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The Honduran Exodus: Understanding the Migrant Crisis at the Southwest Border

Ashley Saul

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THE HONDURAN EXODUS: UNDERSTANDING THE MIGRANT CRISIS AT THE SOUTHWEST BORDER

Ashley Saul*

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I. INTRODUCTION

I had to flee Honduras because I was targeted and threatened by the gangs. I was a nurse in my country, and a mother to three children. I had a home, a car, and a good career, and because of that I was seen as well-off. My children were in bilingual school, and one of my children was in medical school.¹

The mother of three, too scared to reveal her name, described to reporters that no matter how many times the hospital where she worked attempted to relocate her, the gangs would find her and force her to pay extortion money, and if she didn't, they would threaten to kill her and her children.² When she attempted to report the threats she was receiving to police, the police would tell the gangs, and threaten to kidnap her daughters and force them into prostitution.³ After an attempt was made to kidnap one of her daughters, she had no choice but to flee with her children.⁴ Like so

¹ Samantha Henderson, *Refugee Stories: A Family Flees Honduras*, SOUTHWEST CALIFORNIA SYNOD (Feb. 23, 2018), <https://www.socalsynod.org/2018/02/23/refugee-stories-a-family-flees-honduras>.

² *Id.*

³ *Id.*

⁴ *Id.*

many who travel north, Hondurans arriving at the border today are not just simply in search of economic opportunity and a better life, but are truly fleeing for their lives.

According to the Council for Foreign Relations, Honduras consistently ranks among one of the most violent countries in the world.⁵ In 2015, it registered 63.8 murders per 100,000 inhabitants, which was down from the unprecedented 90.4 per 100,000 in 2011.⁶ Although there has been a downward trend in recent years, Honduras' murder rate still remains one of the highest in the world, averaging 42.8 killings per 100,000 people as of 2017.⁷ Of the murders, eighty percent of homicide cases are never investigated, ninety-six percent never reach any judicial resolution, and there are an estimated 40,000 active gang members in the country.⁸ Moreover, according to the World Bank, nearly two-thirds of Hondurans, or almost 5.5 million people, live in poverty.⁹ In the rural areas of the country, one in every five Hondurans is considered to live in extreme poverty.¹⁰ With per capital income averaging just \$120 a month, the World Bank has reported Honduras to have the highest level of economic inequality in Latin America.¹¹

These deteriorating conditions have contributed to a vast exodus from Honduras and fueled the population's strong desire to migrate north, creating unprecedented numbers of Hondurans and other migrants from the Northern Triangle, an area consisting of Guatemala, El Salvador, and Honduras, arriving at the Southwest

⁵ Rocio Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle>.

⁶ Frank Miles, *Honduran crime, extreme poverty fueling migrant caravan*, FOX NEWS (Oct. 23, 2018), <https://www.foxnews.com/world/honduran-crime-extreme-poverty-fueling-migrant-caravan>.

⁷ *Honduras murder rate fell by more than 25 percent in 2017: government*, REUTERS (Jan. 2, 2018), <https://www.reuters.com/article/us-honduras-violence/honduras-murder-rate-fell-by-more-than-25-percent-in-2017-government-idUSKBN1ER1K9>.

⁸ *Why is Honduras so Violent? Impunity, Drugs, Gangs, Poverty and Corruption*, ASSOCIATION FOR A MORE JUST SOCIETY (Jan. 2019), <https://www.ajs-us.org/content/why-honduras-so-violent>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

border of the United States.¹² From 2011 to 2016, the number of people from the Northern Triangle who sought refugee status in neighboring areas increased by 2,249 percent.¹³ In September of 2018, a total of 92,959 migrants filed for asylum from the Northern Triangle, which is a sixty-seven percent increase from the 55,584 claims in the 2017 fiscal year according to U.S. Customs and Border protection.¹⁴ But unlike previous mass migrations seen before from this region, this surge of migrants is coming for a very different reason. It is no longer the hope to pursue the “American Dream,” and search for better economic opportunities, but a dire life and death situation. However, the body of law that functions to provide a solution to the problems these individuals are facing has remained unchanged since its creation by the United Nations Convention in 1951.¹⁵

The United Nations Convention of 1951 formed in response to the aftermath of Nazism from World War II and the spread of communism during the Cold War.¹⁶ These two events left millions of people displaced from their home countries with nowhere to go. Moreover, the reason these individuals became displaced was due to the individual persecution they faced on account of either their race, religion, nationality, membership of a particular social group, or political opinion. However, the influx of migrants at the Southwest Border are not fleeing from individual persecution. Instead, they are fleeing from a government that has become so infiltrated with corruption and gang violence. A government that subjects all of its citizens, not just a certain sector of the

¹² Jonathan T. Hiskey, *Understanding the Central American Refugee Crisis*, AMERICAN IMMIGRATION COUNCIL (Feb. 1, 2016), <https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis>.

¹³ *Central America Refugee Crisis*, UNHCR, <https://www.unrefugees.org/emergencies/central-america> (last visited Mar. 23, 2020).

¹⁴ Molly Hennessy-Fiske, *Immigrant asylum claims increase at the U.S. southern border*, LOS ANGELES TIMES (Dec. 10, 2018, 8:15 PM), <https://www.latimes.com/nation/la-na-border-patrol-asylum-cases-20181210-story.html>.

¹⁵ Kaitlin L. Locascio, *The Modern Refugee: Crafting A New Asylum Policy to Address The Realities of Today's Refugee Oppressors*, 17 LOY. J. PUB. INT. L. 27 (2015).

¹⁶ *Id.*

population, to inhumane conditions.¹⁷ This is a type of situation which the United Nations Convention of 1951 did not envision when it defined “persecution.”

Therefore, to understand why America is facing a migration crisis at the Southwest border, this article will focus on how the immigration system in the United States no longer functions to serve the migrant crises of the twenty-first century, with a particular emphasis on the humanitarian crisis in Honduras. Section II will provide a brief overview on the origins of America’s immigration policies that govern how our legal system processes refugees and asylees. Section III will discuss the state of events that have caused the breakdown of a civilized society in Honduras and explain how these events have caused the influx of migration to the Southwest border. Section IV will discuss how the socio-political climate in Honduras today provides a clear example for how the legal process for seeking asylum has collapsed entirely. Finally, Section V will look at the actions the Trump Administration took towards this issue and discuss tangible solutions.

II. U.S. IMMIGRATION LAW IN A NUTSHELL

In order to fully understand the argument set forth here, it is critical to first address the history behind asylum law in the United States, particularly with respect to Honduras and how exactly this system has broken down.

A. *Background of 8 U.S.C. § 1101 and Refugee Act of 1980*

The development of asylum law in the United States began with the United Nations Convention of 1951 (the “Convention”), a special United Nations conference held on July 28, 1951, for the purpose of providing aid to people displaced by World War II. Article 1 of the Convention defined a refugee as someone who:

[O]wing to a well-founded fear of being persecuted
for reasons of race, religion, nationality,

¹⁷ Dara Lind, *The Migrant caravan, explained*, VOX (Oct. 25, 2018), <https://www.vox.com/2018/10/24/18010340/caravan-trump-border-honduras-mexico>.

membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual resident as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁸

The definition reflects the aftermath of the World War II, where Nazi persecution of Jewish people and other minority groups resulted in the forced migration and displacement of twenty to thirty million during the 1930's.¹⁹ The framework for the term thus reflected the dominant circumstances of the era, with the protections imposing temporal and geographical restrictions, only applying to "those who became refugees by reason of events occurring before 1 January 1951."²⁰ Due to the spread of communism during the Cold War, the 1967 UN Refugee Protocol expanded the definition of refugee to include "any person who has or had well-founded fear of persecution."²¹ However, the remaining part of the definition (persecution for reasons of race, religion, nationality or political opinion) stayed the same. The flow of refugees who came after 1967 sought protection for fairly similar reasons to those of the refugee flow from 1951, but this time the persecution was led by the spread of communism in Eastern Europe.²² While the United States did not sign the 1951 United Nations Convention, it did become a party to the 1968 UN Refugee protocol.

In order to bring U.S. law into compliance with the 1968 Protocol, the United States enacted the Refugee Act of 1980 (the "Act") to provide a permanent and systematic process for the admission of refugees of special humanitarian concern to the U.S.

¹⁸ *Convention relating to the Status of Refugees* art. 1(2) (July 28, 1951), <https://www.unhcr.org/en-us/3b66c2aa10>.

¹⁹ See Locascio, *supra* note 15.

²⁰ Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (last visited Apr. 16, 2020) <https://legal.un.org/avl/ha/prsr/prsr.html>.

²¹ See Locascio, *supra* note 15.

²² *Id.*

and provide “comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who were admitted.”²³ The Act adopted an equivalent definition for refugees as set forth and established by the Convention, and defined a refugee as:

[A]ny person who is outside any country of such persons’ nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return, or is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁴

If an individual can prove that he or she is a refugee under this statutory definition, then, through the 1980 Act, the Secretary of Homeland Security or the Attorney General, may grant her asylum status in the United States.²⁵ Under the Act, this form of relief allowed the applicant to remain in the United States, as well as attempt to petition for their spouse and qualifying children to be granted derivative asylee status and join her in the United States.²⁶ However, the Act established that the burden of proving that the applicant meets the definition of a refugee rests on the applicants themselves.²⁷ While the term “persecution” is not defined in the Act, courts have interpreted the phrase to require “a showing of something more than mere discrimination or harassment.”²⁸ Additionally, the applicant has the burden of proof to show that

²³ *An Overview of U.S. Refugee Law and Policy*, AMERICAN IMMIGRATION COUNCIL (Jan. 17, 2018), <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>.

²⁴ 8 U.S.C. § 1101(a) (2018).

²⁵ Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV 5-6 (2016).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

this persecution was on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁹

B. 1996 Revisions to Asylum Policy

In January of 1996, Congress passed the Illegal Immigration Reform and Immigration Act (the “1996 Act”), which made substantial changes in the way an individual can apply for asylum protection.³⁰ Prior to the 1996 Act, individuals arriving at ports of entry in the United States without any proper immigration documents were eligible to have a hearing in front of an immigration judge to determine whether the individual was admissible as an asylee.³¹ During the hearing, an individual lacking proper documents could still request asylum protection.³² If the individual requesting asylum protection received an unfavorable decision, he or she could seek both administrative and judicial review of the case.³³

However, in the late 1980s and early 1990s, a mass exodus of thousands of asylum seekers from Central America, Haiti, and Cuba prompted concerns that the then-current policy was prone to abuse, because it provided for the opportunity for multiple hearings, reviews, and appeals.³⁴ Further, the 1993 bombing of the World Trade Center heightened fears that terrorists would enter the U.S. under false asylum claims and disappear into the population.³⁵ The Act established expedited removal proceedings, codified many regulatory changes, added strict time limits on filing claims, and limited judicial review in certain circumstances.³⁶ However, the 1996 Act did not alter the numerical limits on asylee adjustments.³⁷

²⁹ 8 C.F.R. § 1208.13 (2018).

³⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. §§ 1101–1363 (2018).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Yalidy Matos, *How America’s 1996 Immigration Act Set the Stage For Increasingly Localized and Tough Enforcement*, SCHOLARS STRATEGY NETWORK (Jan. 9, 2018), <https://scholars.org/brief/how-americas-1996-immigration-act-set-stage-increasingly-localized-and-tough-enforcement>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

C. *Post 9/11*

Following 9/11 and the creation of the Department of Homeland Security in 2002, another big change came to the asylum process.³⁸ The Immigration and Naturalization Service split into three separate organizations: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).³⁹ USCIS became the primary agency overseeing refugee and asylum affairs.⁴⁰ Within USCIS, the Refugee, Asylum and International Operational Directorate became the official entity which carries out refugee policies.⁴¹ Under these new departments, American policy on immigration became one that was primarily welcoming to refugees and asylum seekers to one that is at its core, defunctive. In May of 2005, the Real ID Act (the “ID Act”) was passed by Congress, which brought further limitations on the asylum and refugee process.⁴² Under the ID Act, individuals seeking asylum status are required to establish that race, religion, nationality, social group membership, or political opinion “was and will be at least one central reason” for their persecution.⁴³ Further, asylum seekers must now produce corroborating evidence of otherwise “credible testimony” unless they do not have or cannot reasonably obtain such evidence.”⁴⁴

D. *Current Policy*

The definition to qualify as an asylee remains the same since its inception in 1951. However, because “fear” is a subjective state of mind, assessing the merits of an asylum claim today focuses predominantly on the credibility and legitimacy of the claim and

³⁸ Arthur Dewey, *Immigration After 9/11: The View from the United States*, U.S. DEP’T OF STATE (Apr. 3, 2003), <https://2001-2009.state.gov/g/prm/rls/2003/37906.htm>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Sara Paoletti, *The 9/11 Effect and its Legacy on U.S. Immigration Laws: Essays, Remarks and Photographs*, PENN. STATE. L. LIB. (Sept. 16, 2011) https://elibrary.law.psu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1007&context=irc_pubs.

the likelihood that the persecution would occur if the individual returns home.⁴⁵ Asylum seekers must meet two fundamental standards—credible fear and well-founded fear.⁴⁶ The Immigration and Nationality Act of 1952 (“INA”) states that:

[T]he term “credible fear” means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.⁴⁷

The credible fear standard functions as a pre-screening standard that is often easier to meet and has a broader application than well-founded fear.⁴⁸

However, in *INS v. Cardoza- Fonseca*, 480 U.S. 421 (1987), the United States Supreme Court found that the standard for applicants for asylum to satisfy was too high and held that applicants only need to demonstrate a “well-founded” fear of prosecution.⁴⁹ The Supreme Court, following the standard set by the United Nations, helped clarify the regulations that explain what an applicant for asylum must demonstrate in order to show “well-founded fear.”⁵⁰ These regulations, set out in 8 C.F.R. § 208, state that an asylum seeker has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

⁴⁵ RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 7 (2005).

⁴⁶ *Id.*

⁴⁷ Immigration and Nationality Act § 208, 8 U.S.C.A. § 1225(b)(1)(B)(v) (1952).

⁴⁸ WASEM, *supra* note 45, at 7.

⁴⁹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

⁵⁰ *See id.* at 423-24.

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.⁵¹

The regulations also state that an asylum seeker “does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country.”⁵² Further, the intent of the persecutor can stem from multiple motives, as long as one motive is one of the statutorily enumerated grounds.⁵³

E. Process for Requesting Asylum and Refugee Status

An applicant has the legal right to request asylum status either at the port of entry he or she is seeking admission or once he or she is already in the United States.⁵⁴ This is very different from the process of applying for refugee status, which begins outside of the United States.⁵⁵ There are two different applications USCIS utilizes for the asylum process: “affirmative applications” or “defensive applications.”⁵⁶ While the Department of Homeland Security and USCIS use different procedural processes for affirmative and defensive applications, the same legal standards apply.⁵⁷ Once again, for both processes, the applicant has the sole burden of proof to establish that he or she meets the refugee definition, meaning that he or she has demonstrated a fear of being persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion, as specified in the INA.⁵⁸

⁵¹ 8 C.F.R. § 208.13(b)(2).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ WASEM, *supra* note 45, at 10.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

In an affirmative application process the asylum seeker is not involved with any removal proceedings (i.e., he or she has been admitted to the U.S.); the USCIS schedules a non-adversarial interview with a member of the Asylum Officer Corps who interviews the applicant to see if the or she meets the definition of a refugee.⁵⁹ Contrary to the defensive applications, where a claim for asylum status is raised once the individual is in a “removal proceeding and asserts an asylum claim as a defense to his/her removal.”⁶⁰ From the removal proceeding, the matter moves to immigration court, where formal procedures like the presentation of evidence and direct/cross examination are utilized.⁶¹ While his or her asylum application is being reviewed by the judge, the applicant may be detained until the judge makes a decision.⁶²

Seeking asylum is a very lengthy process.⁶³ It is not uncommon for a person to file his or her application and then receive a hearing or interview date several years later.⁶⁴ By the end of the fiscal year in 2019, more than 340,810 affirmative asylum applications were still pending with USCIS.⁶⁵ Additionally, the backlog in U.S. immigration courts reached an all-time high in March of 2018, with more than 669,000 deportation cases pending.⁶⁶ The majority of these cases remain unresolved, pending on average for more than 718 days.⁶⁷ Individuals with immigration court cases who were granted relief waited more than 1,000 days to receive their outcome.⁶⁸

⁵⁹ *Id.*

⁶⁰ WASEM, *supra* note 45, at 9.

⁶¹ RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL41753, ASYLUM AND CREDIBLE FEAR ISSUES IN U.S. IMMIGRATION POLICY 8 (2005).

⁶² *Id.*

⁶³ *Asylum in the United States*, AMERICAN IMMIGRATION COUNCIL (May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

⁶⁴ *Id.*

⁶⁵ Andrew R. Arthur, *Statistics Reveal the Scope of the Asylum Backlog*, Center for Immigration Studies (Nov 25, 2019), <https://cis.org/Arthur/Statistics-Reveal-Scope-Asylum-Backlog>.

⁶⁶ *Asylum in the United States*, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

III. THE DAY DEMOCRACY LEFT HONDURAS

A. *The 2009 Military Coup*

The mainstream media has attributed the influx of migration at the Southwest border to a situation in which the government of Honduras is failing to protect its citizens from criminal gangs and drug cartels.⁶⁹ However, notwithstanding Honduras' horrific gang and drug problem, there is a systematic problem with "raw violence . . . encouraged, and committed by the post-coup Honduran government as an institution, and directed especially at social justice activity, land rights defendants, the opposition, and journalists,"⁷⁰ which is another reason why individuals are fleeing. This influx in migration can be pinpointed to June 28, 2009, the day when then-democratically elected President Manuel Zelaya was ousted in a military coup.⁷¹ On that morning, soldiers broke into the presidential palace in Tegucigalpa, kidnapping Zelaya and forcing him on a plane to Costa Rica.⁷² Later that weekend, the Honduran Congress voted Zelaya out of office, replacing him with the President of Congress at that time, Roberto Micheletti.⁷³ There was no public explanation ever given by the military to explain Zelaya's ousting.⁷⁴ The only explanation given was by the Honduran Supreme Court, stating that the military acted to defend the law of the land against "those who had publicly spoken out and acted against the Constitution's provisions."⁷⁵

From the very beginning, the coup government took a very aggressive stance, deploying the military, municipal police officers, and paramilitary assassins against anyone who challenged

⁶⁹ DANA FRANK, *THE LONG HONDURAN NIGHT: RESISTANCE, TERROR, AND THE UNITED STATES IN THE AFTERMATH OF THE COUP* 210 (2018).

⁷⁰ *Id.*

⁷¹ See Dana Frank, *Honduras: Which Side is the US on?* THE NATION (May 22, 2012), <https://www.thenation.com/article/archive/honduras-which-side-us/>.

⁷² Elisabeth Malkin, *Honduran President is Ousted in Coup*, N.Y. TIMES (June 28, 2009), <https://www.nytimes.com/2009/06/29/world/americas/29honduras.html>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

it.⁷⁶ Peaceful demonstrations that took place in Tegucigalpa, filled with families, children and elderly people, were met with tear gas and brutal beatings.⁷⁷ Media reports, eyewitnesses, and independent human rights groups in Honduras all reported that police violently made their way through the crowds, attacking marchers with batons and throwing them into the back of trucks.⁷⁸ The Committee of Families of the Disappeared in Honduras reported that more than 3,000 people had been illegally detained since June 28, 2009.⁷⁹ Micheletti led the government ruthlessly for seven months,⁸⁰ however, because his administration was not recognized internationally or by the Organization of American States, a general election was held the following November.⁸¹

Micheletti was replaced by Porfirio Lobo, former President of Congress and the 2005 National Party president.⁸² Lobo “defeated his closest rival, former Vice President Elvin Santos of the Liberal Party (PL), 56.6 [percent] to 38.1 [percent].”⁸³ The legitimacy of Lobo’s election was met with considerable debate within the international community and in Honduras.⁸⁴ Former President of Argentina, Cristina Fernandez de Kirchner, called the election “‘a mockery’ carried out ‘in the most absolute illegality.’”⁸⁵ Argentina, Brazil, Ecuador, Venezuela, and several other countries announced that they would not accept the election results, however, the U.S.

⁷⁶ Dana Frank, *Hondurans’ Great Awakening*, THE NATION (May 22, 2010), <https://www.thenation.com/article/hondurans-great-awakening/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Honduras Truth Commission Rules Zelaya Removal Was Coup*, BBC NEWS (July 7, 2011), <https://www.bbc.com/news/world-latin-america-14072148>.

⁸¹ See *id.*

⁸² See PETER J. MEYER, CONG. RESEARCH SERV., R41064, HONDURAN POLITICAL CRISIS, JUNE 2009-JANUARY 2010 9 (2010).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Nations Divided on Recognizing Honduran President-Elect*, CNN (Nov. 30, 2009, 2:12 PM), <http://www.cnn.com/2009/WORLD/americas/11/30/honduras.elections/index.html>.

was not one of them.⁸⁶ On the night the election results were coming in, State Department spokesman Ian Kelly stated that “[s]ignificant work remains to be done to restore democratic and constitutional order in Honduras, but today the Honduran people took a necessary and important step forward.”⁸⁷ Lobo was officially sworn in and inaugurated on January 27, 2010.⁸⁸

B. Lobo’s Reign- An Illegitimate Regime Continues

When President Lobo assumed power, he “called for a government of national unity and pledged to engage in dialogue with all sectors of Honduran society.”⁸⁹ However, Lobo immediately appointed to top positions within congress and the government the same military figures who orchestrated the military coup to overthrow former President Zelaya, including its leader, General Romeo Vasquez.⁹⁰ Arturo Valenzuela, a U.S. State Department official responsible for the Latin-American region, commented two years removed from the coup, Honduras has made “significant progress in strengthening democratic governance . . . [and] promoting national reconciliation.”⁹¹ However, just two days after Valenzuela’s comment on the state of the country, “a resistance leader named Juan Chincilla was abducted at gunpoint by masked men in police and military uniforms.”⁹² After being tortured for over two days, he was remarkably able to escape in the middle of the night.⁹³ And while there are no official counts, thirty-

⁸⁶ Rory Carroll, *Honduras Elects Porfirio Lobo as New President*, THE GUARDIAN (Nov. 30, 2009, 2:51 PM), <https://www.theguardian.com/world/2009/nov/30/honduras-lobo-president>.

⁸⁷ *Honduras Elects Zelaya Rival Porfirio Lobo as President*, BBC NEWS (Nov. 30, 2009, 2:21 PM), <http://news.bbc.co.uk/2/hi/americas/8384874.stm>.

⁸⁸ *See id.*

⁸⁹ MEYER, *supra* note 82, at 10.

⁹⁰ *Id.* at 3.

⁹¹ Bill Quigley, *Honduras Human Rights Abuses Worse One Year After President Lobo Took Office*, HUFFPOST (May 25, 2011), https://www.huffingtonpost.com/bill-quigley/honduras-human-rights-abu_b_814968.html.

⁹² *Id.*

⁹³ *Id.*

six activist and leaders, as well as fifty other people, were murdered immediately after Lobo took office.⁹⁴

Reports made by the Inter-American Commission on Human Rights stated that children of anti-coup forces were being kidnapped as a strategy to silence any resistance against the new government.⁹⁵ The most prolific story involved Irma Villanueva, a young woman who was grabbed out of a resistance demonstration in Choloma in August of 2009.⁹⁶ Villanueva was kidnapped and brutally gang raped by police.⁹⁷ After the incident, she went on the radio to tell the public what had been done to her, bravely naming the names and titles of the men who attacked her.⁹⁸

Two weeks into the Lobo administration, armed men in ski masks again kidnapped Villanueva along with her husband, sister, and sister's husband, drove them to a remote site, tied the men to trees, then gang-raped both women in front of their husbands. 'We'll see if you report us this time,' they told her.⁹⁹

Moreover, under the Lobo administration, the criminal justice system completely disintegrated—¹⁰⁰assassinations, kidnappings, rapes, extortions, and drug traffickings were not investigated.¹⁰¹ Impunity became the norm.¹⁰²

The Honduran Elite's economic agenda came into play quickly as well.¹⁰³ Congress immediately passed a new mining law that legalized open pit mining and forced evictions while providing for consultations with impacted mines, only after the mines had been approved.¹⁰⁴ A law on temporary employment was passed in November of 2010, which broke up full-time, permanent

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ FRANK, *supra* note 69, at 16.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 35.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See generally id.*

¹⁰³ *Id.* at 36.

¹⁰⁴ *Id.* at 36.

employment and for the first time allowed the legal creation of temporary, part-time jobs.¹⁰⁵ Workers in these new jobs were not eligible for health insurance or pension systems, or the right to organize unions.¹⁰⁶ Further, under the program, workers would receive thirty percent of their money in company-issued script—not real money.¹⁰⁷

Despite all these unprecedented changes to Honduran life, the World Bank and International Monetary Fund reopened loans for Honduras in February and March of that year, lending a total of \$430 million that had been suspended since the coup.¹⁰⁸ The Interment Development Bank announced that it would also restore another \$500 million.¹⁰⁹ Hillary Clinton, Secretary of State during the first Obama administration, announced that the United States would restore the \$31 million in foreign aid that had been withheld from Honduras after the coup.¹¹⁰ U.S. funding for the Honduran military and police increased from \$6.7 million in 2010 to \$9.8 million in 2011.¹¹¹ In 2012, the Central American Regional Security Initiative joined and increased its funding to \$135 million, supposedly to combat drug trafficking in Central America.¹¹² The U.S. also allocated \$45 million for its own military construction in Honduras and opened three new military bases in different regions of the country.¹¹³

C. *Juan Orlando Hernandez- The Rise of Gangs and Drug Traffickers*

Lobo served as president for four years, until 2013, when President Juan Orlando Hernandez, President of Congress from 2011 to 2013, and head of the National Party, defeated Xiomara Castro, of the LIBRE party.¹¹⁴ Many reports detailed the night before the election as one of serious violence and armed terror.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 37.

¹¹¹ *Id.* at 85.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 171.

Post-election reports documented the election as “a nationwide maze of irregularities, apparent fraud, and intimidation.”¹¹⁵ Leo Gabriel, an Austrian member of the EU delegation, stated “[d]uring the transmission of the results there was no possibility to find out where the tallies were being sent, and we received reliable information that at least twenty percent of the original tally sheets were being diverted to an illegal server that they kept hidden.”¹¹⁶ “To speak of transparency, after everything that happened last Sunday, is a joke,” said Gabriel.¹¹⁷ U.S. Ambassador Lisa Kubiske visited the electoral commission’s computer center on December 6, 2013, and declared all was “normal and transparent and that inconsistencies have been verified.”¹¹⁸ On December 12, 2013, the Supreme Electoral Tribunal finally declared Hernandez president, denying the recount that Castro demanded.¹¹⁹ The day after, the United States State Department issued a public statement congratulating the Honduran people for their peaceful participation.¹²⁰

Following the precedents Micheletti and Lobo set, Hernandez quickly fulfilled his promise to put a soldier on every corner, and, on January 6, 2014, congress members introduced an amendment to vastly expand the military police.¹²¹ In March 2014, Hernandez introduced a new program called Guardines de la Patria, in which 25,000 children, as young as five, would spend every Saturday “reciev[ing] civil and religious formation that [would] allow them to shape feelings of love for Honduras.”¹²² Congress then passed laws which required more than 10,000 non-profits to file extremely complex paperwork and disclose several requirements in order to be deemed proper, if the organizations did not successfully fill out the paperwork, they would be shut down immediately and their assets seized.¹²³ The organizations most affected included groups

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 172.

¹¹⁹ *Id.* at 173.

¹²⁰ *Id.*

¹²¹ *Id.* at 178.

¹²² *Id.* at 178.

¹²³ *Id.* at 179.

advocating for women, environmental, and human rights issues.¹²⁴ In the 2014 Senate Foreign Relations Committee hearing to confirm U.S. ambassador to Honduras Tim Kaine, who had studied with Jesuits in Honduras in the 1980s, stated that “[w]hen I was there, it was a military dictatorship. It was a very brutal place. But it’s worse now than then.”¹²⁵

Gangs proliferated in the area by this point, especially in the poor and working-class neighborhoods.¹²⁶ The gangs spread fast and expanded into new income-generated activities, like the extortion of small businesses and transportation operators.¹²⁷ Working along with the local police under Hernandez’s reign, Hondurans paid an estimated two million dollars to extortionist in 2014.¹²⁸ Drug traffickers and the violence that came with it also increased, as the gangs carved out their own territories in the major big cities.¹²⁹ By 2015, the police were deeply interwoven with the growing number of gangs and drug traffickers.¹³⁰ One Honduran government official in charge of police cleanup admitted that seventy percent of police were beyond saving.¹³¹ On June 26, 2015, tens of thousands of Hondurans gathered to protest the scandal that broke when David Romero, the director of Radio Globo, produced evidence in checks and bank records documenting that ninety million dollars had been taken out of the National Health Service and had been put in election funds for the National Party and Juan Orlando Hernandez.¹³² By 2016, the epidemic killing of women, often referred to as “femicides,” increased. Ten women in Honduras were killed every week, eighty-five to ninety percent with impunity, making the country one of the most dangerous places in the world to be female.¹³³

Article 239 of the Honduran Constitution states that no president can serve more than one term, however, under

¹²⁴ *Id.*

¹²⁵ *Id.* at 181.

¹²⁶ *Id.* at 191.

¹²⁷ *Id.*

¹²⁸ *Id.* at 191.

¹²⁹ *Id.*

¹³⁰ *Id.* at 192.

¹³¹ *Id.*

¹³² *Id.* at 212.

¹³³ *Id.* at 192.

Hernandez's reign, the Honduran Supreme Court ruled the articles were not valid because they "violated international norms on human rights."¹³⁴ Then, in November of 2017, Hernandez was re-elected, defeating candidate Salvador Nasralla, of the left-wing Opposition Alliance against the Dictatorship.¹³⁵ On December 17, 2017, the electoral commission officially announced that Hernandez had won; even though abruptly and without any explanation, the same commission shut down the counting process in the middle of election night.¹³⁶ Peaceful demonstrations against the election broke out all over the country, which were met with repression that was even more brutal than that immediately following the 2009 coup.¹³⁷

For the first time, security forces used live bullets against demonstrations, and, in some cases, fired right into the air toward groups of protesters.¹³⁸ In other cases, individual protesters were hunted down in their neighborhoods.¹³⁹ And, "by December 31, according to COFADEH, thirty people had been killed, twenty-one at the hands of the military, one by regular police, and five by unknown perpetrations of paramilitary character."¹⁴⁰ "[Two hundred thirty-two] people had been injured, 1,396 illegally detained, and 126 demonstrations repressed."¹⁴¹ Despite all of this, the U.S. Department of State released a statement on December 22, 2018, congratulating Juan Orlando Hernandez and his victory in the November 26, 2018, presidential elections.¹⁴²

In August of 2019, President Hernandez was identified as a co-conspirator in a drug-trafficking and money laundering case against his brother, Antonio Hernandez, along with several other high-level officials, including former President Lobo.¹⁴³

¹³⁴ *Id.* at 235-36.

¹³⁵ *Id.* at 241.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 241.

¹⁴¹ *Id.*

¹⁴² *Id.* at 242.

¹⁴³ José De Córdoba, *Drug Case Implicates Honduran Leader Praised by Trump for Asylum Pact*, WALL ST. J. (Oct. 2, 2019, 2:51 PM),

Prosecutors in the Southern District of New York stated that President Hernandez, who at the time was a member of Congress, used over \$1.5 million in drug proceeds to support his presidential campaign.¹⁴⁴ Despite all of this, the United States continues to have a supporting relationship with Honduras. In fact, on December 3, 2019, at the Israel American Council National Summit, President Trump stated “President Hernandez is working with the United States very closely. You know what's going on at our southern border. And we're winning after years and years of losing. We're stopping drugs at a level that has never happened.”¹⁴⁵

IV. A COLLAPSED SYSTEM

A. *Failed Empires v. Failed States*

The definition of a “refugee” created by the United Nations in 1951 reflected persecution initiated by totalitarian governments, which functioned to control all aspects of life. Central to Hitler’s regime during World War II was the discrimination and persecution against Jews.¹⁴⁶ Similarly, central to Stalin’s regime during the Cold War under his reign of the Soviet Union was repression and execution of anyone who was diametrically opposed to the communist party.¹⁴⁷ Ultimately, while the Nazi’s were defeated in World War II and the Soviet Union imploded, Stalin and Hitler focused on particular groups of the population to target in order to gain power.¹⁴⁸ However, as explained above, this is not the situation in Honduras. Honduras does not present as a failed empire gaining power at the expense of a targeted group of people, but a government so corrupt and broken that human life is simply unbearable—for all its citizens, not just a particular

<https://www.wsj.com/articles/drug-case-implicates-honduran-leader-praised-by-trump-for-asylum-pact-11570026038>.

¹⁴⁴ *Id.*

¹⁴⁵ Press Release, President Juan Orlando Hernández, President Trump Recognizes Work against Drug Trafficking of the President of Honduras (Dec. 9, 2019) (on file with Cision PR Newswire).

¹⁴⁶ See Samuel Moyn, *Between Hitler and Stalin*, THE NATION (Nov. 17, 2010), <https://www.thenation.com/article/between-hitler-and-stalin/>.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

segment of the population. Honduras presents a new situation, known as a fragile state, which was not originally anticipated by the United Nations in its response to the overwhelming amount of displaced people after World War II.

A “fragile state” “is a state significantly susceptible to crisis in one or more of its sub-systems.”¹⁴⁹ In other words, it is “a state that is vulnerable to both internal and external shocks, as well as domestic and international conflicts.”¹⁵⁰ Countries in a fragile state have institutional arrangements, which embody, and in most cases, preserve the conditions of the crisis.¹⁵¹ For example, in an economic context, this could mean institutions and policies that function to reinforce stagnation or low growth rates.¹⁵² Additionally, it could mean economic institutions and policies that embody extreme inequality by restricting property rights and access to the means to make a living.¹⁵³ In social institutions, this could mean extreme inequality or lack of access to health or education.¹⁵⁴ The opposite of a “fragile state” is a “stable state”—one where dominant and statutory institutional arrangements appear able to withstand internal and external shocks.¹⁵⁵ Fragile states eventually lead to what academics call “the failed state.”¹⁵⁶

Failed states are states that no longer perform basic security and development functions or have any effective control on their territory or borders.¹⁵⁷ Failed states have lost control over the means of violence and cannot maintain peace or stability over its population’s territories.¹⁵⁸ There is no reasonable distribution of social goods or ability to ensure economic growth.¹⁵⁹ Failed states

¹⁴⁹ Jonathan Di John, *Conceptualising the Causes and Consequences of Failed States: A Critical Review of the Literature* 9 (Crisis States Working Paper Series No. 2, Paper No. 24, 2008).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Di John, *supra* note 149, at 9.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* 9-10.

¹⁵⁷ *Id.*

¹⁵⁸ Rose Ehrenreich Brooks, *Failed States, or the State as a Failure*, 72 UNIV. OF CHI. L. REV. 1159, 1160 (2005).

¹⁵⁹ *Id.*

are states often characterized by “massive economic inequities.”¹⁶⁰ Every four years, after the U.S. presidential election, the National Intelligence Council produces a list of fifteen countries it deems to be most in danger of becoming failed states within the next eighteen years, either because of their potential for conflict or for environmental ills.¹⁶¹ While Honduras is not officially recognized as a failed state by the National Intelligence Council, it ranks 68th on the Fragile States Annual Report for 2018.¹⁶²

Violence and crime in Honduras are extremely likely to go unpublicized, with a backlog of more than 180,000 cases in the Honduran Courts.¹⁶³ Gang violence is so pervasive that sources estimate anywhere from 12,000 to 40,000 active gang members in the country.¹⁶⁴ More than half the population lives in poverty and over sixteen percent live in extreme poverty.¹⁶⁵ Additionally, the government institutions are weak, often failing to provide the most basic public services like education and health care to its citizens.¹⁶⁶ Corruption among the government and judicial systems is so apparent, with impunity running rampant for criminals and murderers.¹⁶⁷ In fact, in 2019, Honduras received a score of 29/100 in the Corruptions Perception Index, with zero being very corrupt and 100 very transparent.¹⁶⁸ Tomas Ayuso, a reporter for National Geographic, traveled to Honduras in 2015 to document the mass migration of Hondurans making the perilous journey toward the United States.¹⁶⁹ In his article, Ayuso lists imminent threats against

¹⁶⁰ *Id.*

¹⁶¹ Larisa Epatko, *Report: 15 Countries at Risk of Becoming Failed States*, PBS NEWS HOUR (Dec. 13, 2012, 10:30 AM), <https://www.pbs.org/newshour/world/countries-at-risk>.

¹⁶² J.J. MESSNER ET AL., *2018 Fragile State Index*, FUND FOR PEACE 1, 39 (2018), <https://fragilestatesindex.org/wp-content/uploads/2018/04/951181805-Fragile-States-Index-Annual-Report-2018.pdf>.

¹⁶³ *See Why is Honduras so Violent?*, *supra* note 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Tomás Ayuso, *In Gang-Ridden Honduras, Growing Old is a Privilege, Not a Right*, NAT'L GEOGRAPHIC (Feb. 7, 2018), <https://www.nationalgeographic.com/photography/proof/2018/february/honduras-gang-violence-migration-corruption-boys/>.

lives at the whim of dominant gangs, a workplace shuttered by impossible extortion quotas, or simply being run out by the persistent crossfire in the city peripheries as pivotal reasons for why life in Honduras is no longer an option for so many of its citizens.¹⁷⁰

Each of these factors collectively contribute to why Honduras has found itself in the “fragile state” category. As the definition for fragile states provides, the current socio-economic and political institutions in Honduras both embody and preserve the conditions of the country. The government institutions in place have done nothing but destabilize the economy, cause massive unemployment rates, and create an endemic of corruption and political instability.¹⁷¹ “We’re seeing an accumulation of crisis upon crisis” said Director Lester Ramirez of investigations at the Association for More Just Society, a nonprofit that has received U.S. aid for its anti-violence work.¹⁷² “A lot of people have just lost hope,” Ramirez said.¹⁷³

B. *The Caravan Incident*

The 2018 and 2019 caravans showing up at the Southwestern border have exposed the reality of the desperation and hopelessness Hondurans are experiencing. In May 2018, October 2018, and January 2019, thousands of migrants, mostly from Honduras, (but also some migrants from Guatemala and El Salvador), made the decision to leave their home countries to flee from extreme violence and insecurity.¹⁷⁴ These migrants traveled in large groups, dubbed “caravans”, from Central America with the hopes of reaching the United States-Mexico border to ask for asylum.¹⁷⁵ However, these migrants were met with extreme

¹⁷⁰ *Id.*

¹⁷¹ Kate Linthicum, *Homicides have fallen in Honduras. So why are people still fleeing?* L.A. TIMES (Dec. 14, 2018), <https://www.latimes.com/world/mexico-americas/la-fg-honduras-violence-20181214-story.html>

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Dara Lind, *The Migrant caravan, explained*, VOX (Oct. 25, 2018, 8:53 AM), <https://www.vox.com/2018/10/24/18010340/caravan-trump-border-honduras-mexico>.

¹⁷⁵ *Id.*

hostility, as the Trump administration has dispatched thousands of troops to the border to prevent their entrance and in some cases, even used tear gas on women and children.¹⁷⁶ After the November 2018 caravan, President Trump tweeted “the U.S. will close the Border permanently if need be.”¹⁷⁷

While the caravan incidents have only recently begun to make headline news, the number of Hondurans coming to the U.S. border has escalated over the last decade.¹⁷⁸ From 2011 to 2014, the number of Hondurans detained by the U.S. Border Patrol increased from 11, 270 to 90, 968.¹⁷⁹ From 2011 to 2016, 7, 350 Hondurans applied for asylum—a 166 percent increase compared to the number of applicants from five years prior.¹⁸⁰ During that time period, eighty percent of asylum claims were denied.¹⁸¹ The large number of denials illustrates the underlying argument here: individuals fleeing from Honduras cannot demonstrate a well-founded fear based on belonging to a particular group within the asylum category.

Further, even if they could qualify as a particular group, they cannot prove that it is the central reason for the harm comes at the hands of the Honduran government. This is because the asylum system cannot consider a particular group to be a class of citizens fleeing from governments that monopolize violence and prevent corruption at the expense of its citizens. The women, children and families fleeing for their lives cannot meet the burden of proof that is placed upon them for asylum. The corruption, political instability, violence and deplorable living conditions Hondurans are facing does not meet any one of those categories. Moreover, because it is a phenomenon the entire country is facing, Hondurans seeking asylum do not make up a particular portion of the population that is being persecuted for a particular reason. As a

¹⁷⁶ Maegan Vazquez, *Trump denies tear gas was used on child migrants despite pictures, videos*, CNN (Nov. 26, 2018), <https://www.cnn.com/2018/11/26/politics/customs-border-protection-tear-gas-san-diego-tijuana-san-ysidro/index.html>.

¹⁷⁷ *Id.*

¹⁷⁸ Linthicum, *supra* note 171.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

result, Hondurans are stuck living in a “fragile state,” with no form of recognized relief from the United States.

V. THE TRUMP ADMINISTRATION: A SHIFT IN THE WRONG DIRECTION

Unfortunately, instead of focusing on reforming the asylum and refugee system, the Trump Administration’s approach to the crisis in Honduras and the Northern Triangle has reflected an immigration stance focused on increasing and broadening immigration enforcement, rather than addressing the core of the problem.¹⁸² In his first year of office, Trump decreased refugee admissions to its lowest level since the implementation of the program in 1980, recognized the reelection of President Hernandez in 2017 as a legitimate, free election, attempted to end the Deferred Action for Childhood Arrivals (DACA), and eliminated Temporary Protected Status for an estimated 300,000 individuals from Sudan, El Salvador, Haiti and Nicaragua, who will be forced to return to their countries within a year.¹⁸³ Additionally, he introduced a travel ban suspending entry to all nationals from Iran, Iraq, Somalia, Sudan, Syria and Yemen, implemented extreme vetting practices at the border and suspended the Visa Interview Waiver Program.¹⁸⁴

However, in 2018, in response to the several caravan incidents discussed above, the Trump administration rolled out several policies specifically aimed at targeting the asylee and refugee process.¹⁸⁵

¹⁸² Sara Pierce, Jessica Bolter & Andrew Selee, *Trump’s First Year on Immigration: Rhetoric vs. Reality*, MIGRATION POL’Y INST. 1, 1 (Jan. 2018), <https://www.migrationpolicy.org/research/trump-first-year-immigration-policy-rhetoric-vs-reality>.

¹⁸³ *Id.* at 16.

¹⁸⁴ *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, THE WHITE HOUSE (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

¹⁸⁵ Muzaffar Chishti, Sarah Pierce & Hannah Jacks, *Trump Administration’s Unprecedented Actions on Asylum at the Southern Border Hit Legal Roadblock*, MIGRATION POL’Y INST. (Nov. 29, 2018),

A. *Zero Tolerance Policy*

One of the first policy changes by the Trump administration was introduced in April of 2018, when his administration launched the “Zero Tolerance” policy on the Southwest border, calling for the criminal prosecution of all individuals who enter the United States illegally.¹⁸⁶ The effect of the policy included separating parents from their children when they illegally enter the country together, because parents are referred to be prosecuted, while the children traveling with the adults are turned over to the U.S. Health and Human Services.¹⁸⁷ The Department is then responsible for placing the child with a sponsor while the child’s immigration case is resolved.¹⁸⁸ From April to June of 2018, more than 2,634 children were separated from their parents as a result of the policy.¹⁸⁹ It has been further reported that nearly 1,500 immigrant children were “lost” by the administration.¹⁹⁰ On June 5, 2018, former Attorney General Jeff Sessions stated at the Gatlin Law Enforcement Training Conference, “if you’re smuggling a child then we will prosecute you, and that child will be separated from you as required by law. If you don’t like that, then don’t smuggle your children over the border.”¹⁹¹ After intense national outcry, President Trump eventually relented, issuing an Executive Order

<https://www.migrationpolicy.org/article/trump-administrations-unprecedented-actions-asylum-southern-border-hit-legal-roadblock>.

¹⁸⁶ Muzaffar Chishti & Jessica Bolter, *Family Separation and “Zero-Tolerance” Policies Rolled out to Stem Unwanted Migrants, But May Face Challenges*, MIGRATION POL’Y INST. (May 24, 2018), <https://www.migrationpolicy.org/article/family-separation-and-zero-tolerance-policies-rolled-out-stem-unwanted-migrants-may-face>.

¹⁸⁷ Miriam Valverde, *What you need to know about the Trump administration’s zero-tolerance immigration policy*, POLITIFACT (June 6, 2018), <https://www.politifact.com/truth-o-meter/article/2018/jun/06/what-you-need-know-about-trump-administrations-zer/>.

¹⁸⁸ *Id.*

¹⁸⁹ Anne Flaherty, *8 kids left: The lingering aftermath of Trump’s ‘zero-tolerance’ policy at the border*, ABC NEWS (Dec. 7, 2018, 4:34 AM), <https://abcnews.go.com/beta-story-container/Politics/kids-left-lingering-aftermath-trumps-tolerance-policy-border/story?id=59662270>.

¹⁹⁰ Valverde, *supra* note 187.

¹⁹¹ Maya Rhodan, *Here Are the Facts About President Trump’s Family Separation Policy*, TIME (June 20, 2018, 10:37 AM), <http://time.com/5314769/family-separation-policy-donald-trump/>.

ending the practice in June.¹⁹² Moreover, while a U.S. District Court Judge Dana Sabraw of San Diego has ordered the administration to reunite the children with their families, it remains unclear how many children were successfully reunited with their parents to date.¹⁹³

B. Changing the Process: Adding New Standards to Credible Fear

Another challenge came earlier in January of 2017, when President Trump signed Executive Order 13767, instructing the Secretary of Homeland Security to revise the process for how individuals can seek asylum status.¹⁹⁴ The Asylum Division for USCIS then released new plans to recognize legitimate fear, creating a more restrictive guide for the first screening interview and narrowing the qualifications to establish “credible fear”.¹⁹⁵ For example, the administration added “demeanor, candor, and responsiveness” as a factor in their credibility assessment.¹⁹⁶ The 2014 version included a passage that considered the fact that migrants’ demeanors are often affected by cultural factors, including being detained in a foreign land, not speaking the native language, and the trauma sustained at home or on the journey to the U.S.¹⁹⁷ But the new version removed this passage on guidance and stated that these factors should not be significant in

¹⁹² Michael D. Shear, Abby Goodnough & Maggie Haberman, *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>.

¹⁹³ Josh Gerstein & Ted Hesson, *Federal judge orders Trump administration to reunite migrant families*, POLITICO (June 26, 2018, 11:29 PM), <https://www.politico.com/story/2018/06/26/judge-orders-trump-reunite-migrant-families-678809>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Aline Barros, *How Trump Changed Asylum Rules in 2018*, VOA (Jan. 1, 2019), <https://www.voanews.com/usa/immigration/how-trump-changed-asylum-rules-2018>.

¹⁹⁷ Refugee, Asylum, and Int’l Operations Directorate Officer Training, *Asylum Division Officer Training Course – Credible Fear*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES 18 (Feb. 28, 2014), https://www.aila.org/infonet/uscis-asylum-division-officer-training-course?utm_source=aila.org&utm_medium=InfoNet%20Search.

determining someone's credibility.¹⁹⁸ Additionally, a passage was removed which stated that if an asylum officer has reasonable doubt about a person's credibility, then they should likely find credible fear and allow an immigration judge to further hear the question in a full hearing.¹⁹⁹

On November 9, 2018, President Trump signed a Proclamation banning individuals who cross the U.S.-Mexico border without papers from seeking asylum unless they wait at ports of entry.²⁰⁰ Those who violate the terms of this suspension/restriction of entry will be rendered ineligible for asylum for at least 90 days.²⁰¹ However, this policy is in contrast with the 1951 Convention, which allows individuals to apply for asylum protection from either a port of entry, or inside the country.²⁰² In December 2018, the Ninth Circuit Court of Appeals refused to immediately allow the Trump administration to enforce the ban.²⁰³ Writing for the majority, Circuit Judge Jay Bybee stated "Just as we may not . . . 'legislate from the bench,' neither may the Executive legislate from the Oval office."²⁰⁴ This echoed the order of District Judge Jon Tigar, whose temporary restraining order on the asylum ban had been appealed to the Ninth Circuit Court: "Whatever the scope of the President's authority, he may not rewrite immigration laws to impose a condition that Congress has expressly forbidden."²⁰⁵

¹⁹⁸ Credible Fears Lesson Plans Comparison Chart, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (May 30, 2019), <https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison>.

¹⁹⁹ *Id.*

²⁰⁰ Muzaffar Chishti, Sarah Pierce & Hannah Jacks, *Trump Administration's Unprecedented Actions on Asylum at the Southern Border*, MIGRATION POLICY INSTITUTE (Nov. 29, 2018), <https://www.migrationpolicy.org/article/trump-administrations-unprecedented-actions-asylum-southern-border-hit-legal-roadblock>.

²⁰¹ Jeremy Diamond, Jessica Schneider and Geneva Sands, *Trump signs proclamation missing asylum seekers*, CNN (Nov. 9, 2018), cnn.com/2018/11/09/politics/trump-signs-asylum-order/index.html.

²⁰² *Fact Sheet. U.S. Asylum Process*, NATIONAL IMMIGRATION FORUM (Jan. 10, 2019) <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>.

²⁰³ Kevin Lamarque, *U.S. appeals court won't immediately allow Trump asylum ban*, NBC NEWS (Dec. 7, 2018), <https://www.nbcnews.com/news/us-news/u-s-appeals-court-won-t-immediately-allow-trump-asylum-n945536>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

C. *Eliminating Domestic Abuse and Fear of Gang Violence*

Continuing to challenge the process, Sessions intervened in the individual asylum case of *Matter of A-B* in June 2018 and overturned a prior Board of Immigration Appeals (BIA) case, *Matter of A-R-C-G*. A-B, a woman from El Salvador, suffered severe emotional, sexual, and physical abuse from her husband.²⁰⁶ A-B tried to leave her abuser, but he continued to find her throughout the country.²⁰⁷ With no other options left, she decided to make the dangerous journey to the United States and applied for asylum.²⁰⁸ However, the immigration judge denied her application because

she was not credible and was not a member of a qualifying particular social group asylum category; even if she could qualify as a particular social group, her membership in it was not the central reason for the harm that she experienced at the hands of her husband, and she failed to prove that the government in El Salvador was unable or unwilling to protect her from her husband.²⁰⁹

A-B appealed the decision to the BIA.²¹⁰ Applying the holding from *Matter of A-R-C-G*, which held that victims of domestic violence are eligible to apply for asylum based on their particular social group of “married women in Guatemala who are unable to leave their relationship,” BIA reversed the immigration judge’s decision.²¹¹ The BIA held that A-B did in fact legally qualify for asylum.²¹² However, Sessions intervened in the case and wrote an opinion overruling the prior decision in *Matter of A-R-C-G* and

²⁰⁶ Reena Arya, *Attorney General issues precedent decision, Mater of A-B-, seeking to limit protection*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (June 28, 2018), <https://cliniclegal.org/resources/asylum-and-refugee-law/attorney-general-issues-precedent-decision-matter-b-seeking-limit>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

reversed the BIA's decision in *Matter of A-B*.²¹³ Sessions stated that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”²¹⁴ The ACLU filed suit against USCIS in Washington D.C., under a special process Congress set up to challenge illegal policies related to credible fear or expedited removal, arguing that the policy violates the Refugee Act of 1980, the Immigration and National Act, the Administrative Procedures Act, and the Due Process Clause.²¹⁵ However, the policy remains in place—despite Sessions resigning in November of 2018.²¹⁶

D. *Speedier Trials and Metering*

In March of 2018, Sessions vacated *Matter of E-F-H-L*, a 2014 ruling by the BIA.²¹⁷ In *Matter of E-F-H-L*, an immigration judge ruled that asylum applicants do not warrant a merits hearing with an opportunity to testify, present witnesses, file documentary evidence, and present legal arguments.²¹⁸ On appeal, the BIA concluded that asylum applicants or withholding applicants did, in fact, merit the right to a hearing and remanded the case.²¹⁹ Four years later, the case was revisited when Sessions intervened with a one-page decision that declared moot the BIA decision, thus eliminating the requirement that asylum seekers get a full hearing before an immigration judge.²²⁰ Further, Sessions, along with the Justice Department, set quotas for immigration judges, pushing

²¹³ *US Asylum: Domestic and gang violence cases 'no longer generally qualify'*, BBC NEWS (June 21, 2018), <https://www.bbc.com/news/world-us-canada-44446923>.

²¹⁴ *Id.*

²¹⁵ Cody Wofsy & Katrina Eiland, *Jeff Sessions' Illegal Attacks on Asylum Seekers*, ACLU (Aug. 7, 2018), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/jeff-sessions-illegal-attacks-asylum-seekers>.

²¹⁶ Lauren Jarret & Eli Watkins, *Jeff Sessions out as attorney general*, CNN (Nov. 7, 2018), <https://www.cnn.com/2018/11/07/politics/sessions-resign/index.html>.

²¹⁷ Paul Schmidt, *What Does Sessions' E-F-H-L order Mean?* LEXISNEXIS: LEGAL NEWSROOM (Mar. 6, 2018), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/immigration-law-blog/posts/what-does-sessions-39-e-f-h-l-order-mean>.

²¹⁸ *Matter of E-F-H-L*, 26 I&N Dec. 319 (B.I.A. 2014).

²¹⁹ *Id.* at 324.

²²⁰ *Matter of E-F-H-L*, 27 I&N Dec. 226 (A.G. 2018).

them to resolve cases as fast as possible in order to meet performance standards.²²¹ In response to quotas being set, Sessions stated that he is just trying to make sure that immigration judges are deciding their cases “fairly and efficiently” and is trying to clear a backlog of nearly 700,000 cases.²²²

Additionally, in December of 2018, Department of Homeland Security (DHS) Secretary Kirsten Nielsen announced that the U.S. reached a deal with Mexico to allow border agents to turn back immigrants who cross the Southwest border between legal ports of entry.²²³ “They will have to wait for approval to come into the United States. If they are granted asylum by a U.S. judge, they will be welcomed into America. If they are not, they will be removed to their home countries,” Nielsen stated.²²⁴ The consequence of this policy is a process known as “metering”, in which U.S. Customs and Border Protection have started to allow only a certain number of undocumented immigrants through legal ports of entry, while thousands of others have to remain in high crime cities like Tijuana, awaiting their turn to be heard by an immigration official.²²⁵ Maureen Meyer, Director for Mexico and Migrant Rights for the Washington Office on Latin America stated “the asylum process at the U.S. border has become slow and unmanageable, creating a backlog of people in Mexican border towns who are being pushed to a breaking point after waiting for weeks or even months for an appointment with U.S. officials.”²²⁶

²²¹ Joel Rose, *Sessions Pushes to Speed Up Immigration Courts, Deportations*, NPR (Mar. 29, 2018), <https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold>.

²²² *Id.*

²²³ Julia Ainsley, *DHS to begin returning asylum-seekers at border to Mexico to await decisions*, NBC NEWS (Dec. 20, 2018), <https://www.nbcnews.com/politics/immigration/dhs-begin-returning-asylum-seekers-border-mexico-await-decisions-n950406>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *By Bottlenecking the Asylum Process, the U.S. Government is Contributing to Chaos and Harm at the Border*, WOLA (Nov. 26, 2018) <https://www.wola.org/2018/11/bottlenecking-asylum-process-us-contributing-chaos-harm-border/>.

E. The Infamous Government Shut Down

Lastly, and probably the most aggressive stance towards curbing immigration, has been Trump's promise to build a wall across the Southwest border. A campaign promise that in many ways defined his candidacy and divided the country, Trump promised to build a wall at the border between the United States and Mexico to prevent people from entering the country illegally, suggesting that Mexico would be the one to fund it.²²⁷ The Southwest border is 1900 miles long and has barriers cover about 650 miles of that.²²⁸ On a televised speech in January of 2019, Trump stated "[all] Americans are hurt by uncontrolled, illegal migration We are out of space to hold them and have no way to promptly return them back to their country."²²⁹ Between 2016 and 2020, Trump has continued to stress the importance of the wall to tackle the "security crisis" at the border and help bring down crime rates across the country, calling the immigrants who are trying to arrive at the border today "stone cold criminals."²³⁰ However, as this paper has continually emphasized, while there is in fact a refugee crisis at the border, it is not a security crisis.²³¹

To the contrary, the overall number of people caught at the Southwest border is not at an historic high. During Trump's presidency, the overall apprehension number has been at 300,000, which is down from the 1.6 million apprehensions in the fiscal year of 2000.²³² Further, research has shown that immigrants are less

²²⁷ Dara Lind, *The border wall fight at the center of the government shutdown, explained*, VOX (Jan. 2, 2019), <https://www.vox.com/policy-and-politics/2018/12/21/18151974/trump-border-wall-steel-slats-shutdown>

²²⁸ *Why does Donald Trump want to build a Wall?*, BBC (May 23, 2019), <https://www.bbc.co.uk/newsround/46811167>.

²²⁹ *Donald Trump's border wall speech-in full*, THE GUARDIAN (Jan. 8, 2019), <https://www.theguardian.com/us-news/2019/jan/09/donald-trumps-border-wall-speech-in-full>.

²³⁰ Bart Jansen & Alan Gomez, *President Trump calls caravan immigrants 'stone cold criminals.' Here's what we know*. USA TODAY (Nov. 26, 2018), <https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002/>.

²³¹ Stuart Anderson, *There Is No Crisis At The Border- And DHS Stats Prove It*, FORBES (June 25, 2018), <https://www.forbes.com/sites/stuartanderson/2018/06/25/there-is-no-crisis-at-the-border-and-dhs-stats-prove-it/#2e4c80bf112a>.

²³² *Id.*

likely to commit a crime than people born in the United States.²³³ While there were 17,000 adults arrested with criminal records who tried to cross the border in 2018, as Trump had stated, many of the people who were stopped at the border had a criminal record from previous attempts to enter the U.S. illegally, or were arrested for other nonviolent crimes.²³⁴ This long-standing promise to build a wall in response to the ongoing migrant crisis has led to one of the longest government shutdowns in history, lasting thirty-eight days from December 22, 2018 through January 25, 2019.²³⁵ Still, no agreement has been made by Democrats and Republicans to provide the \$5.81 billion Trump has demanded to build the 1,000-mile-long wall.²³⁶

F. DHS Signs Deal to Send Asylum Seekers from U.S. to Honduras, El Salvador and Guatemala.

In September 2019, DHS announced a series of asylum cooperation agreements with Honduras, El Salvador and Guatemala.²³⁷ These newly formed cooperation agreements provide DHS and other immigration officials with the ability to redirect asylum applicants from the U.S. border to the country in which the individual traveled through in order to get to the United States.²³⁸ For example, an asylum seeker from Nicaragua or Venezuela would first be asked to choose among Guatemala,

²³³ Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?* N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html>.

²³⁴ Salvador Rizzo, *The Trump administration's misleading spin on immigration, crime and terrorism*, WASH. POST (Jan. 7, 2019), <http://www.washingtonpost.com/politics/2019/01/07/trump-administrations-misleading-spin-immigration-crime-terrorism/>.

²³⁵ Yee Nee Lee, *Trump tells WSJ another government shutdown is 'certainly an option'*, CNBC (Jan. 27, 2019), [cnbc.com/2019/01/28/trump-on-government-shutdown-border-wall-funding-deal-wsj.html](https://www.cnbc.com/2019/01/28/trump-on-government-shutdown-border-wall-funding-deal-wsj.html).

²³⁶ *Id.*

²³⁷ Nick Miroff, *U.S. announces asylum deal with Honduras, could send migrants to one of the world's most violent nations*, WASH. POST (Sept 25, 2019), https://www.washingtonpost.com/immigration/us-announces-asylum-deal-with-honduras-could-send-migrants-to-one-of-worlds-most-violent-nations/2019/09/25/cca94a86-dfb6-11e9-8fd3-d943b4ed57e0_story.html.

²³⁸ *Id.*

Honduras or El Salvador as places to seek protection before seeking asylum status in the United States. In a press conference about the agreements, DHS Acting Secretary Kevin McAleenan stated asylum seekers should try to find refuge “as close to home as possible, rather than embarking on the long and often dangerous trip to the United States.”²³⁹ Clara Long of Human Rights Watch commented on the agreements, stating that

[T]he thing about these agreements is that they don't change the underlying conditions in any place that people flee. They just make the harshness of the reception and the potential consequences that much more severe. What the Trump administration is building with these agreements is basically an externalized wall in which it will attempt to keep asylum seekers as far away from the U.S. border as possible.²⁴⁰

G. Asylum Reform, Not a Wall, as a Solution.

The migration crisis going on at the Southwest border is not an isolated problem. It is just one aspect of a regional problem that will not be solved by stripping away asylum rights, advocating for the building of a steel wall, overturning precedent that has been set for decades, and continuing to provide aid for corrupt governments. Instead, what the current administration and Congress should focus on, and perhaps the only tangible solution, is initiating a systematic reform to our current refugee and asylum process. This systematic reform must focus on expanding the definition in which our immigration system looks at in order to assess whether an individual can qualify for asylum protection. The definition cannot only accept persecution on account of race, religion, nationality, membership of a particular social group or political opinion. This definition does not address the root cause of the migration flow across the Southwest border that is occurring

²³⁹ *Id.*

²⁴⁰ *DHS Signs Deal to Send Asylum Seekers from U.S. Border to Honduras, All Things Considered*, NPR (Sept. 30, 2019), <https://www.npr.org/2019/09/30/765834542/dhs-signs-deal-to-send-asylum-seekers-from-u-s-border-to-honduras>.

today, and which will continue to occur, no matter how many walls, theoretical or physical, are built around the U.S. border.

Congress and the Trump Administration should begin this process by looking at the 1984 Cartagena Declaration (the “Declaration”). The Declaration was formed by the Organization of American States (OAS) to address the violence going on at the time in Central and South America.²⁴¹ The Declaration kept the original definition of a refugee from the 1951 U.N. Convention, but expanded it to include “persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.”²⁴² A definition like this, while still extremely broad and would need further reform, moves in a direction that reflects the unique cluster of factors driving migration from the Northern Triangle.

By recognizing the repeated patterns of violence by gangs, domestic partners, weak governments, and impunity that we are seeing in this wave of migration, the U.S. immigration system can create more of a legal channel for migration that actually works to process legitimate from illegitimate claims.²⁴³ Research show us that when legal channels for immigration are created, illegal immigration decreases.²⁴⁴ If the migration flow can shift in an orderly and organized channel, then potentially, these pathways can be linked to industries that are facing labor shortages. If the U.S. can learn how to link the two, then we move away from a failing strategy of trying to stop migration, to a more realistic one of learning how to make the most of this migration flow.

²⁴¹ Locascio, *supra* note 15 at 27.

²⁴² *Id.* at 57.

²⁴³ Cindy Huang & Jimmy Graham, *Responding to Northern Triangle Immigration with Policies that Benefit Both Migrants and Hosts*, CENTER FOR GLOBAL DEVELOPMENT (May 14, 2019), <https://www.cgdev.org/blog/responding-northern-triangle-immigration-policies-benefit-both-migrants-and-hosts>.

²⁴⁴ *Id.*

VI. CONCLUSION

As this Article has shown, the legal definitions of a refugee and asylum seeker are no longer protecting those fleeing from modern-day conflicts. The thousands of Hondurans making the dangerous journey across Mexico are no longer groups fleeing a communist regime or a totalitarian government persecuting a particular segment of the population on account of race, religion, nationality, membership in a particular social group, or political opinion. Congress and President Trump must move away from policy solutions like building a steel wall and setting refugee quotas to a more humanitarian, modernized and appropriate approach to resolve the current crisis. If not, the numbers of migrants arriving at the border will only continue to rise as travel and technology becomes more accessible, and networks for this population will become bigger and bigger.