

2-10-2021

## Asylum or Exile? A Look at How the Trump Administration Is Changing U.S. Asylum Policies

Amber Couzo

Follow this and additional works at: <https://repository.law.miami.edu/umialr>

---

### Recommended Citation

Amber Couzo, *Asylum or Exile? A Look at How the Trump Administration Is Changing U.S. Asylum Policies*, 52 U. Miami Inter-Am. L. Rev. 169 (2021)

Available at: <https://repository.law.miami.edu/umialr/vol52/iss1/8>

This Student Note/Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Asylum or Exile? A Look at How the Trump Administration Is Changing U.S. Asylum Policies

Amber Couzo\*

I.	INTRODUCTION.....	170
II.	A BACKGROUND LOOK AT U.S. ASYLUM PRACTICES AND CENTRAL AMERICAN MIGRATION.....	172
	A. <i>History of U.S. Asylum Law</i> .....	172
	B. <i>Causes of Migration from the Northern Triangle to the United States</i> .....	176
III.	THE TRUMP ADMINISTRATION’S CREATION AND IMPLEMENTATION OF NEW ASYLUM LAWS.....	181
	A. <i>Matter of A-B- Restricts Asylum for Victims of Domestic Abuse or Gang Violence</i> .....	182
	1. Attorney General Decides <i>Matter of A-B-</i> to Overturn Landmark Case.....	183
	2. The Application of <i>Matter of A-B-</i> in Immigration Proceedings.....	186

---

\* Managing Editor, University of Miami Inter-American Law Review, Volume 52; J.D. Candidate 2021, Litigation and Dispute Resolution Concentration, University of Miami School of Law; B.S.C. 2014, Broadcast Journalism, University of Miami. As the daughter and granddaughter of immigrants, I decided to write this note to show the unfairness in immigration policies today, which do not allow families the opportunities my family was afforded—to build a new life in a safe land filled with promise. I would like to thank my grandparents, who sacrificed everything for my family to have a fighting chance, especially my grandma, Mimi. Another heartfelt thank you to my mom, Aurora Couzo, for never settling for less as she began her journey in a new country with no support system. And I would like to thank my brothers and cousin—Gerry Couzo, Carlos Couzo, and Veronica Couzo Kamenjarin—for reminding me to be proud of my family and our roots, no matter what. Finally, I would like to extend my deepest gratitude to Professor of Law Elizabeth Iglesias—without her guidance and mentorship, this paper would not have been possible. This paper is dedicated to all the women and children who have suffered at the hands of the U.S. immigration system.

3. Asylum Seekers Fight Back Against <i>Matter of A-B-</i> and USCIS Policy .....	188
<i>B. The Administration's Implementation of the Migrant         Protection Protocols</i> .....	193
IV. ABUSE OF DISCRETION AND POWER DERAILS U.S. AS SAFE HAVEN FOR REFUGEES .....	197
<i>A. Matter of A-B- Fails to Live Up to Standards Set Forth         by the Violence Against Women's Act</i> .....	198
<i>B. The Migrant Protection Protocols Incorrectly Deem         Mexico a Safe Third Country</i> .....	202
<i>C. The Trump Administration's Asylum Policies Implicate         Central American Migrants' International Human         Rights, Violating Jus Cogens</i> .....	204
V. CONCLUSION.....	207

## I. INTRODUCTION

The “American Dream” is the highly touted national ethos that has attracted immigrants to traverse oceans, rivers, and deserts to enter our nation.<sup>1</sup> The ability to enter a free country that allows uninhibited opportunities for prosperity, success, and upward social mobility is a glimpse of light to individuals enveloped in the darkness of their dangerous home countries.<sup>2</sup> Although the U.S. has not had open borders for immigrants since 1921,<sup>3</sup> it has become a place

---

<sup>1</sup> See James Pethokoukis, *Immigrants Still Successfully Pursue the American Dream*, AMERICAN ENTERPRISE INSTITUTE (Oct. 28, 2019), <https://www.aei.org/economics/immigrants-still-successfully-pursue-the-american-dream/>.

<sup>2</sup> See Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, CENTER FOR AMERICAN PROGRESS (June 1, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/>; Joanna Venator & Richard V. Reeves, *Immigration and the American Dream, Part I*, BROOKINGS INST. (June 19, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/06/19/immigration-and-the-american-dream-part-1/>.

<sup>3</sup> See Ed Krayewski, *Open Borders in America: A Look Back and Forward*, REASON (April 30, 2015, 11:00 AM), <https://reason.com/2015/04/30/open-borders-in-america>.

of refuge for those individuals who are at their wits' end due to violence and persecution back home. However, in recent years, the nation that once led the globe in resettlement populations has diminished its role in housing foreign individuals who face their demise upon returning to their countries of origin.<sup>4</sup>

Since 2016, President Donald Trump's administration drastically diminished the ability for immigrants to receive asylum in the United States.<sup>5</sup> The Trump Administration implemented increased vetting for refugees, lowered the number of refugee admissions, and created stricter rules for the classification of asylum-seekers.<sup>6</sup> Specifically, the Attorney General's decision in *Matter of A-B*<sup>7</sup> and the Administration's implementation of a Safe Third Country Agreement with Mexico have restricted the ability for Central American immigrants to seek and receive asylum despite the violence they face below the border.<sup>8</sup> These laws and policies not only condemn thousands of immigrants to brutality and possible death, but are also violations of U.S. and international law.<sup>9</sup>

This case note will discuss and analyze how the Trump Administration's policies regarding asylum depart from usual immigration practices that foster a safe haven for persecuted immigrants and ultimately violate national and international laws. Part I discusses the history and evolution of asylum law in the United States and the recent influx of Central American migration, specifically from Guatemala, Honduras, and El Salvador due to rampant violence and other factors. Part II introduces and analyzes the context of *Matter of A-B*, a case which Attorney General Jeffrey Sessions usurped to

---

<sup>4</sup> See Brittany Blizzard & Jeanne Batalova, *Refugee and Asylees in the United States*, MIGRATION POLICY INSTITUTE (June 13, 2019), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states>; See generally U.N. High Comm'r for Refugees, Resettlement Data (Jan.–Oct. 2019), <https://www.unhcr.org/en-us/resettlement-data.html> (select “United States of America”).

<sup>5</sup> See *How the Trump Administration is Eliminating Asylum in the U.S.*, INT'L RESCUE COMMITTEE (Feb. 4, 2020), <https://www.rescue.org/article/how-trump-administration-eliminating-asylum-us> [hereinafter *Int'l Rescue Committee*]

<sup>6</sup> See Blizzard & Batalova, *supra* note 4.

<sup>7</sup> 27 I&N Dec. 316, 316 (A.G. 2018).

<sup>8</sup> See *Int'l Rescue Committee*, *supra* note 5; *infra* Part III(C).

<sup>9</sup> See *Int'l Rescue Committee*, *supra* note 5.

overturn immigration practices<sup>10</sup> that fostered the safety of women and children suffering domestic violence. In addition, Part II will address the implementation and context of third-country agreements such as the Migrant Protection Protocols, known as “Remain in Mexico.”<sup>11</sup> Finally, Part III of this note will discuss how the aforementioned immigration policies violate U.S. immigration law and international law due to their reluctance to acknowledge the plague of violence in Central America.

## II. A BACKGROUND LOOK AT U.S. ASYLUM PRACTICES AND CENTRAL AMERICAN MIGRATION

### A. *History of U.S. Asylum Law*

In the nation’s early history, immigrants seeking refuge in the United States from violence and persecution in their home countries were not deemed refugees, but rather treated like any other immigrant seeking the American Dream.<sup>12</sup> Before World War II, the United States did not have any formal laws regarding refugees.<sup>13</sup> After World War II left seven million Europeans displaced from their home countries, the United States, along with other countries in the United Nations, began to create new laws to help individuals seeking refuge from persecution in their home countries.<sup>14</sup>

The U.S. government’s response in creating new refugee immigration laws stems from contemporaneous historical phenomena.<sup>15</sup>

---

<sup>10</sup> If a decision by an Immigration Judge is appealed, the case is heard by the Board of Immigration Appeals (BIA), which is the highest administrative body for interpreting and applying immigration laws. Generally, the BIA does not conduct courtroom proceedings, but rather decides appeals by conducting a “paper review” of cases. BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court.

<sup>11</sup> Press Release, Dep’t. of Homeland Security, Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [hereinafter *MPP Press Release*].

<sup>12</sup> *The Complicated History of Asylum in America—Explained*, THE WEEK (April 28, 2019), <https://theweek.com/articles/837512/complicated-history-asylum-america--explained> [hereinafter *The Complicated History of Asylum*].

<sup>13</sup> DEBORAH ANKER, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, in 13 IN DEFENSE OF THE ALIEN 74, 75 (1990).

<sup>14</sup> *The Complicated History of Asylum*, *supra* note 12.

<sup>15</sup> ANKER, *supra* note 13, at 77.

First, the disturbing experience of the Holocaust that wiped out millions because of their religious and ethnic origins sparked international outrage and influenced a movement to develop human rights laws to protect refugees and victims of war.<sup>16</sup> Second, after World War II, the U.S. became a world power with a mission to contain communism; thus, immigration policies favoring migrants from communist countries like the Soviet Union were created to evoke “the national historical mission [of the United States] as a haven for freedom-loving peoples.”<sup>17</sup>

In 1948, the U.S. implemented the Displaced Persons Act of 1948, which authorized the admission of two hundred thousand displaced Europeans for permanent residence during a short period of time.<sup>18</sup> By 1952, the Displaced Persons Act admitted more than four hundred thousand individuals, with more than seventy percent of the refugees emigrating from Eastern Europe and the Soviet Union.<sup>19</sup> This was the first time in U.S. history that refugees became such a prevalent component of immigration.<sup>20</sup> Nevertheless, growing tensions between Congress and the Executive Branch regarding immigration policy decisions continued to stall formal asylum policies because of differing viewpoints on which refugees should be accepted in the nation.<sup>21</sup> The Executive Branch began to use a small loophole found in the Immigration and Nationality Act (INA), dubbed “parole power,” to admit certain groups of refugees.<sup>22</sup> The use of parole power allowed the admission of several oppressed populations, such as Hungarians in 1956 and Cubans in the 1960s and 1970s.<sup>23</sup> An emphasis was placed on allowing refugees from “communist-dominated” countries.<sup>24</sup>

The Executive’s use of an “ad hoc parole-based refugee admission policy” was considered “administrative chaos.”<sup>25</sup> Congress

---

<sup>16</sup> *Id.* at 77.

<sup>17</sup> *Id.*

<sup>18</sup> *Displaced Persons Act of 1948*, Ballotpedia (last visited March 10, 2020), [https://ballotpedia.org/Displaced\\_Persons\\_Act\\_of\\_1948](https://ballotpedia.org/Displaced_Persons_Act_of_1948).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> ANKER, *supra* note 13, at 77–78.

<sup>22</sup> *Id.* at 78.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 78.

<sup>25</sup> *Id.* at 79–80.

reacted by creating a comprehensive system for granting asylum through the passage of the Refugee Act of 1980.<sup>26</sup> The Refugee Act adopted the nondiscriminatory and non-ideological definition of refugee created by the United Nation's 1951 Refugee Convention.<sup>27</sup> Under the Refugee Act, a refugee was defined as an individual who has been forced to flee her country because of persecution, war, or violence, and has a "well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group."<sup>28</sup> After the Refugee Act's implementation, the U.S. continued its focus on admitting refugees from communist countries as they comprised about ninety percent of refugee admissions.<sup>29</sup> During the 1990s, the U.S. began to recognize the growing problems in neighboring countries, such as the guerrilla wars in Central American countries, which led to the creation of the Temporary Protected Status program<sup>30</sup> that helped migrants affected by armed conflicts or national disasters.<sup>31</sup>

Federal laws state that anyone who physically steps on U.S. soil is entitled to apply for asylum.<sup>32</sup> Individuals seeking asylum at a U.S. port of entry must pass a credible fear interview conducted by immigration officials.<sup>33</sup> If the immigration agent determines there is a "significant possibility" that the applicant can prove persecution or harm in her home country, then the case is referred to immigration court for a hearing and final decision.<sup>34</sup> Recently, the world has seen its most serious refugee crisis since World War II due to armed

---

<sup>26</sup> *The Complicated History of Asylum*, *supra* note 12.

<sup>27</sup> ANKER, *supra* note 13, at 79–80.

<sup>28</sup> *Id.* at 78; U.N. High Comm'r for Refugees, *What is a Refugee?*, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> [hereinafter *What is a Refugee?*].

<sup>29</sup> ANKER, *supra* note 13, at 80.

<sup>30</sup> The secretary of Homeland Security may designate a foreign country for Temporary Protected Status if the country's conditions meet statutory requirements regarding ongoing armed conflict, natural disasters (including epidemics), or other extraordinary and temporary conditions in the country that temporarily prevent its nationals from returning safely. *See* 8 U.S.C. § 1254a(b)(1).

<sup>31</sup> *The Complicated History of Asylum*, *supra* note 12.

<sup>32</sup> 8 U.S.C. § 1158(a) (2009).

<sup>33</sup> 8 U.S.C. § 1225(b)(1)(B)(i)–(ii) (2009).

<sup>34</sup> 8 U.S.C. § 1225(b)(1)(B)(v) (2009).

conflict and forced migration.<sup>35</sup> According to the United Nations High Commissioner for Refugees (UNHCR), by the end of 2017, global displacement had reached a record high 68.5 million people, with 25.4 million formally designated as refugees and another 3.1 million designated as asylum seekers.<sup>36</sup>

Historically, the United States was the global leader in formal refugee resettlement.<sup>37</sup> However, under the much stricter rules imposed by President Donald Trump's administration, the numbers of asylum seekers being granted admission in the U.S. has dwindled.<sup>38</sup> In 2017, the Trump Administration began to implement increased vetting for refugees, slowing down the admissions process.<sup>39</sup> Additionally, President Trump reduced the number of refugees the U.S. accepts annually, first reducing the level originally set for fiscal year 2017 from 110,000 to 50,000.<sup>40</sup> President Trump continues to lower the number of refugee admissions, hitting a record low of accepting only 30,000 refugees for fiscal year 2019.<sup>41</sup> Moreover, in 2018, the

---

<sup>35</sup> See generally U.N. High Comm'r for Refugees, *Forced Displacement in 2018*, GLOBAL TRENDS 1, 4 (June 20, 2019), <https://www.unhcr.org/5d08d7ee7.pdf>.

<sup>36</sup> See generally U.N. High Comm'r for Refugees, *Forced Displacement in 2017*, GLOBAL TRENDS 1, 2 (June 25, 2018), <https://www.unhcr.org/5b27be547.pdf>. A refugee is a person who has fled their country of origin and is unable or unwilling to return because of a well-founded fear of persecution because of their race, religion, nationality, membership of a particular social group, or political opinion. An asylum seeker is a person who is seeking international protection and whose claim has not yet been finally decided on by the country in which he or she has submitted it. Every refugee is initially an asylum seeker, but not every asylum seeker will ultimately be recognized as a refugee. See *What is the Difference Between a Refugee and an Asylum Seeker?*, AMNESTY INT'L (Jan. 24, 2019), [amnesty.org.au/refugee-and-an-asylum-seeker-difference/](https://www.amnesty.org.au/refugee-and-an-asylum-seeker-difference/).

<sup>37</sup> See Blizzard & Batalova, *supra* note 4.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> Exec. Order No. 13,780, 82 F.R.C. 13209, 13216 (March 9, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

<sup>41</sup> Daily Comp. Pres. Doc. No. 2018-24135, Presidential Determination on Refugee Admissions for Fiscal Year 2019, 83 F.R.C. 55091, 55091 (Oct. 4, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-13/>.

U.S. fell behind Canada as the top resettlement country.<sup>42</sup> Lower asylum admissions will continue to be the trend under the Trump Administration, as seen in proposals for lowering the already-low admission numbers to 18,000 for the 2020 fiscal year.<sup>43</sup>

*B. Causes of Migration from the Northern Triangle to the United States*

Most recently, the vast majority of immigrants seeking asylum migrate from the Northern Triangle of Central America: Guatemala, El Salvador, and Honduras.<sup>44</sup> One of the most dangerous areas in the world due in large part to gang violence, the Northern Triangle boasts some of the world's highest homicide rates,<sup>45</sup> comparable even to a war zone.<sup>46</sup> In addition to the high crime rates, migrants

---

<sup>42</sup> Jynnah Radford & Phillip Connor, *Canada now leads the world in refugee resettlement, surpassing the U.S.*, PEW RESEARCH CENTER FACT TANK (June 19, 2019), <https://www.pewresearch.org/fact-tank/2019/06/19/canada-now-leads-the-world-in-refugee-resettlement-surpassing-the-u-s>. Canada resettled 28,000 refugees in 2018 while the U.S. resettled 23,000 a sharp decline from its 33,000 total in 2017, *id.*

<sup>43</sup> U.S. Dep't of State, Off. of the Spokesperson, Report to Congress on Proposed Refugee Admissions for FY 2020 (Sept. 26, 2019), <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fy-2020/>.

<sup>44</sup> *See generally* Dep't. of Homeland Security, Bureau of Customs and Border Prot., U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020 (Dec. 9, 2019), <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>; PETER J. MEYER & MAUREEN TAFT-MORALES, CONG. RESEARCH SERV., IF11151, CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY 1, 1 (June 13, 2019), <https://fas.org/sgp/crs/row/IF11151.pdf>.

<sup>45</sup> U.S. Dep't of State, Bureau of Conflict and Stabilization Operations, Northern Triangle and Mexico Country Conditions (May 23, 2019), <https://www.justice.gov/eoir/page/file/1180711/download>.

<sup>46</sup> *Quick facts: Central American migration*, MERCY CORPS (May 1, 2019), <https://www.mercycorps.org/articles/quick-facts-central-american-migration>; *see Understanding and Estimating Displacement in the Northern Triangle of Central America*, INTERNAL DISPLACEMENT MONITORING CENTRE (September 2018), <http://www.internal-displacement.org/publications/understanding-and-estimating-displacement-in-the-northern-triangle-of-central-america>; *Forced to Flee Central America's Northern Triangle: A Neglected Human Crisis*, DOCTORS WITHOUT BORDERS 1, 8 (last updated June 14, 2017), [https://www.msf.org/sites/msf.org/files/msf\\_forced-to-flee-central-americas-northern-triangle\\_e.pdf](https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf). A recent report from Doctors Without Borders (MSF)

from the Northern Triangle attribute poverty and inequality as further reasons for their departure from their home countries.<sup>47</sup> The Congress Research Service cites four main motivations of migrants seeking asylum: (1) security conditions, (2) governance, (3) socio-economic conditions, and (4) vulnerability to natural disasters.<sup>48</sup>

The terrible security conditions found in the Northern Triangle are due to the high crime rates seen throughout the three countries. The Northern Triangle suffers from widespread crime, including, but not limited to, gang violence, extortion, kidnapping, drug trafficking, and homicide.<sup>49</sup> Nearly a quarter of Northern Triangle residents surveyed in 2017 reported they had been victims of crime in the past year.<sup>50</sup> The poor security situation is caused by interrelated factors including family separation, high levels of poverty, and a “lack of legitimate employment opportunities, which leave many youth in the region susceptible to recruitment by gangs or other criminal organizations.”<sup>51</sup>

The Northern Triangle is home to some of the highest homicide rates on a global scale.<sup>52</sup> Although data shows that homicide rates in

---

states that these Northern Triangle countries are experiencing “unprecedented levels of violence outside a war zone” where citizens are murdered with impunity and kidnappings are daily occurrences, *id.*

<sup>47</sup> See generally Bina Desai, et. al., *Global Report on Internal Displacement*, INTERNAL DISPLACEMENT MONITORING CENTRE 1, 38–41 (May 2018), <http://www.internal-displacement.org/global-report/grid2018/downloads/2018-GRID.pdf>.

<sup>48</sup> MEYER & TAFT-MORALES, *supra* note 44, at 1.

<sup>49</sup> See *id.* at 1–2.

<sup>50</sup> *Id.* at 2; see also PETER J. MEYER, CONG. RESEARCH SERV., RL34027, HONDURAS: BACKGROUND AND U.S. RELATIONS 1, 10 (July 22, 2019), <https://fas.org/sgp/crs/row/RL34027.pdf>. Despite lower crime rates and greater police presence, there continues to be a pervasive sense of insecurity in Honduras as 52% of Hondurans consider their cities unsafe and 88% of Hondurans consider the country unsafe, MEYER, *supra*, at 2. See generally Ben Raderstorf, et. al., *Beneath the Violence: How Insecurity Shapes Daily Life and Emigration in Central America*, LATIN AMERICAN PUBLIC OPINION PROJECT & THE INTER-AMERICAN DIALOGUE 1, 1, 3–6 (Oct. 2017), <https://www.thedialogue.org/wp-content/uploads/2017/10/Crime-Avoidance-Report-FINAL-ONLINE.pdf>.

<sup>51</sup> PETER J. MEYER, CONG. RESEARCH SERV., R44812, U.S. STRATEGY FOR ENGAGEMENT IN CENTRAL AMERICA: POLICY ISSUES FOR CONGRESS 1, 10 (Nov. 12, 2019), <https://fas.org/sgp/crs/row/R44812.pdf>.

<sup>52</sup> See generally Max Roser & Hannah Ritchie, *Homicides*, OUR WORLD IN DATA (last revised Dec. 2019), <https://ourworldindata.org/homicides>.

the Northern Triangle have fallen every year since 2015, they still remain high by global standards rates—up to fifty times higher than those in other countries.<sup>53</sup> More specifically, the Northern Triangle suffers from widespread femicide, with rates of more than ten female homicides per 100,000 women.<sup>54</sup> These cases of femicide are usually caused by escalating domestic violence issues that are often unresolved by law enforcement and fueled by deep-rooted social and systemic factors proliferating gender inequality.<sup>55</sup> Further, because an overwhelming number of femicides are left unsolved, or their perpetrators left unpunished, Central American women have a profound lack of trust in the legal system.<sup>56</sup> The “high degrees of

---

<sup>53</sup> See generally *id.* There is clearly a large difference in death rates between countries across the globe. Rates are high across Latin America—in particular, El Salvador, Honduras, Guatemala, and Mexico—where death rates are often greater than thirty deaths per 100,000 civilians, and even greater in El Salvador where the death rate was over fifty per 100,000. Compare these statistics with death rates across Western Europe, Japan, or the Middle East where homicides were below one per 100,000, *id.*

<sup>54</sup> *Femicide and International Women’s Rights*, GLOBAL AMERICANS (last visited Feb. 15, 2020), <https://theglobalamericans.org/reports/femicide-international-womens-rights/>. The level of violence affecting women in El Salvador and Honduras exceeds the combined rate of male and female homicides in some of the forty countries with the highest murder rates in the world, such as Ecuador, Nicaragua and Tanzania, *id.* See also Maria Fernandez Pérez Arguello & Bryce Couch, *Violence Against Women Driving Migration From the Northern Triangle*, ATLANTIC COUNCIL (Nov. 8, 2018), <https://www.atlanticcouncil.org/blogs/new-atlanticist/violence-against-women-driving-migration-from-the-northern-triangle/> [hereinafter *Violence Against Women*] Juan Forero, *Women in Latin America Are Being Murdered at Record Rates*, THE WALL STREET JOURNAL (Dec. 19, 2018), <https://www.wsj.com/articles/it-is-better-not-to-have-a-daughter-here-latin-americas-violence-turns-against-women-11545237843>.

<sup>55</sup> *Honduras: 30 Femicides in January with 95% Impunity Rate*, TELESUR ENGLISH (Feb. 4, 2019), <https://www.telesurenglish.net/news/Honduras-30-Femicides-in-January-with-95-Impunity-Rate-20190204-0015.html>; *Violence Against Women*, *supra* note 54.

<sup>56</sup> See MEYER & TAFT-MORALES, *supra* note 44, at 2 (“Citizens in the region express low levels of confidence in nearly all of their government institutions according to polling by Latinobarómetro.”); see also U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM’R, *Human Rights Council Working Group on the Issue of Discrimination Against Women in Law and in Practice* (last visited Feb. 15, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23873&LangID=E> [hereinafter *Discrimination Against Women*]. In Honduras, statistics show that nearly 95% of femicides go unpunished, *Discrimination Against Women*, *supra*.

impunity” in cases of violence against women, children, and members of the LGBTQI community leave a great number of the population “with few options for protection beyond migration.”<sup>57</sup>

A legacy of conflict and authoritarian rule has slowed down the creation of strong democratic institutions in most of Central America. The countries of the Northern Triangle did not establish their current civilian democratic systems until the 1980s and 1990s and have since faced bouts of corruption and controversy.<sup>58</sup> Because of scandals and the governments’ struggles to address citizens’ concerns effectively, the Northern Triangle suffers from great distrust between its citizens and legal and political systems.<sup>59</sup> Moreover, these countries have some of the lowest tax collection rates in Latin America, creating underfunded state institutions that contribute to low educational attainment, persistent poverty, lack of protection for citizens, and overall social instability.<sup>60</sup>

The socioeconomic conditions of the Northern Triangle are extremely tragic. The Northern Triangle suffers from great socioeconomic inequality where small groups of elite individuals hold the majority of land ownership and economic power.<sup>61</sup> In El Salvador, 29.2% of the population lives below the poverty line, while in Guatemala and Honduras over half of the population lives below the poverty line with rates of 59.3% and 61.9%, respectively.<sup>62</sup>

There is an enormous lack of legitimate employment opportunities in the Northern Triangle—a problem that will only become greater as nearly half of the Northern Triangle’s population is under

---

<sup>57</sup> *Violence Against Women*, *supra* note 54; see CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R43616, EL SALVADOR: BACKGROUND AND U.S. RELATIONS 1, 15 (August 14, 2019), <https://fas.org/sgp/crs/row/R43616.pdf> (citing David Bernal, *El Salvador: Inseguridad es la segunda razón por la que emigran las mujeres* [El Salvador: Insecurity is the Second Reason Women Migrate], LA PRENSA GRÁFICA (March 8, 2019)). A 2019 survey of Salvadoran women deported from the United States found that violence, often gender-related, was the second-most frequent reason cited for having migrated to the United States, Bernal, *supra*.

<sup>58</sup> MEYER, *supra* note 51, at 8.

<sup>59</sup> *Id.*

<sup>60</sup> MEYER & TAFT-MORALES, *supra* note 44, at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1 (citing World Bank, DATABANK, <https://data.worldbank.org/indicator/SI.POV.NAHC> (using data from most recent year available: 2017 for El Salvador, 2014 for Guatemala, and 2018 for Honduras)).

the age of twenty-five.<sup>63</sup> Because of the relatively young population in the Northern Triangle, all three countries will see a rise in working-age populations, but will not seemingly have enough economic infrastructure to support the influx.<sup>64</sup> This has already been noted when, in 2017, the Northern Triangle's labor force increased by more than 353,000 people, but fewer than 35,000 jobs were created in the formal economy.<sup>65</sup> This disparity leaves workers desperate, searching for jobs in informal sectors that do not provide security, benefits, or other opportunities in a foreign country.<sup>66</sup>

Finally, natural disasters contribute to a large part of the migration from the Northern Triangle. Hurricanes, earthquakes, and long bouts of drought are all very real risks that destroy the Northern Triangle's infrastructure and dominant agrarian economy.<sup>67</sup> Specifically, "El Salvador and Guatemala are among the [fifteen] countries in the world most at risk from natural disasters, due to their frequent exposure and weak response capacity."<sup>68</sup> The Northern Triangle also comprises a great amount of the Central American Dry Corridor, which "is extremely susceptible to irregular rainfall" that can lead to "destroyed crops and [great] 'levels of food insecurity.'"<sup>69</sup> The risk of natural disasters has created displacement and forced many citizens of the Northern Triangle to take on debt, sell off land, and migrate.<sup>70</sup> Because of the aforementioned reasons, Central American migrants have entered the U.S. in droves within the last decades.<sup>71</sup> Deemed an "immigration crisis," the issues surrounding

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> MEYER & TAFT-MORALES, *supra* note 44, at 1.

<sup>67</sup> *See id.* at 1–2.

<sup>68</sup> *Id.* at 1.

<sup>69</sup> *Id.* at 1–2.

<sup>70</sup> *Id.* at 2.

<sup>71</sup> Allison O'Connor, et. al., *Central American Immigrants in the United States*, MIGRATION POLICY INSTITUTE (Aug. 15, 2019), <https://www.migration-policy.org/article/central-american-immigrants-united-states> ("Immigrants from the Northern Triangle comprised 86 percent of the Central Americans in the United States. In 2017, Central American immigrants represented 8 percent of the United States' 44.5 million immigrants.").

border protection and illegal migration became huge talking points for the 2016 Presidential Election.<sup>72</sup>

### III. THE TRUMP ADMINISTRATION'S CREATION AND IMPLEMENTATION OF NEW ASYLUM LAWS

During his campaign, President Donald Trump's platform mainly consisted of discussions centered around immigration, especially migration on the southern border with Mexico.<sup>73</sup> Capitalizing on the sixty percent of registered voters who reported that immigration was an important factor in electing a candidate, President Trump used his platform to discuss how he would "fix" these immigration issues.<sup>74</sup> President Trump's proposed solutions included building a wall at the U.S.-Mexican border that would be funded by the Mexican government, rescinding President Barack Obama's executive orders on the Deferred Action for Childhood Arrivals (DACA) program, and even ultimately banning Muslims from entering the U.S.<sup>75</sup>

Since entering office, President Trump has made a myriad of changes to U.S. immigration laws, including those proposed during his campaign.<sup>76</sup> Riddled with xenophobic undertones, the Trump

---

<sup>72</sup> See Donald J. Trump, President of the United States., Remarks by President Trump on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>).

<sup>73</sup> *Donald Trump Presidential Campaign, 2016/Immigration*, Ballotpedia (last visited Feb. 28, 2020), [https://ballotpedia.org/Donald\\_Trump\\_presidential\\_campaign\\_2016/Immigration](https://ballotpedia.org/Donald_Trump_presidential_campaign_2016/Immigration) [hereinafter *Trump Immigration Ballotpedia*].

<sup>74</sup> *Id.*; see Jeffrey M. Jones, *One in Five Voters Say Immigration Stance Critical to Vote*, GALLUP (Sept. 9, 2015), [https://news.gallup.com/poll/185381/one-five-voters-say-immigration-stance-critical-vote.aspx?g\\_source=immigration&g\\_medium=search&g\\_campaign=tiles](https://news.gallup.com/poll/185381/one-five-voters-say-immigration-stance-critical-vote.aspx?g_source=immigration&g_medium=search&g_campaign=tiles).

<sup>75</sup> *Trump Immigration Ballotpedia*, *supra* note 73.

<sup>76</sup> See Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>; Peniel Ibe, *Trump's Attacks on the Legal Immigration System Explained*, AMERICAN FRIENDS SERVICE COMMITTEE (Feb. 21, 2020), <https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained>; Sarah Pierce, et. al., *U.S. Immigration Policy Under Trump: Deep Changes and Lasting Impacts*, MIGRATION POLICY INSTITUTE (July 2018), <https://www.migrationpolicy.org/research/us-immigration-policy-trump-deep-changes-impacts>; Sarah

Administration's proposed and implemented changes have shaken up the immigration landscape, specifically pertaining to asylum law.<sup>77</sup> The Trump Administration has altered the course of asylum law by designating new parameters as to which migrants are allowed to apply for asylum and implementing new logistical procedures when applying for and awaiting an asylum hearing.<sup>78</sup> This note will focus on two asylum policies. First, this note will address the issuance of *Matter of A-B-*, a landmark case that overruled past practices allowing victims of domestic violence to come forward with asylum claims.<sup>79</sup> Second, this note will address the Migrant Protection Protocols, or "Remain in Mexico," which is a newly established program that returns asylum seekers to dangerous areas in Mexico to await U.S. immigration proceedings.<sup>80</sup>

*A. Matter of A-B- Restricts Asylum for Victims of Domestic Abuse or Gang Violence*

On June 11, 2018, former Attorney General Jeffrey Sessions decided *Matter of A-B-*<sup>81</sup>, overruling the landmark case *Matter of A-R-C-G-*<sup>82</sup>, and changing the landscape of asylum law in the United States. Attorney General Sessions' ruling in *Matter of A-B-* narrowed the scope of the particular social groups granted asylum, rescinding immigration practices established in *Matter of A-R-C-G-* that allowed victims of domestic abuse and gang violence to apply and attain asylum if found to be in credible fear for their lives.<sup>83</sup> In his decision, Sessions specifically stated that claims pertaining to "domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," diminishing the

---

Pierce & Andrew Steele, *Immigration Under Trump: A Review of Policy Shifts in the Year Since the Election*, MIGRATION POLICY INSTITUTE (Dec. 2017), <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts>.

<sup>77</sup> See generally Ibe, *supra* note 76; Pierce, et. al., *supra* note 76.

<sup>78</sup> See Ibe, *supra* note 76.

<sup>79</sup> 27 I&N Dec. 316 (A.G. 2018).

<sup>80</sup> MPP Press Release, *supra* note 11. See generally Ibe, *supra* note 76.

<sup>81</sup> *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

<sup>82</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014).

<sup>83</sup> *Matter of A-B-*, 27 I&N Dec. at 321.

opportunity for a vast number of migrants fleeing from lives filled with abuse in the Northern Triangle.<sup>84</sup>

1. Attorney General Decides *Matter of A-B-* to Overturn Landmark Case

In *Matter of A-B-*, the petitioner, a native from El Salvador, applied for asylum claiming that her ex-husband and father of her three children repeatedly abused her.<sup>85</sup> On her application, the petitioner stated that she was eligible for asylum because she was being persecuted on account of her membership in the purported social group, “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.”<sup>86</sup> The Immigration Judge denied her relief and placed an order of removal on the petitioner, reasoning that she failed to establish that her membership in a social group was a central reason for her persecution.<sup>87</sup>

The petitioner appealed and the Board of Immigration Appeals (BIA) reversed the Immigration Judge’s decision because the petitioner’s purported social group was substantially similar to a previously recognized group used in *Matter of A-R-C-G-*.<sup>88</sup> While the petitioner in *Matter of A-R-C-G-* was of Guatemalan origin, she similarly listed her social group as “married women in Guatemala who are unable to leave their relationship.”<sup>89</sup> The BIA in *Matter of A-R-C-G-* stated that the petitioner’s group designation established all the elements necessary to prove membership in a “particular social group” because (1) the group was composed of members who share a common immutable characteristic like gender,<sup>90</sup> (2) the group was defined with particularity by using the words “married women,”<sup>91</sup> and (3) the group was socially distinct within Guatemalan society because of the vulnerability women face at the hand of domestic abusers who are never subjected to any legal punishment.<sup>92</sup> *Matter*

---

<sup>84</sup> *Id.* at 320.

<sup>85</sup> *Id.* at 321.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 319.

<sup>88</sup> *Id.* at 321.

<sup>89</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 390 (BIA 2014).

<sup>90</sup> *Id.* at 392 (citing *Matter of Acosta*, 19 I & N Dec. 211, 233 (BIA 1985)).

<sup>91</sup> *Id.* at 393.

<sup>92</sup> *Id.* at 394.

of *A-R-C-G-* solidified the acceptance of domestic abuse victims as members of a social group recognized under asylum law.<sup>93</sup> Because of this precedent, the BIA reversed *Matter of A-B-*, stating that the Immigration Judge erred on several grounds, including his determination that the petitioner's assigned group was not a particular social group under asylum laws.<sup>94</sup>

However, former Attorney General Sessions overtook the case, holding that asylum applicants must establish more than the mere fact that they are part of a group that is at risk of being a victim of crime.<sup>95</sup> In his decision, Sessions criticizes *Matter of A-R-C-G-*, stating that the opinion has caused confusion due to its recognition of a vast new category of particular social groups based solely on violence perpetrated by private actors.<sup>96</sup> Sessions stated that a "prototypical refugee" flees her country because of government persecution, either through the government's actions or through the government's inability to prevent the misconduct of non-government actors.<sup>97</sup> In the case that a persecutor is not a government actor, immigration judges must consider both the reason for the harm inflicted and the government's role in sponsoring such actions.<sup>98</sup> Because the asylum statute "does not provide redress for all misfortune," Sessions stated that a rigorous analysis must be applied when an asylum seeker purports to be part of a particular social group fleeing harm by a private actor.<sup>99</sup>

Sessions further commented that the BIA's decision in *Matter of A-R-C-G-* compelled the BIA and immigration judges to rely upon it as an "affirmative statement of law" without any necessary legal and factual analysis.<sup>100</sup> Specifically, Sessions contends that in *Matter of A-R-C-G-* the BIA exploited the Department of Homeland Security's (DHS) concessions that the respondent suffered harm rising to the level of past persecution, that she was a member of a qualifying particular social group, and that her membership in that group

---

<sup>93</sup> *Id.* at 395.

<sup>94</sup> *Matter of A-B-*, 27 I. & N. Dec. 316, 321 (A.G. 2018).

<sup>95</sup> *Id.* at 320.

<sup>96</sup> *Id.* at 319.

<sup>97</sup> *Id.* at 318.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Matter of A-B-*, 27 I&N Dec. at 319.

was a central reason for her persecution in order to create a precedent that allows victims of private violence to seek asylum.<sup>101</sup> These concessions resulted in a lack of legal analysis, which led to a “misleading impression concerning the cognizability of similar social groups,” and the allowance of asylum claims premised upon persecution on account of membership in those groups.<sup>102</sup> Sessions criticized the BIA’s approach saying it was contrary to the appropriate analysis used in prior decisions like *Matter of R-A*.<sup>103</sup>

Although former Attorney General Janet Reno vacated *Matter of R-A*, federal courts and the BIA have relied on its analysis of particular social groups.<sup>104</sup> In *Matter of R-A*, the BIA concluded that the petitioner was ineligible for asylum because her purported social group, “Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination,” did not qualify under asylum law.<sup>105</sup> The BIA also held that, even if this group were to be recognized as a cognizable particular social group, the petitioner failed to show a sufficient nexus between her husband’s abuse and her membership in that social group.<sup>106</sup> The BIA reasoned that, without a demonstration that persecutors saw their victims as members of their particular social group, it would be difficult to understand how the persecution was “on account of” membership in those groups.<sup>107</sup>

Because the BIA did not apply this same analysis in *Matter of A-B*, but rather only generally cited to *Matter of A-R-C-G*, Sessions deemed it reversible error.<sup>108</sup> Sessions further clarified in his opinion that (1) a “social group must ‘exist independently’ of the harm

---

<sup>101</sup> *Id.* at 331.

<sup>102</sup> *Id.* at 334.

<sup>103</sup> *See id.* at 318–19.

<sup>104</sup> *See id.* at 329. *See generally* *Matter of R-A*, 22 I. & N. Dec. 906 (A.G. 2001) (vacating BIA’s decision and staying consideration of the case pending final publication of a proposed rule offering guidance on the definitions of “membership in a particular social group,” “persecution,” and the use of “on account of” relating to persecution based on an individual’s purported particular social group).

<sup>105</sup> *Matter of R-A*, 22 I&N Dec. at 917–18.

<sup>106</sup> *Id.* at 920–21.

<sup>107</sup> *Id.*

<sup>108</sup> *Matter of A-B*, 27 I&N Dec. at 340.

asserted in an [asylum application]”;<sup>109</sup> (2) “social groups defined by their vulnerability to private criminal activity likely lack the [required] particularity . . .”;<sup>110</sup> and (3) a “social group must avoid . . . being too broad [that it lacks] definable boundaries and too narrow to have larger significance in society.”<sup>111</sup> Thus, like the petitioner in *Matter of A-B-*, other victims of domestic and gang violence have not qualified as members of a cognizable particular social group to which asylum is provided since this decision.<sup>112</sup>

## 2. The Application of *Matter of A-B-* in Immigration Proceedings

Just one month after the Attorney General’s decision in *Matter of A-B-*, the U.S. Citizenship and Immigration Services (USCIS) released a Policy Memorandum (Policy Memo).<sup>113</sup> Riddled with redactions, the publicly released version of the Policy Memo breaks down the legal analysis and procedural steps officers must take when applying *Matter of A-B-* in asylum cases.<sup>114</sup> In summary, the Policy Memo adopts dicta from the *Matter of A-B-* decision—treating it as law—and synthesizes the process down to five steps USCIS officers must take.<sup>115</sup>

---

<sup>109</sup> *Id.* at 334.

<sup>110</sup> *Id.* at 335.

<sup>111</sup> *Id.* at 334.

<sup>112</sup> *See id.* at 344–45.

<sup>113</sup> *See generally* Dep’t. of Homeland Security, U.S. Citizenship and Immigration Services, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* 1, 1 (July 11, 2018), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf?utm\\_source=CLINIC+Mail&utm\\_campaign=c4626c9142-Affiliate\\_Up-date\\_9\\_25\\_17\\_COPY\\_02&utm\\_medium=email&utm\\_term=0\\_a33179621a-c4626c9142-280621937](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf?utm_source=CLINIC+Mail&utm_campaign=c4626c9142-Affiliate_Up-date_9_25_17_COPY_02&utm_medium=email&utm_term=0_a33179621a-c4626c9142-280621937) [hereinafter *Matter of A-B- Policy Memo*].

<sup>114</sup> *See generally id.* at 1.

<sup>115</sup> *See also* Reena Arya, *Federal Judge Rejects Administration’s Restrictions on Credible Fear Claims in Expedited Removal*, THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Dec. 21, 2018), <https://cliniclegal.org/resources/asylum-and-refugee-law/federal-judge-rejects-administrations-restrictions-credible-fear>; Victoria Neilson, *New Government Guidance on Matter of A-B- Incorporates Grace v. Whitaker*, THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Jan. 28, 2019), <https://cliniclegal.org/resources/asylum-and-refugee-law/new-government-guidance-matter-b-incorporates-grace-v-whitaker>.

First, officers must determine whether the petitioner “is a member of a clearly-defined particular social group” as defined in *Matter of A-B*.<sup>116</sup> The Policy Memo further asserts the essential requirement that a particular social group must exist independently of the persecution asserted. Second, the officer must confirm that the petitioner’s membership in the particular social group is “a central reason for the persecution suffered.”<sup>117</sup> It reiterates the three elements necessary to prove persecution laid out in *Matter of A-B*: (1) the persecution involves “an intent to target a belief or characteristic,” (2) “the level of harm [suffered] must be severe,” and (3) “the harm or suffering must be inflicted either by the government . . . or by persons or an organization that the government [cannot] control.”<sup>118</sup> Third, if the alleged persecutor has no government affiliation, applicants are required to prove that their home government is unwilling or unable to protect them.<sup>119</sup> Fourth, officers must determine whether internal relocation is a viable option for the petitioner.<sup>120</sup> Finally, officers are allowed to use discretion in determining whether an applicant qualifies for a grant of asylum.<sup>121</sup>

---

<sup>116</sup> As stated in *Matter of A-B*-, USCIS explains that particular social groups must have a common immutable characteristic, be defined with particularity, and be socially distinct within the society in question, *Matter of A-B- Policy Memo*, *supra* note 113, at 2.

<sup>117</sup> The memo specifically defines persecution as “a threat to the life or freedom of, or the infliction of suffering of harm upon, those who differ in a way regarded as an offense.” *Id.* at 5 n.3.

<sup>118</sup> *Id.* at 5 (internal quotations omitted).

<sup>119</sup> *Id.* at 9; *see also id.* at 6 (quoting *Matter of A-B-*, 27 I. & N. Dec. 316, 322 (2018)). (“The asylum statute was not intended as a remedy for ‘the numerous personal altercations that invariably characterize economic and social relationships,’ [thus personal violence based on personal relationships that do not constitute a governmental nexus is not considered a recognizable harm under the asylum statute.]”).

<sup>120</sup> If an asylum applicant cannot prove past harm then the applicant must prove that relocating within her home country would not be a reasonable option. *Id.* at 6–7 (citing 8 C.F.R. § 208.13(b)(3)(i)).

<sup>121</sup> In exercising discretion, officers should consider any relevant factor, including but not limited to:

[T]he circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third

### 3. Asylum Seekers Fight Back Against *Matter of A-B-* and USCIS Policy

While the July 2018 Policy Memo reminded officers that credible fear interviews should be conducted in a “nonadversarial manner,”<sup>122</sup> the guidelines therein significantly narrowed the scope of who would be granted an interview.<sup>123</sup> Traditionally, credible fear interviews apply a “significant possibility” standard, which ensured that valid asylum seekers are not wrongfully returned to their home countries where they could possibly suffer further persecution.<sup>124</sup> However, the Policy Memo’s adoption of dicta found in *Matter of A-B-* alluded to a heightened standard that resulted in backlash from immigration support groups.<sup>125</sup>

Because of the narrower scope found in the Policy Memo, The Center for Gender and Refugee Studies and the American Civil Liberties Union (ACLU) sued the government, seeking to enjoin the use of the memorandum.<sup>126</sup> The plaintiffs involved in the suit—many of them women who endured sexual and gender-based persecution—challenged that the new credible fear guidelines found in the Policy Memo and *Matter of A-B-* “unlawfully and arbitrarily imposed a heightened standard [for] credible fear determinations” than originally found in the INA, violating the statutory notice and proposal procedures required under the Administrative Procedure Act (APA).<sup>127</sup> The District Court for the District of Columbia heard *Grace v. Whitaker* and answered the question whether the guidelines found in the July 2018 Policy Memo could be properly applied to credible fear interviews.<sup>128</sup>

INA section 242(e)(3)(A) allowed the D.C. District Court to hear this case because it is the only U.S. court with the jurisdiction to review “a systemic challenge to the legality of a written policy

---

country; and his or her living conditions, safety, and potential for long-term residency there.

*Matter of A-B- Policy Memo*, *supra* note 113, at 7 (quoting *Matter of A-B-*, 27 I&N Dec. at 345 n.12).

<sup>122</sup> *Id.* at 4 n.2.

<sup>123</sup> *See id.* at 8–9.

<sup>124</sup> 8 U.S.C. 1225(b)(1)(B)(v) (2009); *see also* Neilson, *supra* note 115.

<sup>125</sup> *See generally* *Matter of A-B- Policy Memo*, *supra* note 113, at 9–10.

<sup>126</sup> *See generally* *Grace v. Whitaker*, 344 F. Supp. 3d 96, 96 (D.D.C. 2018).

<sup>127</sup> *Id.* at 105; *see* Arya, *supra* note 115.

<sup>128</sup> *See generally* *Grace*, 344 F. Supp. 3d at 96.

directive, written policy directive guideline, or written procedure issued by or under the authority of the Attorney General to implement the expedited removal process.”<sup>129</sup> In its decision, the D.C. District Court abrogated *Matter of A-B-* and the subsequent USCIS Policy Memo, rejecting the newly implemented credible fear policies.<sup>130</sup> The court held that they violated the APA because they are “arbitrary, capricious, and contrary to immigration law,” violating the INA in five key respects explained below.<sup>131</sup>

First, the court concluded that the new credible fear policies incorrectly allowed a blanket rejection of all credible fear claims based on gang-related and domestic violence.<sup>132</sup> The court stated that the general rule has no legal basis for this categorical ban on domestic violence and gang-related claims.<sup>133</sup> Moreover, the rule runs contrary to the instructions set out by the INA that require asylum claims to be analyzed on a case-by-case basis.<sup>134</sup> Because this general rule would discontinue an individualized analysis of each asylum case, the court further stated that it was inconsistent with Congress’ intent in writing the Refugee Act and INA.<sup>135</sup> Specifically, the court stated that the Attorney General failed to stay within the bounds of his statutory authority by issuing a general rule that effectively bars claims based on certain categories of persecutors or certain kinds of violence, which contradicts Congress’ intent in passing the Refugee Act of 1980 to bring U.S. refugee law into conformance with the United Nations’ 1967 Protocol Relating to the Status of Refugees.<sup>136</sup>

Second, the court admonished the implementation of a heightened standard for the past persecution analysis in credible fear screening.<sup>137</sup> The established past persecution standard requires the asylum seeker who suffered harm from a private actor to establish that the government was unable and/or unwilling to protect her.<sup>138</sup>

---

<sup>129</sup> *Id.* at 115 (citing 8 U.S.C.A. § 1252(e)(3)(A) (2005)).

<sup>130</sup> *Id.* at 105.

<sup>131</sup> *Id.* at 133.

<sup>132</sup> *Id.* at 126.

<sup>133</sup> *Id.*

<sup>134</sup> *Grace*, 344 F. Supp. 3d at 126.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 128–29.

<sup>138</sup> *Id.*

However, the new credible fear policies laid out in the Policy Memo incorrectly increase this standard, requiring asylum seekers to establish that the government “condones” or is “completely helpless” in protecting them.<sup>139</sup> The court rejected this new standard, finding that it was contrary to decades of established case law and the statutory definition of a refugee.<sup>140</sup>

Third, the court concluded that the credible fear policies incorrectly interpret “circularity” in particular social group analysis.<sup>141</sup> Specifically, the court rejected the new blanket denial of common particular social groups associated with domestic abuse that USCIS claimed were defined by the harm the asylum seeker suffered.<sup>142</sup> The court held that each case must be subjected to a case-by-case analysis, and that USCIS’ interpretation of the rule against circularity “ensures that women unable to leave their relationship will always be circular.”<sup>143</sup> The D.C. Circuit reasoned that the Attorney General misinterpreted *Matter of M-E-V-G-*, which held that there cannot be a general rule in the determination of whether a group is distinct because “it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.”<sup>144</sup> Thus, the general rule created in *Matter of A-B*—that the plaintiff’s inclusion of an “inability to leave her relationship” in her asylum claim created impermissible circularity because she is only able to claim this victim status directly due to harm suffered in her relationship—is arbitrary, capricious, and contrary to immigration law.<sup>145</sup> The policy that “the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave, because that would amount to circularly defining the particular social group by the harm on which the asylum claim was based” created a default ruling of circularity upon domestic violence claims without taking

---

<sup>139</sup> *Grace*, 344 F. Supp. 3d at 133.

<sup>140</sup> See 8 U.S.C. 1101(a)(42)(A) (2014).

<sup>141</sup> *Grace*, 344 F. Supp. 3d at 133.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (2014); see *Grace*, 344 F. Supp. 3d at 133.

<sup>145</sup> *Grace*, 344 F. Supp. 3d at 133; see *Matter of A-B-*, 27 I&N Dec. 316, 319, 335 (A.G. 2018).

into account specificities of the asylum claim.<sup>146</sup> All proposed groups should be analyzed individually, taking into consideration the societies from which the asylum seeker is fleeing.<sup>147</sup>

Fourth, the court deemed the Policy Memo's delineation requirement unlawful.<sup>148</sup> The court stated that the Policy Memo goes beyond the decision in *Matter of A-B-* by requiring asylum applicants to delineate their particular social groups during the credible fear stage.<sup>149</sup> This policy was considered arbitrary and capricious because it goes against the INA.<sup>150</sup> Further, the delineation requirement during the credible fear stage would force asylum applicants to create and name the particular social group without any legal representation.<sup>151</sup>

Finally, the court criticized the Policy Memo's directive that asylum officers should ignore circuit case precedent if it is contrary to BIA case law.<sup>152</sup> The court stated that this directive goes against the precedent set out in *National Cable & Telecommunication Association v. Brand X Internet Services*, which held that an agency may only override a prior judicial interpretation if the agency's interpretation is entitled to deference.<sup>153</sup> Without this deference entitlement, judicial construction of an agency statute is considered binding, even if it is contrary to the agency's view.<sup>154</sup> Thus, the memorandum's directives to ignore precedent were found to be unlawful.<sup>155</sup>

Judge Emmet G. Sullivan strongly stated that "it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal" in finding the USCIS policies

---

<sup>146</sup> See *Grace*, 344 F. Supp. 3d at 133–134; see generally *Matter of A-B- Policy Memo*, *supra* note 113.

<sup>147</sup> See *id.* (citing *Matter of M-E-V-G-*, 26 I & N Dec. at 242 (particular social groups are cognizable if based on immutable characteristics—even those based on past experiences independent of persecution)).

<sup>148</sup> *Id.* at 133–34.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 134–35.

<sup>152</sup> See *Matter of A-B- Policy Memo*, *supra* note 113, at 11–12.

<sup>153</sup> *Grace*, 344 F. Supp. 3d at 137–138 (D.D.C. 2018).

<sup>154</sup> *Id.* at 138 n.22.

<sup>155</sup> *Id.* at 138.

improper.<sup>156</sup> Judge Sullivan also stated that Congress' intent in promulgating the Refugee Act of 1980 included giving a statutory meaning to the nation's commitment to human rights and humanitarian concerns.<sup>157</sup> This express mention of a congressional intent to preserve human rights alludes to the court's mindfulness of a possibility that the Executive's decision in *Matter of A-B-* and subsequent policies could be cause for legal and humanitarian concern.<sup>158</sup>

After the publication of the *Grace* opinion, USCIS and the Executive Office for Immigration Review (EOIR) issued guidance for adjudicating credible fear interviews.<sup>159</sup> The new instructions disallow immigration judges from relying on a general rule against domestic violence and gang-related asylum claims, categorically rejecting particular social groups based on the inability to leave a violent domestic partner, or requiring an applicant to delineate a particular social group during the early stage of a credible fear interview.<sup>160</sup> Immigration judges must continue evaluating asylum hearings on a case-by-case basis.<sup>161</sup> These evaluations include the longstanding test of determining whether the government is "unable or unwilling to control" a non-government persecutor and the application of the federal circuit law most favorable to the applicant during credible fear interviews.<sup>162</sup>

Although the *Grace* decision inspired new directives that granted some relief to asylum applicants, the opinion still leaves room for error in the asylum process beyond the credible fear interview stage.<sup>163</sup> Because the plaintiffs only challenged the application of *Matter of A-B-* in the context of credible fear interviews, the D.C. District Court's decision directly enjoins the Executive branch from the troublesome actions above *only* during the earliest stage of the asylum process: the credible fear interview.<sup>164</sup> It is important to note that the *Grace* decision analyzes the asylum process during the credible fear interview because it leaves room for error during the

---

<sup>156</sup> *Id.* at 105.

<sup>157</sup> *Id.* at 106.

<sup>158</sup> See *infra* Part III(A); see also *Grace*, 344 F. Supp. 3d at 105.

<sup>159</sup> Neilson, *supra* note 115.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See *id.*

<sup>164</sup> *Id.*

subsequent—and more important—stages, like asylum hearings, where the final determination of asylum is made.<sup>165</sup> Further, because the court found that the Executive’s decision in *Matter of A-B-* and the subsequent Policy Memo were violations of the INA and APA, there was no determination made as to whether there were any constitutional violations in the case.<sup>166</sup> The questions left unanswered in *Grace* as to the policy implications upon asylum applicants’ rights will be addressed in Part III.<sup>167</sup>

*B. The Administration’s Implementation of the Migrant Protection Protocols*

The Trump Administration enacted the Migrant Protection Protocols (MPP), colloquially dubbed “Remain in Mexico,” in January 2019.<sup>168</sup> In violation of the APA, the MPP were propagated by the DHS and bypassed necessary notice-and-comment rulemaking procedures.<sup>169</sup> According to the DHS, the MPP “are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings . . . .”<sup>170</sup> The DHS claims that the MPP’s implementation helps “restore a safe and orderly immigration process, decrease the number of those taking advantage of the immigration system . . . and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need.”<sup>171</sup> Despite the DHS’s claims that the MPP will ensure appropriate humanitarian protections, violence against immigrants sent back to Mexico to await asylum proceedings remains a great concern.<sup>172</sup>

Remain in Mexico, or the MPP, created new procedures for immigrant entrants who attempt to seek asylum at the nation’s

---

<sup>165</sup> See generally *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

<sup>166</sup> *Grace v. Whitaker*, 344 F. Supp. 3d 96, 141 n.27 (D.D.C. 2018).

<sup>167</sup> See *infra* Part III(A).

<sup>168</sup> *MPP Press Release*, *supra* note 11.

<sup>169</sup> *Innovation Law Lab v. Wolf*, No. 19-15716, 2020 WL 964402, at \*3 (9th Cir. Feb. 28, 2020).

<sup>170</sup> *MPP Press Release*, *supra* note 11.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

southwest border.<sup>173</sup> Under the MPP, “certain aliens” attempting to enter the U.S. without documentation—even those seeking asylum—are no longer released within the country.<sup>174</sup> Instead, these migrants are given a standard “Notice to Appear” and returned to Mexico where they await the date of their immigration court hearing.<sup>175</sup> Many times, migrants are returned to locations in Mexico far from where they crossed the border with instructions to return to specifically designated ports of entry.<sup>176</sup>

Customs Border and Protection (CBP) officials released the MPP Guiding Principles to instruct CBP officers and Border agents on how to effectively administer the MPP.<sup>177</sup> The CBP asserts that no other immigration screening procedures have been altered through the issuance of the MPP other than the determination of whether a migrant qualifies to be returned to Mexico.<sup>178</sup> This document lists exemptions from the program: unaccompanied children, Mexican citizens or nationals, individuals processed for expedited removal, individuals with mental or health issues, criminals with violent records, and third-country individuals who claim a credible fear of returning to Mexico.<sup>179</sup> Immigration officers generally only returned non-Mexican, Spanish-speaking migrants to Mexico upon its inception, providing an additional unlisted exemption to their analysis.<sup>180</sup> However, in January 29, 2020, DHS announced that the MPP expanded to Brazilian nationals, even though they do not hail from a Spanish-speaking country.<sup>181</sup>

---

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Dep’t. of Homeland Security, Bureau of Customs and Border Prot., MPP Guiding Principles 1, 1 (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf> [hereinafter *MPP Guiding Principles*].

<sup>176</sup> *Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact*, AMERICAN IMMIGRATION COUNCIL 1, 2–3, [https://www.americanimmigrationcouncil.org/sites/default/files/research/policies\\_affecting\\_asylum\\_seekers\\_at\\_the\\_border.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf) [hereinafter *Policies Affecting Asylum Seekers*].

<sup>177</sup> *MPP Guiding Principles*, *supra* note 175, at 1.

<sup>178</sup> *Id.* at 1; *see MPP Press Release*, *supra* note 11.

<sup>179</sup> *MPP Guiding Principles*, *supra* note 175, at 1.

<sup>180</sup> *See Policies Affecting Asylum Seekers*, *supra* note 176, at 3.

<sup>181</sup> *Id.*

The MPP Guiding Principles also state that CBP officers and Border Patrol agents may exercise discretion on a case-by-case basis.<sup>182</sup> Because of this power of discretion, immigration officers sometimes treat individuals who cross the border at the same time differently.<sup>183</sup> While one individual is sent back under MPP, the other person who entered the U.S. at the same time may be admitted under the regular asylum process.<sup>184</sup> These situations have led to families being separated, with one parent being sent back to Mexico while the other parent and their child are allowed to enter the United States.<sup>185</sup> Further, immigration officers implement the MPP Guiding Principles inconsistently throughout the border.<sup>186</sup> Reports show CPB Officers have violated the Guiding Principles by returning individuals with serious medical conditions to Mexico despite being part of the group of individuals with health issues clearly exempted within MPP's directives.<sup>187</sup>

Remain in Mexico was most recently challenged in the Ninth Circuit, where the court affirmed the District Court's granting of a preliminary injunction setting aside the policy.<sup>188</sup> The Ninth Circuit concluded that plaintiffs showed a likelihood of success on both claims that (1) Remain in Mexico is inconsistent with the INA, specifically, 8 U.S.C. section 1225(b), which provides the guidelines for inspection by immigration officers and the expedited removal of inadmissible aliens;<sup>189</sup> and (2) that Remain in Mexico "does not comply with [the nation's] treaty-based non-refoulement obligations codified at 8 U.S.C. section 1231(b)"<sup>190</sup> because asylum

---

<sup>182</sup> *MPP Guiding Principles*, *supra* note 175, at 1.

<sup>183</sup> *Policies Affecting Asylum Seekers*, *supra* note 176, at 3.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*; *see, e.g.*, Robert Moore, *3-Year-Old Asked To Pick Parent In Attempted Family Separation, Her Parents Say*, NPR (July 15, 2019), <https://www.npr.org/2019/07/15/741721660/follow-up-what-happened-after-a-border-agent-asked-toddler-to-pick-a-parent>.

<sup>186</sup> *Policies Affecting Asylum Seekers*, *supra* note 176, at 3.

<sup>187</sup> *See MPP Guiding Principles*, *supra* note 175, at 1; *see, e.g.*, Jasmine Aguilera, "Vulnerable" Asylum Seekers Are Supposed to Be Able to Stay in the U.S.—But Critically Ill Migrants Are Still Being Sent Back to Mexico, TIME (Dec. 19, 2019), <https://time.com/5751734/ill-asylum-seekers-sent-back-to-mexico/>.

<sup>188</sup> *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1077 (9th Cir. 2020).

<sup>189</sup> *Id.* at 1081 (relying on 8 U.S.C. § 1225(b) (2009)).

<sup>190</sup> *Id.* at 1081–82 (referencing 8 U.S.C. § 1231(b)(i)–(iii) (2006)).

officers failed to ask the migrants if they feared being returned to Mexico.<sup>191</sup>

The Ninth Circuit provides a thorough statutory interpretation of the INA.<sup>192</sup> Ultimately, the court deemed that the MPP had been incorrectly applied to all asylum applicants, rather than proscribing to the express distinctions between the class of immigrants delineated in 8 U.S.C. section 1225(b)(1), which provides guidance for inadmissible aliens due to misrepresentation or lack of document, and 8 U.S.C. section 1225(b)(2), which regards an immigrant who is not clearly and beyond a doubt entitled to be admitted.<sup>193</sup> Specifically, the court concludes that the “return-to-a-contiguous-territory” provision laid out in 8 U.S.C. section 1225(b)(2)(C) is only applicable to migrants who fall under the second “catch-all” category.<sup>194</sup>

The court then analyzed the MPP’s insufficiency in protecting migrants from refoulement.<sup>195</sup> First, the court emphasized the Supreme Court’s declaration that Congress’ intent in promulgating section 1253(h)(1) was to parallel Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees in ensuring the safety of asylum seekers.<sup>196</sup> Second, the court then discussed how the MPP asylum procedures differ from those already set in the INA because they apply the heightened “more likely than not” standard ordinarily used only after an alien has had a removal hearing and do not entitle migrants with “advance notice of, and time to prepare for, the hearing with the asylum officer.”<sup>197</sup> Finally, the court cited to personal anecdotes of migrants returned to Mexico under the MPP.<sup>198</sup> This section created a strong statement by highlighting migrants’ personal ordeals to further show how the policy’s directives

---

<sup>191</sup> *Id.*

<sup>192</sup> *See generally id.*

<sup>193</sup> *Id.* at 1084–85; *see Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) (“[A]pplicants . . . fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined . . . inadmissible due to fraud, misrepresentation, or lack of valid documentation . . . .Section 1225(b)(2) . . . serves as a catchall provision that applies to . . . applicants . . . not covered by § 1225(b)(1).”).

<sup>194</sup> *Wolf*, 951 F.3d at 1085; *see Jennings*, 138 S. Ct. at 837.

<sup>195</sup> *Wolf*, 951 F.3d at 1087–88.

<sup>196</sup> *Id.* at 1089.

<sup>197</sup> *Id.* at 1088–89.

<sup>198</sup> *Id.* at 1090–92.

allowed immigration officers to defer from asking if migrants had a credible fear of returning to Mexico in violation of 8 C.F.R. section 208.30(d).<sup>199</sup>

Nevertheless, the Ninth Circuit's decision in *Innovation Law Lab v. Wolf* ricocheted faster than it was issued.<sup>200</sup> Immediately after the decision, the Trump Administration requested an emergency stay on the injunction, which the Ninth Circuit granted.<sup>201</sup> On March 11, 2020, the Supreme Court gave no reasons when publishing their decision to affirm the stay and continue to allow immigration officers to implement Remain in Mexico as legal challenges proceed.<sup>202</sup>

#### IV. ABUSE OF DISCRETION AND POWER DERAILS U.S. AS SAFE HAVEN FOR REFUGEES

The lasting and detrimental impact that *Matter of A-B-* and the MPP have created goes far beyond the legal challenges presented against them. Through blatant abuses of discretion and power, the Trump Administration has moved the U.S. away from its legacy as a beacon of hope and liberty to migrants affected by violence, especially those migrating from the Northern Triangle. Through its categorical disallowance for victims of domestic violence to be considered a social group, *Matter of A-B-*'s directives undermine the nation's reputation as a pioneer in women's rights—exemplified in the passing of the landmark 1994 Violence Against Women Act (VAWA).<sup>203</sup> Moreover, the MPP's promulgation violates the INA's Safe Third Country provisions by returning asylum seekers to some

---

<sup>199</sup> *See id.*

<sup>200</sup> *See* Maria Sacchetti, et. al, *Federal appeals court blocks President Trump's "Remain in Mexico" policy but stays its own ruling*, WASH. POST (Feb. 28, 2020), [https://www.washingtonpost.com/immigration/trump-remain-in-mexico-halted-federal-court/2020/02/28/87bbf85e-e481-11e9-b403-f738899982d2\\_story.html](https://www.washingtonpost.com/immigration/trump-remain-in-mexico-halted-federal-court/2020/02/28/87bbf85e-e481-11e9-b403-f738899982d2_story.html).

<sup>201</sup> *Id.*

<sup>202</sup> Adam Liptak & Zolan Kanno-Youngs, *Supreme Court Revives "Remain in Mexico" Policy for Asylum Seekers*, N.Y. TIMES (March 11, 2020), <https://www.nytimes.com/2020/03/11/us/supreme-court-mexico-asylum-seekers.html>.

<sup>203</sup> *See generally* Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

of the most dangerous areas in Mexico to await their immigration proceedings.<sup>204</sup> Finally, both these asylum policies stray away from goals and missions set forth by international provisions that ensure the safety and wellbeing of refugees around the globe, creating violations of *jus cogens*.<sup>205</sup> *Jus Cogens*, translated from Latin to mean “compelling law,” is the technical term given to international laws that are argued to be hierarchically superior than local or national laws.<sup>206</sup> This concept is rooted in the influence of natural law concepts and provides a standard for nations to protect their citizens.<sup>207</sup>

A. *Matter of A-B- Fails to Live Up to Standards Set Forth by the Violence Against Women’s Act*

Asylum protection for victims of gender-based violence has been well established for decades, both in the U.S. and under the international human rights system.<sup>208</sup> Specifically, the United Nations’ 1951 Refugee Convention establishes the right to claim asylum on the basis of gender-based crimes.<sup>209</sup> The U.S. Refugee Act of 1980 was created to model the United Nations’ own asylum protocols,<sup>210</sup> thus the Act includes relief for victims of gender-based violence.<sup>211</sup> Nevertheless, in a rash decision by the Attorney General, *Matter of A-B-* undermined the opportunity for victims of violence to seek the proper means of asylum.<sup>212</sup> This decision must be

---

<sup>204</sup> See 8 U.S.C. 1158(a)(2)(A) (2009).

<sup>205</sup> See also Jean Allain, *The jus cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 538–539.

<sup>206</sup> Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*, 3 SANTA CLARA J. INT’L L. REV. 72, 73 (2005).

<sup>207</sup> *Id.*

<sup>208</sup> See U.N. High Comm’r for Refugees, *UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender 1*, 1 (Nov. 2016), <https://www.unhcr.org/en-us/5822266c4.pdf> [*UNHCR’s Views*]. See generally U.N. High Comm’r for Refugees, *Convention and Protocol Relating to the Status of Refugees 1*, 3–4 (last visited March 11, 2020), <https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [hereinafter *U.N. Refugee Protocol*].

<sup>209</sup> See *UNHCR’s Views*, *supra* note 208, at 1. See generally *U.N. Refugee Protocol*, *supra* note 208.

<sup>210</sup> *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1088 (9th Cir. 2020).

<sup>211</sup> See *UNHCR’s Views*, *supra* note 208, at 1.

<sup>212</sup> 27 I&N Dec. 316 (A.G. 2018).

vacated not only because it violates statutory directives,<sup>213</sup> but it does not comply with national policies set forth in VAWA to ensure protection for women against gender-based violence.<sup>214</sup>

The Violence Against Women Act of 1994 was adopted to address domestic and sexual abuse against women.<sup>215</sup> VAWA provided \$1.6 billion toward the investigation and prosecution of violent crimes against women, imposed automatic and mandatory restitution on those convicted, and allowed civil redress in cases prosecutors chose to leave unprosecuted.<sup>216</sup> Reauthorized in 2013, VAWA has proven to be a work in progress that habitually amends and extends its jurisdictional framework to provide wider protection to a greater number of women across the nation.<sup>217</sup> However, VAWA has not been reauthorized under the tenure of the Trump Administration.<sup>218</sup> Moreover, its longstanding influence in guiding the State Department's Humanitarian Response has been eradicated within the immigration process.<sup>219</sup>

The decision in *Matter of A-B-* violates VAWA because it goes against the policy of diminishing gender-based violence through optimal criminal justice response.<sup>220</sup> Through programs like asylum,

---

<sup>213</sup> *Grace v. Whitaker*, 344 F. Supp. 3d 96, 96 (D.D.C. 2018).

<sup>214</sup> See generally Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

<sup>215</sup> LISA N. SACCO, CONG. RESEARCH SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 1, 1–2 (April 23, 2019), <https://fas.org/sgp/crs/misc/R45410.pdf>.

<sup>216</sup> Monica N. Modi, et. al, *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 JOURNAL OF WOMEN'S HEALTH 253, 254 (2014).

<sup>217</sup> SACCO, *supra* note 215, at 1–2.

<sup>218</sup> See H.R. 1585, 116th Cong. (2019); see, e.g., Jordain Carney, *GOP Senator Blocks Vote on House-Passed Violence Against Women Act*, THE HILL (Nov. 20, 2019), <https://thehill.com/homenews/senate/471386-gop-senator-blocks-vote-on-house-passed-violence-against-women-act>.

<sup>219</sup> See U.S. Dep't of State, United States Strategy to Prevent and Respond to Gender-Based Violence Globally 1, 12 (Aug. 2012), <https://2009-2017.state.gov/documents/organization/196468.pdf> (“[The U.S. Refugee Admissions Program] works with the Office of the United Nations High Commissioner for Refugees to process refugees, including women-at-risk and survivors of gender-based violence and to provide resettlement in the United States.”).

<sup>220</sup> See, e.g., *Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018).

the U.S. can extend its national policy of protecting women from domestic violence to protect asylees from the same violence in their home countries. As pioneers in the fight against gender-based violence, the U.S. should exemplify the spirit of VAWA by all law enforcement, including those officers that enforce immigration laws at the border.

Affected most by *Matter of A-B-*'s precedent are the women who migrate from the Northern Triangle.<sup>221</sup> Living in countries plagued by gender-based violence and receiving no help from law enforcement, Central American women have sought safety in the U.S.<sup>222</sup> However, because of *Matter of A-B-*, victims of domestic violence from the Northern Triangle, and likely other countries around the world, will no longer be able to seek refuge despite government inaction.<sup>223</sup> This dangerous precedent allows immigration judges to impose a blanket bias against women who suffer violence at the hands of private actors. Notwithstanding the collective threat faced by women in the Northern Triangle, each woman suffers a unique yet violent relationship with domestic partners who abuse them. *Matter of A-B-* precludes immigration courts from providing case-by-case analyses of these individualized violent relationships because of a blanket denial of asylum for those who claim being victims of domestic violence.<sup>224</sup> The implications of this bias are addressed in *Grace v. Whitaker*, but are only analyzed at the earliest stage of proceedings (credible fear interviews), precluding any implication to these possible biases at the final stage of asylum hearings in front of Immigration Judges.<sup>225</sup> Because *Matter of A-B-*'s directives were immediately interpreted as stating that victims of domestic violence should not be considered a particular social group

---

<sup>221</sup> See discussion *supra* Part I(B), Part II(A).

<sup>222</sup> *Id.*

<sup>223</sup> See *Matter of A-B-*, 27 I. & N. Dec. 316, 320 (A.G. 2018).

<sup>224</sup> See generally *id.*

<sup>225</sup> *Grace v. Whitaker*, 344 F. Supp. 3d 96, 96 (D.D.C. 2018). The D.C. Circuit received this case regarding an asylum claim that was at the credible fear interview stage. This stage is one of the first steps for asylum applicants and helps determine whether asylum seekers have viable enough claims of violence in their home countries to remain in the country as asylees until they can be heard in front of an Immigration Judge. See *id.*

protected under asylum, its undertaking may result in a complete ban of entire class of victims.<sup>226</sup>

*Matter of A-B-* prejudices asylum seekers from the Northern Triangle because they are the population most gravely affected by gender-based violence.<sup>227</sup> Women from the Northern Triangle are more likely to survive the dangers of migration than the dangers felt at the hands of their abusers.<sup>228</sup> With some of the highest rates of femicide around the globe, the Northern Triangle's problem with domestic violence is not something to dispel when analyzing asylum seekers' claims.<sup>229</sup> Instead, the U.S. should extend the policies implemented in VAWA to include protections for women who suffer violence and come to the U.S. for refuge.

Further, the nonexistent prosecution of domestic violence cases in the Northern Triangle should trigger VAWA's application even further in asylum proceedings. VAWA's mission to increase prosecutions of perpetrators inflicting gender-based violence within the U.S. establishes the importance in condemning this behavior. While *Matter of A-B-* argues that victims of domestic violence suffer at the hands of private actors,<sup>230</sup> it is the government's inaction that should also be a cause for concern. The blatant disregard law enforcement officials show toward domestic abuse in the Northern Triangle is a problem asylum laws once aimed to address. Expressed in the INA, a government's failure to address violence by private actors could meet the standards of a viable asylum claim.<sup>231</sup> Yet, in issuing *Matter of A-B-*, the Trump Administration overlooks this plausibility and deems victims of private violence—even if it is gender-based—ineligible for refuge.

*Matter of A-B-* contradicts policies enacted by the U.S. in purporting itself to be a progressive powerhouse for liberty and equality. By disallowing victims of domestic violence to effectively seek asylum, *Matter of A-B-* encourages gender-based violence in the Northern Triangle. Additionally, by not extending VAWA concerns in an international scope through immigration proceedings, the U.S.

---

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

<sup>227</sup> See *supra* Part I(B).

<sup>228</sup> See *id.*

<sup>229</sup> See *supra* Part I(B).

<sup>230</sup> See *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

<sup>231</sup> 8 U.S.C. 1101(a) (2014).

government condones Northern Triangle governments' disregard towards domestic violence. Because of these policy concerns, *Matter of A-B-* must be vacated to ensure that the U.S. continues to be a safe haven for women and victims of gender-based violence.

*B. The Migrant Protection Protocols Incorrectly Deem Mexico a Safe Third Country*

The legality of Safe Third Country Agreements, like the MPP, depend both on international human rights law and U.S. statutory standards.<sup>232</sup> The INA states that a safe third country must be able to provide safety, security, and due process for asylum seekers.<sup>233</sup> Safe third countries also must not persecute individual asylum seekers on account of their religion, nationality, political opinion, or membership in a particular social group.<sup>234</sup>

Already deemed unable to satisfy the requirements of a safe third country in 1994,<sup>235</sup> Mexico has not made sufficient changes in its asylum processes to now be considered a possible refuge for asylum applicants from the Northern Triangle.<sup>236</sup> Specifically, because of its high crime rate and the apparent violence perpetrated against asylum seekers awaiting U.S. immigration proceedings, Mexico cannot qualify as a safe third country.<sup>237</sup>

The Mexican government has proven that it is unable to protect asylum seekers within its territory. About a decade ago, the discovery of seventy-two bodies of Central American migrants killed by criminal gangs in northern Mexico sparked a national and international look at the dangers migrants face.<sup>238</sup> Yet, this outcry against

---

<sup>232</sup> See 8 U.S.C. 1158(a)(2)(A) (2009); *UNHCR's Views*, *supra* note 208, at 1. See generally *U.N. Refugee Protocol*, *supra* note 208.

<sup>233</sup> 8 U.S.C. 1158(a)(2)(A) (2009).

<sup>234</sup> *Id.*

<sup>235</sup> Isabela Dias, *Can Mexico Qualify as a Safe Third Country?*, PACIFIC STANDARD (July 16, 2019), <https://psmag.com/news/can-mexico-qualify-as-a-safe-third-country>.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See Randal C. Archibold, *Victims of Massacre Said to Be Migrants*, N.Y. TIMES (Aug. 25, 2010), <https://www.nytimes.com/2010/08/26/world/america/26mexico.html>; Jo Tuckman, *Survivor Tells of Escape from Mexican Massacre In Which 72 Were Left Dead*, THE GUARDIAN (Aug. 25, 2010),

migrant violence did not create any drastic changes in Mexican immigration or criminal policies.<sup>239</sup> Between December 2012 and January 2018, the Mexican National Human Rights Commission received more than three thousand complaints of abuses against migrants.<sup>240</sup> This number is likely skewed because of underreporting as a result of migrants' fear of authorities and the reporting centers' inconvenient locations far from where the crimes are committed.<sup>241</sup> Now more than ever, asylum seekers sent back to Mexico under the MPP face these harrowing experiences.<sup>242</sup>

An estimated 57,000 non-Mexican migrants have been returned to Mexico since the MPP's implementation.<sup>243</sup> Since January 2019, there have been 636 reports of crimes like rape, kidnapping, and torture from migrants returned under the MPP.<sup>244</sup> Notwithstanding these self-reported crimes, further reports show that a staggering eighty percent of migrants under the MPP are victims of violence.<sup>245</sup> This alarming number of victims demonstrates how Mexico cannot be deemed a safe third country. It is impossible to safely await immigration proceedings in a country where crime towards its own citizens is rampant. Moreover, it is impossible to find refuge in a

---

<https://www.theguardian.com/world/2010/aug/25/mexico-massacre-central-american-migrants>.

<sup>239</sup> See Dias, *supra* note 235.

<sup>240</sup> *Mexico: Events of 2018*, HUMAN RIGHTS WATCH (last visited: March 11, 2020), <https://www.hrw.org/world-report/2019/country-chapters/mexico>.

<sup>241</sup> *Id.*

<sup>242</sup> Julián Aguilar, *Report: Crimes against migrants waiting in Mexico to seek U.S. asylum continue to climb*, TEXAS TRIBUNE (Dec. 5, 2019), <https://www.texastribune.org/2019/12/05/report-crimes-against-migrants-waiting-mexico-continue-climb/>.

<sup>243</sup> Julia Love, *Mexico Says U.S. Returning Sharply Fewer Migrants Under "Remain in Mexico,"* REUTERS (Feb. 12, 2020), <https://www.reuters.com/article/us-usa-immigration-mexico/mexico-says-us-returning-sharply-fewer-migrants-under-remain-in-mexico-idUSKBN20622B>.

<sup>244</sup> See Aguilar, *supra* note 242. See generally *Publicly reported cases of violent attacks on individuals returned to Mexico under the "Migrant Protection Protocols,"* HUMAN RIGHTS FIRST, 1, 1–48 (Dec. 5, 2019), <https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks-5Dec2019.pdf>.

<sup>245</sup> David Agren, *Remain in Mexico: 80% of Migrants in Trump Policy are Victims of Violence*, THE GUARDIAN (Jan. 29, 2020), <https://www.theguardian.com/us-news/2020/jan/29/migrants-mexico-trump-policy-victims-of-violence>.

country that does not and cannot take active measures in protecting migrants.

The victimization of Central American migrants in Mexico should be a predominant factor in determining that the MPP should not continue. The Ninth Circuit addressed these concerns in over two pages of their decision granting the MPP's injunction.<sup>246</sup> Detailing personal anecdotes from Central American migrants, the Ninth Circuit brings to light how they are persecuted for reasons usually protected under the INA.<sup>247</sup> For example, Central American migrants are often persecuted in Mexico because they are not originally from Mexico.<sup>248</sup> Persecution based upon an individual's nationality is expressly disallowed under directives for safe third countries.<sup>249</sup>

Additionally, Mexico is unable to provide "full and fair" due process to asylum seekers. Under-resourced and inaccessible, the Mexican Commission for Aid to Migrants is unable to provide help or protection for Central American migrants being returned under the MPP.<sup>250</sup> Although migrants arguably receive due process within U.S. immigration proceedings, having to await these hearings in a territory riddled with crime and violence does not provide assurance that due process will be ultimately served.<sup>251</sup> As long as migrants from the Northern Triangle are returned to Mexico to await asylum decisions, they will never truly find refuge.

*C. The Trump Administration's Asylum Policies Implicate Central American Migrants' International Human Rights, Violating Jus Cogens*

The foundation of the international system, *jus cogens* laws are peremptory in nature, preventing nations from creating laws that

---

<sup>246</sup> See *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1073 (9th Cir. 2020).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1090–92.

<sup>249</sup> See 8 U.S.C. § 1158(a)(2)(A).

<sup>250</sup> Susan Gzesh, "Safe Third Country" Agreements with Mexico and Guatemala Would be Unlawful, JUST SECURITY (July 15, 2019), <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/>.

<sup>251</sup> See also Joel Rose, *Few Asylum-Seekers Winning Cases Under "Remain in Mexico" Program*, NPR (Dec. 19, 2019), <https://www.npr.org/2019/12/19/789780155/few-asylum-seekers-winning-cases-under-remain-in-mexico-program>.

deviate from this standard.<sup>252</sup> Expressed in international law through Articles 53 and 64 of the Vienna Convention on the Law of Treaties, the concept of *jus cogens* provides that treaties may be invalidated upon their ratification or later terminated if their content “conflicts with a peremptory norm of general international law” that is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”<sup>253</sup> Norms of *jus cogens* are considered “norms so essential to the international system that their breach places the very existence of that system in question.”<sup>254</sup>

The U.N. Refugee Agency declared that the prohibition of arbitrary deprivation of life attained the rank of *jus cogens*.<sup>255</sup> Ultimately, countries have an inherent obligation not to send individuals to another country where they may face a real risk of torture or extreme violence.<sup>256</sup> The U.N. Refugee Agency further asserts that “the prohibition of refoulement to a risk of cruel, inhuman or degrading treatment or punishment” is in the process of becoming customary international law.<sup>257</sup> Rooted in international human rights protection, the U.N. Refugee Agency recognizes how imperative it is to create peremptory laws to protect refugees. The Trump Administration’s decisions to foreclose asylum for victims of domestic violence and to force migrants from the Northern Triangle to await asylum in Mexico’s most dangerous cities are a direct violation of *jus cogens*. The requirement that asylum seekers return to cities where they will undoubtedly experience violence deprives them of the right to life they seek to preserve through asylum, which is understood internationally to be a program designed for the safekeeping of immigrants and a temporary or permanent relocation from the dangers they face in other countries.

---

<sup>252</sup> Hossain, *supra* note 206 at 73.

<sup>253</sup> See Vienna Convention Law of Treaties Article 53; Article 64.

<sup>254</sup> Allain, *supra* note 205, at 535.

<sup>255</sup> See U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating the Status of Refugees and its 1967 Protocol 1, 11 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf> [hereinafter *U.N. Non-Refoulement Advisory Opinion*].

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

Gender-based violence continues to be an important concern throughout the globe. So much so, that the U.N. Refugee Agency mandated that international protection to refugees include victims of sexual and gender-based violence.<sup>258</sup> Gender-based violence is a major cause of forced displacement,<sup>259</sup> solidifying the need to include victims of this type of persecution as a group that can successfully seek asylum claims. Therefore, categorically disallowing victims of domestic violence hailing from the Northern Triangle from receiving asylum goes against international standards.

As a matter of international policy, *Matter of A-B-* cannot be the final say when it comes to individuals persecuted by private actors. The danger in doing so is not only a breach of international law because it precludes victims of violence from rightfully seeking asylum, but it also encourages Central American governments' complete ignorance of their countries' domestic violence pandemic. Rather, these governments should be condemned by both the U.S. Executive and international governing entities to ensure that victims of domestic abuse can obtain justice. Additionally, *Matter of A-B-* directs immigration officials to ignore the plight of women facing domestic abuse and send them back to the hands of their persecutors. By disallowing women facing gender-based violence to seek refuge, the Trump Administration is ultimately returning women to cruel and degrading treatment.

Further, the Trump Administration's Remain in Mexico policy is rooted in the prohibited practice of returning individuals to countries where they face extreme violence and torture.<sup>260</sup> Migrants returned to Mexico under the MPP not only face torture on account of their nationality but are also victims of under-prosecuted crimes.<sup>261</sup> The Executive attempts to use the guise of forthcoming immigration proceedings to convince themselves that there is fairness behind returning migrants to their demise. However, an opportunity to seek

---

<sup>258</sup> U.N. High Comm'r for Refugees, Sexual and Gender Based Violence (last visited March 11, 2020), <https://www.unhcr.org/en-us/sexual-and-gender-based-violence.html>.

<sup>259</sup> *Id.*

<sup>260</sup> *See Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger*, HUM. RTS. FIRST, <https://www.human-rightsfirst.org/campaign/remain-mexico> (last updated May 13, 2020).

<sup>261</sup> *See Aguilar, supra* note 242.

asylum that is only available while facing certain specific instances of danger and violence does not live up to the standards set out to protect refugees, because refugee protection is embedded in the ideal of ensuring *all* individuals an opportunity to seek help in the face of violence or inevitable demise. Ultimately, both these policies vehemently violate U.N. anti-refoulement mandates and our legislators and justices cannot allow them to continue.<sup>262</sup>

## V. CONCLUSION

For the last few years, the Trump Administration has abused its power in order to maintain “control” at the southern border. However, this purported control comes at the expense of longstanding policies that protect refugees. Newly implemented asylum policies, like the *Matter of A-B-* decision and the Migrant Protection Protocols (MPP) ignore established laws that once provided refuge to victims of torture and extreme violence. These policies reveal the Trump Administration’s lack of concern for the safety of Central American asylum seekers because they disregard the dangers refugees face. Further, these policies ignore preemptory international laws, specifically, *jus cogens*. Because of the Administration’s extreme ignorance of the law, legal intervention to reverse these policies is imperative.

Facing legal challenges already, *Matter of A-B-* and the MPP have caused uproar and may find their way to the Supreme Court. Along with the legal considerations analyzed in challenges below, there are tremendous policy concerns the Court must address. First, the decision in *Matter of A-B-* contradicts national laws that promote the welfare and safety of women facing domestic abuse. Second, the MPP violates the INA by sending migrants to Mexico—an *unsafe* third country—to await asylum proceedings. Finally, both *Matter of A-B-* and the MPP irreverently stray from preemptory international norms of non-refoulement that bar returning individuals from countries where they face torture or extreme violence. The aforementioned policies’ implications have resounded strongly and negatively, as Central American men, women, and children face hardships rather than refuge. If these policies continue to be

---

<sup>262</sup> See U.N. *Non-Refoulement Advisory Opinion*, *supra* note 255, at 11.

implemented, the U.S.'s image as a beacon of hope will be erased. If these policies continue to be implemented, there can be no more American Dream.