorial border of the United States have the opportunity to claim asylum, despite their technical presence outside of the United States. DEP’T OF HOMELAND SEC., *supra* note 78. Even if the Executive Branch were to find that noncitizens at the border are not entitled to INA-mandated protections against refoulement because of their technical presence outside the United States, in arguendo, the Executive’s efforts to implement the Migrant Protection Protocols may be perceived as an indirect attempt to circumvent the nation’s international obligations and therefore the will of Congress in passing domestic asylum legislation. It is worth noting that, in striking down the Migrant Protection Protocols, the Ninth Circuit explained that the policy did not comply with treaty-based obligations of the United States to prevent refoulement. *See Innovation Law Lab*, 951 F.3d at 1081–82.

<sup>159</sup> *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. at 453 (1987) (finding that the agency’s interpretation of the asylum provision of the INA ran contrary to the provision’s plain meaning and the Act’s inherent structure). *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936). Certain actions undertaken by the Executive, such as those related to foreign policy or international relations, will typically enjoy substantial deference, but the Executive’s authority is still limited in certain matters, especially when the authority it relies on was delegated by Congress. *See generally Chevron*, 467 U.S. at 844 (providing that a federal agency’s authority may not be “arbitrary, capricious or manifestly contrary to the statute.”). In addition to relying on *Chevron* deference, courts may also evaluate policies invoking the Executive Branch’s authority by applying Justice Jackson’s taxonomy analysis as described in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952). Given that the *Youngstown*’s analysis is primarily relevant when reviewing the President’s foreign relations authority, this Note does not rely on the *Youngstown* test because international implications of domestic U.S. immigration practice are considered insofar as it infringes on customary and treaty-based rights of migrants as opposed to relations between the United States and a given foreign state.

and El Salvador and by issuing the Third Country Asylum Rule to limit discriminately asylum claims from nationals arriving at the southern border.<sup>160</sup>

Additionally, unlike asylum, which is a “discretionary immigration benefit,”<sup>161</sup> certain forms of relief from removal cannot be denied. Notably, statutory withholding of removal and protection under CAT must be provided to qualifying applicants, albeit a higher evidentiary burden must be satisfied and only temporary protections are available.<sup>162</sup> First, to obtain either form of mandatory relief, the United States requires the applicant to demonstrate that their removal to a particular country would “more likely than not” result in them being persecuted or tortured.<sup>163</sup> Cognizant of the fact that asylees have been removed from the United States prior to having the opportunity to make such argument,<sup>164</sup> the threshold to meet this burden becomes increasingly difficult to satisfy when confronted with an applicable ACA. Each agreement is predicated on a “categorical determination” which presumes, without considering the specific facts or arguments made by an individual applicant, that the receiving country is “safe” and can provide a “full and fair procedure” for determining claims to asylum.<sup>165</sup> The evidentiary burden became virtually insurmountable due to the eligibility bar imposed by the Third Country Asylum Rule. This policy is based on the assumption that a noncitizen will not be able to demonstrate a well-founded fear of persecution or torture—seemingly overlooking the country conditions that make a home country’s government unable or unwilling to protect the asylee—so long as the individual did not first receive a denial of protection in a country they passed through to arrive at the U.S. border.<sup>166</sup>

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<sup>160</sup> See Asylum Eligibility, 84 Fed. Reg. at 33830–31; see generally Implementing ACAs, 84 Fed. Reg. at 63995–96.

<sup>161</sup> Implementing ACAs, 84 Fed. Reg. at 63995; Asylum Eligibility, 84 Fed. Reg. at 33830, 33832.

<sup>162</sup> See *L.N.S. v. Stevic*, 467 U.S. 407, 429–430 (1984). Moreover, withholding of removal recipients can be sent to another country “under certain circumstances.” *Matter of Mogharabi*, 19 I. & N. Dec. 439, 440 (BIA 1987). Because the person who receives withholding is ordered deported, but the deportation is “withheld,” DHS often requires they search for a third country to accept them and may require periodic updates to an Enforcement and Removal Operations office. See MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BASED DEFENDANTS 7 (8th ed. 2019).

<sup>163</sup> See 8 C.F.R. §§ 208.16(b)(2), (c)(2); cf. *Cardoza-Fonseca*, 480 U.S. at 449 (holding that, by showing a “well-founded fear of persecution,” asylees do not need to prove that it is “more likely than not” that they will be persecuted or tortured in their home country).

<sup>164</sup> See Elliot Spagat, *Inspector general report says U.S. turning away asylum-seekers at border is flawed*, PUB. BROAD. SERV. (Oct. 30, 2020), <https://www.pbs.org/newshour/nation/inspector-general-report-says-u-s-turning-away-asylum-seekers-at-border-is-flawed>, archived at <https://perma.cc/8EBH-VKKX>.

<sup>165</sup> See Implementing ACAs, 84 Fed. Reg. at 63997.

<sup>166</sup> Asylum Eligibility, 84 Fed. Reg. at 33835. Rather than address concerns regarding the third countries’ asylum capabilities, the executive agencies instead analogize their regulatory activity in an effort to establish “consistency with international practice” but fail to provide factual comparisons to establish such similarities. Implementing ACAs, 84 Fed. Reg. at 64000. The U.S. government also argues that it has implemented the non-refoulement provisions of relevant treaties through the withholding of removal provisions. Asylum Eligibility, 84 Fed. Reg. at 33835, 33839. Although withholding of removal is a mandatory form of relief, many

Second, even with the substantial deference offered to its factual determinations, an agency's regulatory authority cannot be entirely unfettered.<sup>167</sup> Courts must strike down agency actions that are "arbitrary, capricious, or manifestly contrary" to the authorizing statute.<sup>168</sup> If the court deems the Refugee Protocol and CAT to be persuasive based on Congress's intention in implementing the treaties, it should consider international legal sources, including the international treaties themselves and related scholarly commentaries, to evaluate an agency's exercise of its authority and to ensure the nation's international obligations are being met.<sup>169</sup>

As implemented, both immigration policies conflict with the United States' obligation to prevent non-refoulement because, despite findings made by the DOJ and DHS to the contrary, the Central American countries that have been designated as "safe third countries" lack the necessary mechanisms to protect asylum seekers and to provide "a full and fair" adjudicatory process for persons removed to these countries.<sup>170</sup> The executive agencies' requisite factual findings for the Central American ACAs and the Third Country Asylum Rule have not satisfied the statutory elements for invoking the INA's "Safe Third Country" exception.<sup>171</sup> The findings do not overcome nor even attempt to address the prevailing safety and legal shortcomings of Guatemala, Honduras, and El Salvador, as reflected in several IACHR judgments and venerable scholarly commentaries.<sup>172</sup> A U.S. court's inquiry into each policy's compliance with the INA should therefore be informed by

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migrants being removed under the rule would still be subject to refoulement due to the heightened standard and lack of long-term immigrant benefits for recipients of withholding of removal, including a path towards legal permanent residency and citizenship. See ALEINIKOFF, *supra* note 2, at 794 (noting that recipients of withholding of removal are likely to remain in a form of "uncertain legal limbo for decades" because there is no provision in the INA for "eventual adjustment of status to lawful permanent resident").

<sup>167</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>168</sup> *Id.*

<sup>169</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 450–51 (1987) (Blackmun, J., concurring). Compare *The Paquete Habana*, 175 U.S. 677, 700 (1900) (noting that "resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators. . .") with *Hamdi v. Rumsfeld*, 542 U.S. 507, 551 (2004) (emphasizing the court's decision not to apply rules of customary international law unless the specific principle has been implemented by congressional legislation) and *Bond v. United States*, 572 U.S. 844, 856 (2014) (finding that, despite reviewing the treaty text and related scholarly commentary, ambiguity in the intention of a treaty will be resolved by reviewing the implementing legislation "consistent with principles of federalism inherent in our constitutional structure").

<sup>170</sup> See, e.g., Salvadoran President's interview, *supra* note 16 (describing El Salvador's lack of "asylum capabilities"); see also Press Release, Inter-Am. Comm'n H.R., *supra* note 144 (noting how removal to Central American "safe third countries" would "expose these people to numerous risks, which include extortion, kidnapping, and other acts of violence at the hands of criminal organizations and common criminals founds in the areas where these people are returned, as well as lack of access to basic services").

<sup>171</sup> See *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 849–50 (9th Cir. 2020); see generally 8 U.S.C. § 1158 (a)(2)(A) (describing the need for protection and "a full and fair procedure for determining a claim of asylum or equivalent temporary protection").

<sup>172</sup> See "*Las Dos Erres*" Massacre at ¶ 130, 152–53; accord *Massacres of El Mozote* at ¶ 242; see, e.g., *Velásquez-Rodríguez v. Honduras* Merits, Judgment Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 118–19 (July 29, 1988); see also Press Release, Inter-Am. Comm'n H.R., *supra* note 144.

these international legal sources because these writings demonstrate the three Central American countries' inability to adequately offer protection to asylum seekers.

Consideration of foreign courts' judgments and related scholarly work is appropriate because their conclusions are consistent with the U.S. State Department's annual Country Reports on Human Rights Practices. As the executive agency responsible for overseeing the nation's foreign and international relations, the State Department describes the judiciaries of Honduras, Guatemala, and El Salvador as being "often ineffective" in addressing human rights abuses, including acts of torture and persecution, because judicial actors in these countries are typically subject to intimidation and corruption, and lack the necessary internal controls to prevent judicial officials from being susceptible to bribery that may otherwise allow for a fair adjudicatory process.<sup>173</sup> The reports provided by the executive agencies cast doubt on the validity of the joint DOJ-DHS findings supporting the implementation of the Central American ACAs and the Third Country Asylum Rule.

Further, the U.S. Court of Appeals for the Ninth Circuit already struck down the Third Country Asylum Rule as "arbitrary and capricious" due to the agencies' inability to demonstrate that asylum seekers can be safe if removed from the United States.<sup>174</sup> The Ninth Circuit found that the agencies' interpretation of the INA in implementing the rule was unreasonable considering the United States' treaty obligations, suggesting that the Executive Branch's current policy of removing asylees to Central American countries—without ensuring the necessary protective and legal guarantees are adequately available—would violate the customary principle of non-refoulement.<sup>175</sup> While the ACAs with Guatemala, Honduras, and El Salvador were never challenged in court prior to their termination in 2021, the agreements would have likely been struck down under judicial review because they could not satisfy the statutory requirement that the receiving third country be able to offer a "full and fair procedure" for determining claims for asylum status.<sup>176</sup>

As the federal legislative body of the United States, Congress is vested with the constitutional authority to establish and amend immigration laws.<sup>177</sup> Although Congress intended for asylum to be a discretionary form of relief,<sup>178</sup> the executive agencies' decision to constructively deny asylum claims

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<sup>173</sup> See Country Conditions for Guatemala, *supra* note 145, at 6–7; accord Country Conditions for El Salvador, *supra* note 145, at 8 (acknowledging that the government has not always respected judicial independence and that the judiciary has been burdened by "inefficiency and corruption"); see Country Conditions for Honduras, *supra* note 145, at 7.

<sup>174</sup> See *East Bay Sanctuary Covenant*, 950 F.3d at 1274–75.

<sup>175</sup> *Id.* at 1274.

<sup>176</sup> See 8 U.S.C. §§ 1158(a)(2)(A); see e.g., Am. Fed'n of Lab. & Cong. of Indus. Orgs., et al., *supra* note 16, at 4; accord Press Release, U.S. Dep't of State, *supra* note 17.

<sup>177</sup> U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to establish a uniform "Rule of Naturalization").

<sup>178</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987) (explaining that even when an individual is eligible for asylum, the AG has discretion to grant it).

of all persons traveling from a particular region through the application of the Third Country Asylum Rule and execution of ACAs constituted an abuse of the agencies' discretion. Both policies modified asylum eligibility in an arbitrary and discriminatory manner and infringed upon the United States' international obligation to prevent refoulement. Even if Congress intended to authorize the agencies to enforce one or both policies, Congress would need to have articulated an "intelligible principle" to which the agencies would be directed to conform.<sup>179</sup> Allowing the agencies to essentially legislate and modify existing immigration practices by enforcing either policy would not only extend the Executive Branch's power and thus infringe upon Congress's authority to create federal immigration laws, but would also discount legislative steps taken by Congress, in passing the Refugee Act and FARRA, to codify the customary principle of non-refoulement in the INA.<sup>180</sup> Without proper guidance from Congress regarding how the AG and the Secretary may alter the legal rights of arriving asylum seekers, immigration courts should only consider statutory bars to asylum eligibility, including grounds of inadmissibility,<sup>181</sup> as applied during exclusion and removal hearings when assessing an individual's protection claim.<sup>182</sup>

*B. The executive agencies may still regulate asylum eligibility so long as their policies comply with both domestic statutory requirements and the international obligation of the United States to prevent refoulement.*

Both immigration policies likely constitute a breach of domestic and international legal principles.<sup>183</sup> The DOJ and DHS retain the authority to

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<sup>179</sup> See *J.W. Hampton*, 276 U.S. at 409. Irrespective of whether or not evidence of congressional intent is sufficient to uphold each policy, amending the INA to allow either restriction on asylum eligibility would require a full legislative process with cooperation from both Houses of Congress followed by a signature by the President because the policies are "essentially legislative" and have the "purpose and effect of altering the legal rights, duties, and relations" of particular persons. *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983).

<sup>180</sup> See Refugee Act, § 203(e); see also FARRA, § 1242(a); but see Restatement (Fourth), The Foreign Relations Law of the United States, § 406 ("Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. If a federal statute cannot be so construed, the federal statute is controlling as a matter of federal law").

<sup>181</sup> 8 U.S.C. § 1182(a) provides an exhaustive list of "aliens ineligible for visas or admission" that additionally bar certain foreign nationals from applying for asylum in the United States.

<sup>182</sup> See generally *Matter of Pula*, 191 & N. Dec. 467, 473–75 (BIA 1987). 8 U.S.C. § 1225 (explaining the inspection and screening process conducted for expedited removal of noncitizens who are inadmissible upon their arrival at a U.S. port of entry). U.S. immigration courts already consider whether noncitizens passed through any other countries or arrived in the United States directly and whether they made any attempts to seek asylum elsewhere before coming to the United States in deciding whether an asylum applicant merits a "favorable exercise of discretion," which is a burden of the asylum applicant to satisfy. *Matter of Pula*, 191 & N. at 473-74.

<sup>183</sup> See, e.g., Spagat, *supra* note 164 (describing the practice of removal "to Mexico before having a chance to seek protection from persecution back home" as being "contrary to U.S.

regulate and thus restrict the right to claim asylum but only insofar as their regulatory actions are developed in accordance with statutory requirements under the INA and the APA as well as in compliance with the nation's international obligations.<sup>184</sup> Invoking their respective authority as the chief administrators of U.S. immigration law, the AG and the Secretary have shaped the immigration application and removal process for new arrivals and for immigrants already residing in the United States.<sup>185</sup>

As previously discussed, given that either official may establish additional conditions or restrictions on the consideration of asylum claims so long as they are “*not inconsistent with the INA*,” the AG and the Secretary are empowered to conclude and implement ACAs pursuant to the “safe third country” statutory exception only if they can demonstrate that the receiving country can in fact ensure the person's safety and provide access to a “full and fair procedure” to review their protection claim.<sup>186</sup> Applying the same regulatory requirements mandated by the INA, the executive officials may also issue additional restrictions on the general right to claim asylum—as attempted with the Third Country Asylum Rule—but would need to provide adequate reasons for their decisions so as not to infringe on a person's right against refoulement.<sup>187</sup> Although determinations pursuant to the “Safe Third Country” exception are not subject to judicial review,<sup>188</sup> federal courts may still review each policy as they pertain to constitutional claims or questions of law raised upon a petition for review of a removal order and as written policies regarding the expedited removal of inadmissible persons.<sup>189</sup>

The IACHR, international human rights organizations, and jurists, as well as certain leadership of designated “safe third countries,” have scrupulously documented the conditions in the three countries—Guatemala, Honduras, and El Salvador—currently receiving removed asylees from the United States; their collective findings reflect the countries' inability to protect the person from persecution and torture based on a legally protected ground or provide them an avenue to seek legal protection there.<sup>190</sup> Deportation

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immigration law”); *see also* Press Release, Inter-Am. Comm'n H.R., *supra* note 144 (“these policies are contrary to [the United States' and the third country's] obligations in the area of human rights, particularly in regards to the right to request and receive asylum and the principle of *non-refoulement*. . .”).

<sup>184</sup> *Cf.* Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1915 (2020) (finding that, although the decision to eliminate DACA was unlawful based on the agency's current determination, it still retains the authority to eliminate the program if it does in accordance with the intelligible principle).

<sup>185</sup> *See, e.g.,* *Regents of the Univ. of Cal.*, 140 S. Ct. at 1901 (recognizing the Secretary's authority to issue a memorandum announcing an immigration relief program for “certain young people who were brought to this country as children.”) (internal cite omitted); *see, e.g.,* *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987) (citing the Refugee Act to emphasize the AG's role in immigration to establish a procedure for a noncitizen to apply for asylum, and that the noncitizen may be granted asylum in the discretion of the AG if they determine that such a noncitizen is a refugee under the INA).

<sup>186</sup> 8 U.S.C. §§ 1158(a)(2)(A), (d)(5)(b).

<sup>187</sup> *See East Bay Sanctuary*, 385 F. Supp. 3d at 956 (internal citation omitted).

<sup>188</sup> 8 U.S.C. § 1158(a)(3).

<sup>189</sup> 8 U.S.C. §§ 1252(a)(2)(D), (e)(3)(A).

<sup>190</sup> *See, e.g.,* Press Release, Inter-Am. Comm'n H.R., *supra* note 144.

tion is “always a harsh measure; it is all the more replete with danger” when noncitizens make a claim that they will be subject to death or persecution if forced to return to their home country or to a country where their “life or freedom would be threatened.”<sup>191</sup> In light of the inherent risks associated with a person’s removal, the U.S. government is obliged to demonstrate that its regulatory policies would not result in asylees’ refoulement, a result that is inconsistent with the INA.<sup>192</sup> Based on the considerable consensus regarding lack of judicial and legal safeguards in the countries that would receive immigrants affected by the two U.S. policies, neither the Central American ACAs nor the Third Country Asylum Rule can remain in effect where doing so would constitute acts of refoulement.<sup>193</sup> While the decision whether to grant asylum is a matter which Congress has left for the AG and the Secretary to decide,<sup>194</sup> Congress could not have intended to restrict this form of relief for otherwise eligible asylum seekers, and thus causing their refoulement, solely because of their mode of travel to reach the United States.

### III. APPLICATION

In 2021, the federal agencies of the Biden administration rescinded the Central American ACAs and the Third Country Asylum Rule. However, by this time, the United States had summarily excluded or removed over 1000 persons under these policies.<sup>195</sup> Furthermore, while in effect, these regulations withstood legal challenges to prevent their enforcement,<sup>196</sup> making it increasingly likely that either or both regulatory mechanisms could reemerge once more in subsequent administrations seeking to restrict the right to claim asylum. If that occurs, litigation will follow, in the form of appeals to removal orders, where the claimant would challenge the policy’s application as violative of the U.S. obligation of non-refoulement.

Presented as an abridged legal brief, the following hypothetical challenges the legality of each policy in the case of a Salvadorian asylum seeker possibly facing removal to Guatemala.<sup>197</sup> Applying this Note’s analytical

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<sup>191</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421m 449 (1987).

<sup>192</sup> 8 U.S.C. § 1158(b)(2)(C) (providing the authority to establish by regulation additional limitations and conditions for seeking asylum, consistent with section 1158); *accord* 5 U.S.C. § 706(2)(A) (requiring the enjoinder of agency actions that are not established in accordance with law); *see generally East Bay Sanctuary Covenant*, 950 F.3d at 1274–75 (holding that the Third Country Asylum Rule cannot remain in effect since it contradicts existing domestic legislation and international treaty obligations); *see also* Spagat, *supra* note 164.

<sup>193</sup> Sieff & Sheridan, *supra* note 18.

<sup>194</sup> *Cardoza-Fonseca*, 480 U.S. at 450.

<sup>195</sup> Sieff & Sheridan, *supra* note 18; Andrew Craycroft & Nithya Nathan-Pineau, *THE ASYLUM TRANSIT BAN AFTER CAIR COALITION V. TRUMP: Obtaining Relief in Asylum Transit Ban Cases*, ILRC (Oct. 2020), [https://www.ilrc.org/sites/default/files/resources/asylum\\_transit\\_ban\\_after\\_cair\\_v\\_trump\\_10.2020.pdf](https://www.ilrc.org/sites/default/files/resources/asylum_transit_ban_after_cair_v_trump_10.2020.pdf), *archived at* <https://perma.cc/VYM3-9WYH>.

<sup>196</sup> *See, e.g., Barr v. East Bay Sanctuary Covenant*, 140 S.Ct. at 3.

<sup>197</sup> The facts of this hypothetical are based on a true case, but the claimant’s name, precise cause of action, and identifying characteristics have been changed to preserve their anonymity.

framework, the hypothetical claimant urges the court to consider international legal sources when analyzing the Third Country Asylum Rule and the Guatemalan ACA. The IACHR has documented country conditions which demonstrate that the third country, Guatemala, lacks the requisite safety and legal mechanisms to adequately protect the claimant. These international sources would enhance the court's analysis by allowing for a more comprehensive review of Guatemala's ability to protect the claimant if he were removed to Guatemala. In doing so, the claimant argues that the court must strike down both policies to ensure that the United States continues its observance of the treaty-based obligation of non-refoulement, as Congress intended by passing the Refugee Act and FARRA.

### A. *Factual and Procedural History*

Jose Martinez ("Mr. Martinez") is an eighteen-year-old citizen of El Salvador and a victim of the country's endemic gang and drug trafficking violence. In his home country, he was forced to work in agriculture to support himself after his parents abandoned him at the age of fifteen. During the last several months before he fled El Salvador, Mr. Martinez was targeted by the local Mara Salvatrucha gang, MS-13, who attempted to recruit him to cultivate cocaine and heroin on behalf of the gang in its joint drug-trafficking operation with the Mexican Mafia.<sup>198</sup>

When Mr. Martinez refused to assist MS-13 in its illicit operation, several gang members warned him that if he tried to escape his "responsibilities," he would be found and killed for his noncompliance. He was also told that he had nowhere to hide because their gang was spread across Central America, and they had eyes surveilling the entire region. They finally warned that the authorities would not protect him because they had the police paid off. Nevertheless, Mr. Martinez went to report these threats but was quickly dismissed by police officers who told him that they would not get involved in local affairs. Mr. Martinez ultimately fled El Salvador and traveled through Guatemala and Mexico to reach the United States. He did not seek asylum in either transit country due to his fear, stemming from the gang's warnings, that they would find him in either country.

Upon his arrival at the U.S. border, Mr. Martinez expressed fear of persecution and underwent a credible-fear screening as administered by an asylum officer.<sup>199</sup> After the immigration officer found that Mr. Martinez possessed a "significant possibility" that he could establish asylum eligibility

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For purposes of the hypothetical, the Central American ACAs implemented during the Trump Administration are considered to be still in effect.

<sup>198</sup> Although the MS gang is "still far from constituting a drug cartel," its members have used the Mexican Mafia's "leverage and contacts," and the Mafia has relied on the gangs' presence throughout Central America to produce and distribute drugs on its behalf. See INSIGHT CRIME & CTR. FOR LATIN AM. & LATINO STUD., MS13 in the Americas 64–66 (2019) [hereinafter "MS-13 IN THE AMERICAS"].

<sup>199</sup> See 8 C.F.R. §§ 208.9(c), 208.30(c).



during removal proceedings, Mr. Martinez's case was referred to an IJ to review and determine whether to grant him asylum status.<sup>200</sup>

During his individual hearing, Mr. Martinez, with assistance of counsel, claimed he was persecuted on account of his membership in a particular social group: impoverished indigenous Salvadoran farmers. Based on the facts established during the credible fear interview coupled with testimony and evidence submitted with the application for asylum, the IJ found that Mr. Martinez's claim of past persecution was credible based on the death threats he had received.<sup>201</sup> The judge further determined that, as noted in the State Department's Country Conditions Report, the Salvadoran government has taken certain steps to curtail drug cultivation and prosecute corrupt government officials, but drug activity and corruption remained rampant throughout the territory.<sup>202</sup>

While the government did not overcome the rebuttable presumption of future persecution,<sup>203</sup> the IJ agreed with the AG's finding that Mr. Martinez cannot seek asylum in the United States because he had engaged in "irregular" migration in which he failed to apply for protection in Guatemala or Mexico.<sup>204</sup> After the AG determined that it would not be "in the public interest" to allow Mr. Martinez to apply for asylum in the United States, the IJ determined that Mr. Martinez should be removed to Guatemala pursuant to the respective ACA.<sup>205</sup> Mr. Martinez filed his petition for review in a timely manner,<sup>206</sup> but the BIA upheld the removal order and denied his appeal from the IJ's decision because the ruling was not "clearly erroneous."<sup>207</sup> Mr. Martinez then appealed the BIA decision to the U.S. Court of Appeals for the

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<sup>200</sup> See 8 C.F.R. §§ 208.30(a), (e)(1)–(2) ("DHS has exclusive jurisdiction to make credible fear determinations, and the Executive Office for Immigration Review has exclusive jurisdiction to review such determinations").

<sup>201</sup> The Ninth Circuit has "consistently held that death threats alone can constitute persecution." *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (internal citations omitted) (citing various cases in which asylum and withholding claimants have successfully demonstrated past persecution based on credible threats of death alone). For the purpose of this hypothetical, Mr. Martinez's application and accompanying brief—claiming asylum, withholding of removal, and protection under CAT—was received by the immigration court within one year of his arrival in the United States. 8 U.S.C. § 1158(a)(2)(B).

<sup>202</sup> See Country Conditions for El Salvador, *supra* note 145, at 8–9. The Guatemalan government has taken similar action to diminish such crimes, but drug activity and corruption remain pervasive issues throughout the nation. See Country Conditions for Guatemala, *supra* note 145, at 6–7.

<sup>203</sup> "Where past persecution is established by the applicant, the [government] ordinarily will have to present, as a factor militating against the favorable exercise of discretion, evidence that there is little likelihood of present persecution." *Matter of Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989). The government failed to suggest that either Mr. Martinez has a reasonable opportunity to relocate within his country or the circumstances in El Salvador have changed insofar as he would no longer be persecuted if removed. 8 C.F.R. §§ 208.13(b)(1)(i)(A)–(B).

<sup>204</sup> See Asylum Eligibility, 84 Fed. Reg. at 33829, 33840. Mr. Martinez had claimed that he did not seek asylum in Guatemala because of the death threats from the MS gang members who warned that they could find him anywhere in Central America. The judge found this to be inconsequential in their analysis for a discretionary grant of asylum.

<sup>205</sup> 8 U.S.C. § 1158(a)(2)(A); see Guatemala ACA, 84 Fed. Reg. at 64095.

<sup>206</sup> 8 U.S.C. § 1252(b)(1).

<sup>207</sup> 8 U.S.C. § 1252(a)(2)(B)(ii).

Ninth Circuit.<sup>208</sup> His appeal from the removal order challenges the agencies' conclusion and implementation of both the Guatemalan ACA and the Third Country Asylum Rule on the basis that upon removal, he would continue to be persecuted in Guatemala, a country that he passed through during his transit to the United States,<sup>209</sup> on account of his membership in a particular social group.<sup>210</sup> He argues that both immigration policies violate the INA as well as the nation's international obligation of non-refoulement as implemented under the Refugee Act and the FARRA.<sup>211</sup>

*B. Mr. Martinez is statutorily eligible for and should have been granted asylum.*

Mr. Martinez applied for relief from removal in the form of asylum pursuant to Section 208 of the INA.<sup>212</sup> Asylum may be granted where the applicant is unable or unwilling to return to his home country due to past persecution or a well-founded fear of future persecution on account of a protected ground.<sup>213</sup> Persecution is a threat to a person's life or freedom or the infliction of suffering or harm to punish a person for possessing a belief or characteristic that the persecutor attempts to overcome.<sup>214</sup> While physical persecution may satisfy the requirement for asylum,<sup>215</sup> verbal threats can also constitute persecution.<sup>216</sup> Furthermore, a persecutor may have multiple motives for targeting someone, but a victim may qualify for asylum based on past persecution so long as a protected ground is "at least one central reason" for the persecution.

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<sup>208</sup> 8 U.S.C. § 1252(a)(5).

<sup>209</sup> Although "refoulement" is usually construed to encompass a person's "return" to their home country, the term should also cover countries that the person passes through en route to the United States because their removal to the transit country, even if their presence there was only temporary, would constitute their "return" to that country. *See generally Refoulement*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2019) (describing "the act of forcing . . . return" without noting a minimal period of residency in the country in which the asylee is set to be removed).

<sup>210</sup> 8 U.S.C. § 1252(a)(2)(D).

<sup>211</sup> *Accord* Refugee Act, § 203(e); *see* I.N.S. v. Stevic, 467 U.S. 407, 421 (1984) (referencing the codification of the Refugee Protocol's non-refoulement obligation in INA § 241(b)(3)); *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 434 (1987) (describing congressional amendments to the INA's definition of "refugee" to reflect the international legal requirement of a "well-founded fear of persecution"); *see also* FARRA § 1242(a).

<sup>212</sup> Noncitizens seeking humanitarian relief during removal proceedings generally seek statutory withholding of removal and protection under CAT in the alternative. Practitioners should argue for each form of relief where the applicant is statutorily eligible in case their asylum claim is denied.

<sup>213</sup> *See* 8 U.S.C. § 1101(a)(42)(A); *see also* 8 U.S.C. § 1158(a)(1).

<sup>214</sup> *See Matter of Acosta*, 19 I&N Dec. 211, 222-23 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

<sup>215</sup> *See Matter of Diaz*, 10 I&N Dec. 199, 201 (BIA 1963).

<sup>216</sup> *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998). The Ninth Circuit has consistently held that death threats constitute persecution. *See Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (citing *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000)).

1. Mr. Martinez suffered past persecution on account of him being an impoverished indigenous Salvadoran farmer.

Mr. Martinez suffered past persecution in the form of death threats. As noted by the IJ, Mr. Martinez has credibly stated that MS-13 gang members sought to force him to harvest drugs for the gang's trafficking operation on threat of death. Moreover, his particular social group—impoverished indigenous Salvadoran farmers—satisfies the three requirements of a cognizable particular social group.<sup>217</sup> First, Mr. Martinez shares a common immutable characteristic based on a shared past experience; he was sought out for his agricultural experience to cultivate narcotics. His work experience is not something that he can change. Second, the group is sufficiently particular to provide a “clear benchmark for determining” its members due to its “discrete” and “definable” boundaries.<sup>218</sup> Finally, Mr. Martinez's group is socially distinct because indigenous people are common targets of local gangs and represent a significant portion of agricultural workers in the country.<sup>219</sup>

2. Mr. Martinez established a presumption of well-founded fear of persecution that the government did not rebut.

Mr. Martinez demonstrated that he experienced persecution in El Salvador, such that a presumption of future harm exists.<sup>220</sup> DHS may only rebut this presumption by showing that there has been a “fundamental change in circumstances” such that the person no longer has a “well-founded fear of persecution” in their home country or that the person “could avoid future persecution by relocating” to another part of their country of nationality and “it would be reasonable to expect the applicant to do so.”<sup>221</sup> Mr. Martinez's testimony during the merits hearing coupled with the submitted country condition evidence demonstrate that internal relocation would not have been reasonably practicable and that conditions in El Salvador have not changed since his departure to lessen the impunity by which narco-traffickers operate throughout the country.<sup>222</sup>

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<sup>217</sup> See generally Matter of M-E-V-G-, 26 I&N Dec. 227, 236–39 (BIA 2014) (outlining the three requirements for PSG cognizability).

<sup>218</sup> See *id.* at 239.

<sup>219</sup> See, e.g., Country Conditions for El Salvador, *supra* note 145, at 21–22; see M-E-V-G-, at 240.

<sup>220</sup> 8 C.F.R. § 208.13(b)(1).

<sup>221</sup> 8 C.F.R. §§ 208.13(b)(1)(i)(A)–(B).

<sup>222</sup> See, e.g., Country Conditions for El Salvador, *supra* note 145, at 2 (“Impunity persisted despite government steps to dismiss and prosecute abusers in the security forces, executive branch, and justice system.”).

3. The Salvadoran government was unable or unwilling to prevent threats to Mr. Martinez's livelihood and wellbeing.

Noncitizens seeking asylum in the United States must establish that their persecution was the direct result of government actions or by private forces that their government was unable or unwilling to control.<sup>223</sup> A government's mere "difficulty" in controlling private conduct does not necessarily indicate that it is unable to do so; even where the home government appears willing to control the action of private actors, however, the "efficacy of those efforts" must also be examined to evaluate the government's ability to control threats levied against its citizens.<sup>224</sup> Sister circuit courts have held that "access to a nominal or ineffectual remedy does not constitute 'meaningful recourse,' for the foreign government must be both willing *and able* to offer an applicant protection."<sup>225</sup> Further, courts generally will not accept evidence of "empty or token 'assistance'" as the basis to find that a foreign government is willing and able to protect an asylum seeker.<sup>226</sup> Therefore, a government's inability or unwillingness to control acts of persecution may be established where the respondent does not seek police assistance because it would be futile, or where the government responds to a request for protection by failing to meaningfully act to control the persecutor's conduct.<sup>227</sup>

The U.S. State Department has described the human rights issues in El Salvador as "significant," reporting extrajudicial killings, difficulty maintaining an independent judiciary, prevailing gang violence and inability to control criminal delinquency, and corruption despite talks of reform.<sup>228</sup> Moreover, gangs would often "mount[ ] incursions into and appropriate[ ] indigenous land" and would particularly target adolescents "to perform illicit activities in the arms and narcotics trades."<sup>229</sup> In September 2019, media outlets accused the Salvadoran government of negotiating with senior gang leaders to obtain electoral support and the reduction in homicides prior to the legislative and municipal elections.<sup>230</sup> Corruption and impunity remain endemic despite investigating corruption in law enforcement and senior government officials.<sup>231</sup>

In this case, Mr. Martinez's experiences and country condition reports evidence the Salvadoran government's unwillingness or inability to protect him. Mr. Martinez became the victim of recruitment efforts by MS-13 gang

<sup>223</sup> See *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018).

<sup>224</sup> See *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (emphasis added); *accord Orellana v. Barr*, 925 F.3d 145, 152 (4th Cir. 2019).

<sup>225</sup> *Orellana*, 925 F.3d at 152 (citation omitted).

<sup>226</sup> *Id.* at 153.

<sup>227</sup> See *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006); *accord Orellana v. Barr*, 925 F.3d at 153.

<sup>228</sup> Country Conditions for El Salvador, *supra* note 145, at 1.

<sup>229</sup> U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., EL SALVADOR 2020 HUMAN RIGHTS REPORT 22, 26 (2021).

<sup>230</sup> *Id.* at 16.

<sup>231</sup> *Id.* at 15.

members as a minor. He initially refrained from seeking police protection because gang members warned him that law enforcement were paid off and would not intervene. Yet, Mr. Martinez tried reporting the gang's threats, but police officers quickly dismissed his concerns. The authorities did not investigate or make any efforts to control the gang's actions and prevent the threats against Mr. Martinez.

*C. The executive agencies failed to satisfy requirements under the Administrative Procedure Act and INA when concluding the Guatemalan Asylum Cooperative Agreement because Guatemala lacks a “full and fair procedure” for asylum adjudication.*

The Asylum Cooperative Agreement between the United States and Guatemala allows for the removal of asylum applicants, who are neither residents nor citizens of Guatemala, to the foreign country without affording the individual an opportunity to seek asylum in the United States and leaving these persons without an effective path to claim protection in the receiving country.<sup>232</sup> The DOJ and DHS failed to satisfy INA requirements when creating the ACA with Guatemala because the agencies' categorical determination that Guatemala possesses a “full and fair procedure” for adjudicating protection claims fails to address or to even acknowledge the general consensus of the international legal community as well as findings by the U.S. State Department to the contrary.<sup>233</sup> Based on several IACHR judgments, which have since been supported by the State Department's Country Condition Reports, the Guatemalan government's actions and enacted legislation have not ensured that the country's judiciary possesses the capacity to review and offer asylum to persons removed from the United States.<sup>234</sup>

Furthermore, although the INA requires, prior to any removal to a third country, that the federal government conduct screenings to ensure that the individual would not face persecution or torture on account of a protected

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<sup>232</sup> See Guatemala ACA, 84 Fed. Reg. at 64097; see also Country Conditions for Guatemala, *supra* note 145, at 6–7, 12 (highlighting the country's political and judicial deficiencies as hinderances on the adjudication process for claims of protection and of human rights abuses within the country).

<sup>233</sup> *Id.* at 6–7; see also Press Release, Inter-Am. Comm'n H.R., *supra* note 144; see generally 8 U.S.C. § 1158(a)(2)(A) (providing the criteria by which an ACA can be concluded). Even if the third country is capable of offering asylum to a person to stay lawfully there, this would not ensure that they are safe and protected from their persecutors who may pose a threat that transcends a country's territorial borders.

<sup>234</sup> Compare Implementing ACAs, 84 Fed. Reg. at 63997 (describing the agencies' categorical determination as to whether a country can offer “access to a full and fair procedure” for adjudicating asylum cases without providing the factual basis for its determination) with Country Conditions for Guatemala, *supra* note 145, at 6–7, 12 (“[The Guatemalan] judicial system generally failed to provide fair or timely trials due to inefficiency, corruption, and intimidation of judges, prosecutors, and witnesses,” as well as their “identification and referral mechanisms for potential asylum seekers were inadequate”) and “Las Dos Erres” Massacre, at ¶ 153 (noting that victims of human rights abuses lacked access to a fair trial to remedy injustices because, among other reasons, their suits for protection were denied, judicial delays were not justified, and investigations were neither thorough nor comprehensive).

ground if removed, this process adopts the heightened burden of proof that applies in the withholding-of-removal context.<sup>235</sup> Since the agencies' categorical finding presumes that Guatemala has adequate safety and judicial safeguards to offer protection to asylees, Mr. Martinez would almost certainly be unable to obtain withholding of removal as an alternative to asylum because he would have the heightened burden of showing that he would "more likely than not" be persecuted if removed to Guatemala.<sup>236</sup> Mr. Martinez should thus be allowed to submit evidence to contest the agencies' "full and fair" finding and to demonstrate that the United States would be violating its international obligation of non-refoulement if he were removed to Guatemala pursuant to the ACA.<sup>237</sup> In presenting evidence to contest the bilateral agreement's legality under the INA's "Safe Third Country" exception, Mr. Martinez would prevail in demonstrating his eligibility for asylum and would likely succeed in showing he merits a favorable exercise of discretion by the IJ.<sup>238</sup>

Mr. Martinez's travels through Guatemala without seeking asylum also trigger the Third Country Asylum Rule.<sup>239</sup> His return to Guatemala, however, would certainly result in his continued persecution at the hands of the MS-13 gang, a transnational organization,<sup>240</sup> because he is an impoverished indigenous Salvadoran farmer, and MS-13 had threatened him with surveillance throughout Central America.<sup>241</sup> Therefore, this Court should evaluate the legitimacy of the Third Country Asylum Rule because, as implemented, the policy has both domestic and international implications that impact not only Mr. Martinez's right to claim protection in the United States but the general right to claim asylum in the United States.

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<sup>235</sup> See Implementing ACAs, 84 Fed. Reg. at 63999.

<sup>236</sup> *Id.* (describing how the rule does not apply if a noncitizen establishes that it is "more likely than not" that the noncitizen would be persecuted or tortured on account of a protected ground in that country); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987) (describing the evidentiary burden for asylum as significantly lower than for withholding of removal).

<sup>237</sup> See, e.g., Press Release, Inter-Am. Comm'n H.R., *supra* note 144.

<sup>238</sup> *Matter of Pula*, 19 I. & N. at 474 ("An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted," and "the danger of persecution should generally outweigh all but the most egregious of adverse factors").

<sup>239</sup> See Asylum Eligibility, 84 Fed. Reg. at 33831.

<sup>240</sup> See MS-13 IN THE AMERICAS, *supra* note 198, at 3.

<sup>241</sup> Drug cartels are known to exploit agriculture activities in Guatemala, and its government has made certain efforts to prevent these illicit activities, but the country is unable to prevent these efforts from continuing within its own borders, let alone in other countries. See generally Country Conditions for Guatemala, *supra* note 145, at 1, 14, 18, 27–28 (emphasizing how gangs and drug trafficking groups "coerce[ ] young males . . . to [harvest,] sell or transport drugs").

*D. The Third Country Asylum Rule exceeds the authority delegated to the DOJ and DHS under the INA and likely violates Mr. Martinez's treaty-based right against refoulement as codified under the Refugee Act and the FARRA.*

Implementation of the Third Country Rule would bar Mr. Martinez from seeking asylum in the United States because he did not first seek asylum in Guatemala.<sup>242</sup> However, the Ninth Circuit should strike down the Third Country Asylum Rule because it exceeds the authority Congress delegated to the DOJ and DHS by restricting the legal rights of certain noncitizens, like Mr. Martinez.<sup>243</sup> Furthermore, this Court should allow Mr. Martinez to present evidence that the government's assessment of the country conditions in Guatemala does not satisfy the requisite criteria described in the INA's "Safe Third Country" exception to asylum eligibility. Given that Mr. Martinez has faced persecution in El Salvador by MS-13 gang members, this Court should conclude that his removal to Guatemala would constitute refoulement in violation of the international obligations of the United States<sup>244</sup> because he has reason to believe he will be persecuted or killed upon his return based on the gang members' warnings.

Similarly, the likelihood that Mr. Martinez would be subject to continued persecution in Guatemala—one of the Central American nations with a widespread MS-13 presence—requires that his appeal be reviewed carefully.<sup>245</sup> The government must bear the burden of proving that its immigration policies neither violate domestic requirements under the INA nor breach the nation's treaty-based obligation to prevent refoulement.<sup>246</sup> As reaffirmed by the Ninth Circuit, the district court in *East Bay Sanctuary Covenant* held that the agencies failed to offer "any reasoned explanation for the [Third Country Asylum] Rule's methodology of determining that a . . . [receiving] country is safe and asylum relief is sufficiently available, such that the failure to seek asylum there casts doubt on the validity of an applicant's claim."<sup>247</sup>

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<sup>242</sup> See Asylum Eligibility, 84 Fed. Reg. at 33831. For the purposes of this hypothetical, the immigration judge did not cite Mr. Martinez's failure to claim asylum in Mexico as a basis for invoking the rule and thus is not an issue raised in this section.

<sup>243</sup> See U.S. CONST. art. I, § 8, cl. 4 (providing Congress with the authority to establish a uniform Rule of Naturalization); see also 8 U.S.C. § 1252(a)(2)(B)(ii) (providing jurisdiction to federal appellate courts to review legal challenges to immigration-related regulatory policies); cf. *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1963) (describing legislative actions as those with "the purpose and effect of altering the legal rights, duties and relations" of particular persons).

<sup>244</sup> *Accord* Refugee Act, § 203(e) (codifying the treaty-based right against refoulement under the INA); see Refugee Protocol, *supra* note 33, at art. 33.1.

<sup>245</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440, 449 (1987).

<sup>246</sup> See generally *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1274–77 (9th Cir. 2020) (analyzing the regulatory policy's inconsistency with the United States' treaty obligation of non-refoulement).

<sup>247</sup> *East Bay Sanctuary Covenant*, 385 F. Supp. 3d at 952.

When the Rule was promulgated, neither the AG nor the Secretary provided any factual basis to justify the policy's issuance; therefore, the government should not be able to apply the eligibility bar in this case. As Mr. Martinez explained during his oral testimony, which the IJ found to be credible, he did not apply for asylum in Guatemala due to his fear that the gang would find him there. Based on the rule's underlying reasoning, Mr. Martinez's need for protection would not be any less legitimate or serious.<sup>248</sup> Thus, the government has not met the requisite burden of proof to preclude Mr. Martinez from claiming asylum in the United States under either an ACA or the Third Country Asylum Rule.

### CONCLUSION

The right against *refoulement* has become gradually qualified in the decades since asylum emerged as a form of relief from removal, despite the right's status as a fundamental principle of international refugee law and American immigration law.<sup>249</sup> The United States first assumed the obligation of non-*refoulement* when it ratified the Refugee Protocol and CAT,<sup>250</sup> which Congress implemented by enacting the Refugee Act and FARRA respectively.<sup>251</sup> As cases involving the right of non-*refoulement* quickly began to arise, the U.S. Supreme Court narrowly construed the treaty-based obligation to apply upon the noncitizen's arrival in the United States.<sup>252</sup>

The Executive Branch has consistently recognized, through its practices, that noncitizens may apply for asylum upon their arrival at the U.S. border.<sup>253</sup> These practices have been in accordance with the Supreme Court's interpretation of the right of non-*refoulement*<sup>254</sup> and in accordance with the statutory language of the INA.<sup>255</sup> As immigration grows more politicized in the face of national security, cultural, and economic interests, however, the United States has become increasingly more reluctant to offer protection to noncitizens forced to flee their home countries, which became abundantly clear during President Trump's term.<sup>256</sup>

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<sup>248</sup> See Asylum Eligibility, 84 Fed. Reg. at 33839.

<sup>249</sup> See U.N. High Comm'r for Refugees, *supra* note 46, at para. 5; see also ALEINIKOFF, *supra* note 2, at 793.

<sup>250</sup> See Refugee Protocol, *supra* note 33, at art. 1; see also CAT, *supra* note 34, at art. 3.

<sup>251</sup> See Refugee Act, § 203(e); see also FARRA, § 2242(a).

<sup>252</sup> See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993).

<sup>253</sup> See DEP'T OF HOMELAND SEC., *supra* note 78.

<sup>254</sup> See *Sale*, 509 U.S. at 187.

<sup>255</sup> See 8 U.S.C. § 1158(a)(1) (describing asylum eligibility, notwithstanding port of arrival, as encompassing noncitizens who "arrive[ ] in the United States) (whether or not at a designated port of arrival . . .)").

<sup>256</sup> See, e.g., Zolan Kanno-Youngs & Michael D. Shear, *Trump Virtually Cuts Off Refugees as He Unleashes a Tirade on Immigrants*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/trump-refugees.html>, archived at <https://perma.cc/QW92-UU42> (describing expected cuts to the allotted number of refugee admissions on the basis of "security concerns" within the region of origin); see, e.g., Miriam Jordan, *Trump Administration Says That Nearly 200,000 Salvadorans Must Leave*, N.Y. TIMES (Jan. 8, 2018), <https://www.nytimes.com/2018/01/08/us/salvadorans-tps-end.html>, archived at <https://>



Out of the many efforts by the Trump administration to streamline the immigration process, the Central American ACAs and the Third Country Asylum Rule have drawn significant controversy and have inspired several lawsuits, in part, because of the policies' international implications under existing international agreements and customary international law.<sup>257</sup> Despite the considerable prospect that removals under either policy would result in refoulement, as acknowledged by the Ninth Circuit,<sup>258</sup> the Supreme Court allowed the continued removal of asylum seekers pursuant to both policies.<sup>259</sup>

While the AG and the Secretary may restrict the general right to claim asylum pursuant to their shared regulatory authority under the INA,<sup>260</sup> they did not fulfill the requirements under the INA when implementing the Central American ACAs and the Third Country Asylum Rule. The legislative history of the two policies further illustrates the extent of the efforts by the executive agencies of the Trump administration to repudiate the nation's obligation to prevent refoulement.<sup>261</sup> First, before concluding each Asylum Cooperative Agreement, the DOJ and DHS claimed to have established cooperation with Guatemala, Honduras, and El Salvador to process asylum claims there.<sup>262</sup> However, as supported by the U.S. State Department's independent findings, as well as findings by international courts and legal scholars, all three countries lacked the safety and legal mechanisms that are required under the INA.<sup>263</sup> The United States had properly concluded an ACA with Canada in 2004 after determining that "the same safeguards accorded to aliens who are eligible for a credible fear determination" would be provided if the person was removed to Canada.<sup>264</sup> Such agreements are thus

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perma.cc/3H9W-8DH6 (describing the Trump administration's decision to end the Temporary Protection Status program for Salvadoran nationals after taking these protections away from Haitian and Nicaraguan nationals).

<sup>257</sup> See Narea, *supra* note 137; see also Press Release, Inter-Am. Comm'n H.R., *supra* note 144.

<sup>258</sup> See *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1274–75 (9th Cir. 2020).

<sup>259</sup> See *East Bay Sanctuary Covenant*, 588 U.S. at 1; accord Sieff, *supra* note 24.

<sup>260</sup> See 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(C).

<sup>261</sup> See Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not To Migrate To The United States*, NPR (June 7, 2021), <https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states>, archived at <https://perma.cc/HBM6-MMCB> ("Vice President Harris . . . had a direct message for Guatemalans thinking of migrating to the United States: 'Do not come'"). *But see* Press Release, Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras (Feb. 6, 2021) (on file with the U.S. Dep't of State). Despite terminating the three bilateral agreements and the Third Country Asylum Rule, the United States has not shown a genuine willingness to accept Central American migrants forced to flee their home countries due to fear of persecution or torture. *Id.*

<sup>262</sup> See Guatemala ACA, 84 Fed. Reg. at 64095; see Honduras ACA, 85 Fed. Reg. at 25464; see El Salvador ACA, 85 Fed. Reg. at 83598–99.

<sup>263</sup> See, e.g., Velásquez-Rodríguez v. Honduras Merits, Judgment Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 118–19 (July 29, 1968); accord "*Las Dos Erres*" Massacre, at ¶ 130, 152–53; *Massacres of El Mozote*, at ¶ 242; Country Conditions for Honduras, *supra* note 145, at 7; Country Conditions for Guatemala, *supra* note 145, at 6–7; Country Conditions for El Salvador, *supra* note 145, at 8; see also Press Release, Inter-Am. Comm'n H.R., *supra* note 144.

<sup>264</sup> Canada ACA, 69 Fed. Reg. at 69482.

feasible, but the AG and the Secretary must ensure that the receiving country possesses the requisite safety and legal safeguards as mandated by domestic statutory and international authorities.<sup>265</sup>

Second, the Third Country Asylum Rule was an effort spearheaded by the Trump administration to “forbid almost all Central Americans—even unaccompanied children—[from applying] for asylum . . . unless they were first denied asylum in . . . another third country.”<sup>266</sup> While Congress intended for asylum to be a discretionary form of relief that the AG and the Secretary may regulate,<sup>267</sup> the promulgated rule is an abuse of the agencies’ discretion, given that it discriminately imposes a bar on asylum eligibility while also disregarding the nation’s obligation to avoid removal practices that would constitute refoulement.<sup>268</sup> Viewed against the plethora of international judgments and scholarly commentaries to the contrary, both policies are not only “arbitrary and capricious” but also “unreasonable” in light of the United States’ international treaty obligations.<sup>269</sup>

Even as the Supreme Court prepares to review Trump-era asylum policies,<sup>270</sup> and as the Biden administration’s proposed changes to U.S. immigration enforcement are still materializing and being implemented,<sup>271</sup> the two policies have and will continue to leave an everlasting impact on how asylum claims are adjudicated in the United States.<sup>272</sup> While asylum seekers are expected to remain a highly politicized issue for the foreseeable future,<sup>273</sup> the United States’ priority of non-refoulement cannot be unheeded because to do so would negate the decades-long development of refugee law by this “vi-

<sup>265</sup> 8 U.S.C. § 1158(a)(2)(A) (requiring the receiving country to possess a “full and fair procedure” for adjudicating protection claims).

<sup>266</sup> See *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 4 (2019) (Sotomayor, J., dissenting).

<sup>267</sup> Accord *Asylum Eligibility*, 84 Fed. Reg. at 33830, 33832; see 8 U.S.C. § 1158 (b)(2)(C); see also *Implementing ACAs*, 84 Fed. Reg. at 63995, 63999.

<sup>268</sup> See *East Bay Sanctuary Covenant*, 950 F.3d at 1274–75.

<sup>269</sup> *Id.* at 1274.

<sup>270</sup> *Wolf v. Innovation Law Lab*, 140 S.Ct. at 1564 (granting certiorari to review the lawfulness of the Migrant Protection Protocols vis-à-vis existing asylum practice of the United States).

<sup>271</sup> See Biden Administration’s Review of Immigration Policies Memorandum, *supra* note 83, at 1–2 (imposing a “100-day pause on certain removals” and coordinating a “Department-wide review of policies and practices” concerning immigration enforcement and removal).

<sup>272</sup> See Alan Gomez & Daniel Gonzalez, *Biden might need years to reverse Trump’s immigration policies on DACA, asylum, family separation, ICE raids, private detention and more*, USA TODAY (Nov. 13, 2020), <https://www.usatoday.com/story/news/nation/2020/11/12/how-biden-reverse-trump-immigration-policies/6228892002/>, archived at <https://perma.cc/FW45-PKB9> (“You can come in on day one and . . . issue memos that will reset the world . . . . But . . . [c]an you undo the damage?). *But see* Rodriguez, *supra* note 24 (noting the Biden State Department’s decision to suspend and terminate the Central American ACAs, notwithstanding the fact that the Guatemala ACA had already been implemented for several months).

<sup>273</sup> See Miroff, *supra* note 16; see also John Bowden, *Biden won’t immediately roll back Trump immigration restrictions, advisors say*, THE HILL (Dec. 22, 2020), <https://thehill.com/homenews/administration/531311-biden-wont-immediately-roll-back-trump-immigration-restrictions>, archived at <https://perma.cc/KUY2-4TP3>.

brant twenty-first-century democracy built on the not completely fulfilled promise of ‘liberty and justice for all.’”<sup>274</sup>

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<sup>274</sup> Schmidt, *supra* note 1, at 92.

