RETHINKING ASYLUM ADJUDICATION AND REFUGEE RESETTLEMENT IN THE CONTEXT OF CENTRAL AMERICAN MIGRATION

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Introduction

Former President Donald Trump rose to power by demonizing and dehumanizing immigrants, particularly asylum-seekers at the U.S.-Mexico border (Stanley, 2018). He termed the growing Central American refugee crisis an "invasion" and an "infestation," and called asylum-seekers "criminals," "rapists," and "animals" (Scott, 2019). His campaign rallies were filled with chants to "Build the Wall." Once in office, he set about the full-scale dismantling of the right to asylum. By the time he left office in January 2021, he had largely succeeded.

President Joe Biden has promised to restore the right to asylum, but a refugee crisis continues to grip the U.S.-Mexico border, despite the fact that the Trump Administration has ended (Biden and Harris Campaign, 2020). In March 2021, shelters for unaccompanied minors were facing severe overcrowding, with 516 minors held in a facility that—due to COVID-related capacity limitations—should have held a maximum of 32 people (Miroff, 2021). As of May 2021, an estimated 16,138 people who had applied for asylum while the Migrant Protection Protocols (MPP) were still required to wait in Mexico for their hearings, and 10,375 people formerly in the MPP system had their cases transferred to traditional U.S. immigration courts, where they may face years-long backlogs (Transactional Records Access Clearinghouse, 2021). In June 2021, almost 189,000 people were apprehended by U.S. Customs and Border Patrol, the highest number in decades (CBP, 2021; Walsh, 2021). Returning the asylum system to its previous state will not solve the crisis. Instead, the Biden administration should take a new approach to humanitarian protection in the context of Central American migration to the United States and move beyond asylum adjudication as the primary—and inadequate—means by which we are addressing the crisis.

This chapter traces the development of the U.S. asylum system and contrasts it with the U.S. refugee resettlement system. It argues that the asylum system has always been, and will continue to be, ill-equipped to manage the Central American migration crisis, let alone develop durable and lasting solutions. Finally, it proposes a reimagining of the U.S. asylum system to focus on alternative adjudicatory mechanisms, forms of relief, and burden-sharing agreements.

Non-Refoulement and Its Impact on Interpretation of the Refugee Definition

The cornerstone of international refugee law and the U.S. asylum system is the legal obligation of non-refoulement, which prohibits the return of people who meet the refugee definition to their countries of origin. Specifically, the Refugee Convention and its 1967 Protocol provides that "[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (United Nations, 1951: Art. 33; 1967). A refugee is defined as 1) any person outside the country of nationality or last habitual residence, 2) for whom the country of nationality or last habitual residence is either unable or unwilling to provide protection, and who has 3) a well-founded fear of persecution that 4) has a nexus to a protected ground, including 5) race, religion, nationality, membership in a particular social group, or political opinion (un, 1951: Art. 1).[1] These obligations were subsequently codified in the U.S. Refugee Act of 1980.[2] Accordingly, any asylum seeker who

[1] Upon enactment in 1951, the Refugee Convention's definition was limited to people who had become refugees as a result of "events occurring . . . before 1 January 1951." (Art. 1). At the time of ratification, states could also opt to apply a geographic limitation to the definition that limited the definition's applicability to refugees of "events occurring 'in Europe' before 1 January 1951." (Art. 1). The 1967 Protocol to the Refugee Convention eliminated these geographic and temporal limitations on the refugee definition.

[2] More limited bases for refugee admission existed under earlier immigration laws. The first major development was the enactment of the Immigration and Nationality Act of 1952, which provided a parole authority that allowed the attorney general to admit people for humanitarian reasons. The 1965 amendments to the Immigration and Nationality Act of 1952 codified a refugee definition that included some of the elements of the Refugee Convention's definition, but it was limited to people fleeing communist-controlled countries.

arrives in U.S. territory and meets the refugee definition is protected against return to their home country.

By contrast, the United States has no international legal obligation to engage in the resettlement of people who meet the refugee definition. While international agreements do contain admonitions for the international community to collaborate to address refugee flows, they do not create binding legal obligations. The preamble to the Refugee Convention, for example, acknowledges the importance of interstate collaboration, noting that "the grant of asylum may place unduly heavy burdens on certain countries," therefore requiring "international co-operation" to achieve a solution (UN, 1951).

The recent New York Declaration states a commitment "to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States" (UN, 2016). The language found in these documents are expressions of cooperation, not legally binding agreements.

These dichotomous legal obligations create incentives to treat asylum seekers and refugees differently. With respect to asylum seekers, the United States owes a duty to every individual who reaches the territory and who is able to demonstrate that the refugee definition is met. To regain control of the admission of asylum seekers, politicians and adjudicators have favored a narrow reading of the refugee definition, the detention of asylum seekers, and other forms of deterrence. With respect to refugees being considered for resettlement, by contrast, the United States owes no similar duty of adjudication, nor must a refugee be resettled even after a positive determination is made on their case. As a result, the U.S. asylum system and the U.S. refugee resettlement system operate in distinct ways.

In practice, if a person reaches U.S. territory and expresses a fear of return to their home country to a government official, the asylum seeker must present their case to an asylum officer conducting an initial interview or, when the asylum seeker is placed in removal proceedings, to an immigration judge. The adjudicator must find that the asylum seeker has established a "reasonable possibility" that they will be persecuted if returned to their country of origin (INS v. Cardoza-Fonseca, 1987).

Due to backlogs in the immigration courts, however, it can take years before an asylum seeker receives a decision granting or denying asylum. While

they wait for hearings, immigrants may be detained, released with electronic ankle monitors, or obligated to attend in-person checks with an Immigration and Customs Enforcement officer. Asylum seekers also must attend periodic status checks in immigration court. While asylum seekers may appeal denials of asylum to the Board of Immigration Appeals and then to the federal court system, success on appeal is rare. A positive grant of asylum typically leads to permanent residency and, five years later, the ability to apply for U.S. citizenship.

In the context of refugee resettlement, the United States exercises discretion over refugee admissions, rather than being legally obligated to provide access to residency for every person who meets the refugee definition. Setting the target number for annual refugee resettlement is the prerogative of the president. The U.S. Department of State, an executive-branch department, sets the priorities for the characteristics of the refugees who will be resettled. In these ways, the government uses the refugee admissions program to "align refugee admissions with foreign and domestic policy interests, as well as to make international humanitarian statements" (Van Selm, 2014: 514). Over the course of history, the United States has prioritized refugees fleeing communist regimes in China, southeast Asia, and Cuba; religious and ethnic minorities; and women and children, among other groups. Even within prioritized groups, the United States can select the individuals it actually will resettle from among the millions of refugees abroad. Because the number of refugees awaiting resettlement—even in the priority categories—far exceeds the number of refugees actually resettled, it may be possible to avoid the cases that pose the closest calls for the refugee definition. While the United States has an obligation to adjudicate the claim of every refugee that reaches its territory, it owes no similar legal obligation to refugees anywhere else in the world.

Because of the relative ease with which Central Americans can travel to the United States, seek asylum, and trigger U.S. non-refoulement obligations, the United States has limited the refugee definition in ways that are prejudicial to people from the region. The next section argues that developments in immigration law since the 1980s bear out this prejudice.

Incentives to Constrain Access to Asylum Have Led to Prejudicial Treatment of Central U.S. Asylum Claims

Since the advent of the modern U.S. immigration system in the 1980s, Central Americans have faced unique barriers to accessing asylum. One particularly egregious example of discrimination against Central American claims involved near wholesale denial of the claims of asylum seekers from the region. In the 1980s, many Central Americans were fleeing brutal civil wars, characterized by forced disappearances, summary executions, and the targeting of indigenous populations.

Despite this context, asylum approval rates for Guatemalans, Hondurans, and Salvadorans hovered around 2 percent (Hamlin, 2014: 39). By contrast, asylum approval for applicants from the Soviet Union were as high as 70 percent (Hamlin, 2014: 39). Partly in response to the low approval rates for Central Americans, advocates and civil rights organizations sued the U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, and the Department of State on behalf of a class of undocumented Guatemalans and Salvadorans, alleging discriminatory application of immigration laws in violation of the U.S. Constitution's Fifth Amendment guarantee of equal protection (*American Baptist Churches v. Meese*, 1990). The case *American Baptist Churches v. Thornburgh* was ultimately settled. The settlement agreement entitled certain Guatemalans and Salvadorans *de novo* asylum adjudication, in recognition of the inadequacies of prior adjudications of these asylum claims.[3]

Even legal developments that were broadly positive for Central American migrants in the United States contained prejudicial characteristics. The Nicaraguan Adjustment and Central American Relief Act (NACARA), passed in 1997, provides one example. NACARA provided access to work authorization, permanent residence, and citizenship for Nicaraguans and Cubans but, for Guatemalans and Salvadorans, limited access to work authorization and only allowed for suspension of deportation or cancellation of removal. These forms of relief are more tenuous than asylum because they do not create a pathway for accessing permanent residence and citizenship (Caldwell, 2000: 1581).

[3] A *de novo* asylum adjudication allows an asylum seeker to present their asylum claim as though there were not a prior denial.

By the 2000s, the rising influence and increasing brutality of criminal gangs was causing Central Americans to flee to the United States and seek asylum. For Central Americans fleeing gang violence, the "particular social group" ground often was used to establish asylum eligibility. This ground didn't have a clear meaning at the time of adoption of the Refugee Convention, and its meaning has been subject to the interpretation of the courts (Schoenholtz, 2015: 107-08).

Historically, American jurisprudence converged on the principle that a particular social group was defined by an "immutable" characteristic shared by its members (*Matter of Acosta*, 1985). But in 2008, the Board of Immigration Appeals issued two seminal cases that narrowed the definition of particular social group (*Matter of E-A-G-*, 2008; *Matter of S-E-G-*, 2008). The board concluded that, in addition to immutability, viable particular social groups required both "social visibility" and "particularity." Both these cases involved young people who resisted gang recruitment in Central America in the context of rising numbers of young people from Central America seeking asylum. In *Matter of E-A-G-*, the board rejected particular social groups defined as "young persons who are perceived to be affiliated with gangs" and "persons resistant to gang membership" (2008: 594-595). In *Matter of S-E-G-*, the board rejected the viability of two more proposed particular social groups: "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" and "family members of such Salvadoran youth" (2008: 585, 588). The facts underlying these cases, as well as the impact of the decisions on other cases involving asylum seekers from Central America, led one scholar to conclude that "the fear of increasing numbers of children fleeing gang violence in Central America seeking asylum in the United States improperly influenced the [Board of Immigration Appeals]" (Settlage, 2016: 292).

Limiting Central American asylum claims did not end the flow of refugees arriving at the U.S.-Mexico border. Beginning in 2014, at the same time the Board of Immigration Appeals was limiting gang-related claims, greater numbers of families and unaccompanied minors began to make the journey to the United States. This new influx of asylum seekers stressed the asylum system and created difficult choices for the Obama administration, which tried to balance its pro-immigrant rhetoric with the unfolding crisis and

criticism from conservatives, including from then-presidential candidate Donald Trump.

The Trump Administration and Asylum

The Trump Administration inherited an overburdened asylum system that did a poor job of protecting Central Americans from the threats they faced at home. But whereas the Obama Administration attempted to make changes at the margins to asylum, Trump attempted nothing short of a full dismantling of the asylum system. Most of Trump's asylum policies could be classified into three distinct but interrelated strategies. He sought to deter individuals from seeking asylum at the U.S.-Mexico Border, to detain asylum-seekers who were not deterred, and to deny the claims of those asylum-seekers by narrowing the legal definition of "refugee" under U.S. law. Though many of these actions were enjoined by U.S. courts, the cumulative effect rendered the U.S. asylum system almost unrecognizable by the end of Trump's term in office.

With respect to deterrence, the Trump administration implemented several interlocking policies that together made invoking the right to asylum at the U.S.-Mexico border next to impossible. In early 2018, the administration imposed "metering" at border checkpoints, which limited the number of asylum-seekers who could be processed each day (AIC, 2020: 1). Long waiting lists arose as asylum-seekers languished for months on the Mexican side of the border waiting for their numbers to be called. Metering increased incentives for asylum-seekers to attempt to cross between entry checkpoints and then claim asylum upon encountering U.S. law enforcement. In response, in November 2018, the administration promulgated a regulation that became known as the "Asylum Ban 1.0," which made asylum-seekers who crossed between checkpoints ineligible for asylum (Harris, 2020: 157).

Another pair of policies implemented in 2019 brought the administration even closer to accomplishing its goal of dismantling the asylum system. In January 2019, the administration began implementing the Migrant Protection Protocols, also known as the "Remain in Mexico" program whereby asylum-seekers are processed at border checkpoints and then returned to Mexico to await their asylum hearings (AIC, 2020: 2). Many people never made it back for their hearings because they did not receive notice of date

changes or were prevented from making it back to the border because of economic or security concerns. Of those that did, only 0.1 percent were granted asylum (Solis, 2019). Then, in July 2019, the administration promulgated what became known as the "Asylum Ban 2.0," which made anyone who crossed through a third country, including Mexico, ineligible for asylum. The Asylum Ban 2.0 was followed by agreements with Guatemala, El Salvador, and Honduras, which purported to declare them "safe third countries" where asylum-seekers could be legally deported to under U.S. law (Harris, 2020: 146, 158).

Immigrants' rights advocates had mixed success challenging these policies in court. The Asylum 1.0 was quickly enjoined. However, temporary court orders enjoining the implementation of Remain in Mexico and the Asylum Ban 2.0 were vacated by the Supreme Court and the policies were allowed to go into effect (Wadhia, 2019: 126-130). A lawsuit challenging the metering policy is still pending. As these interlocking policies went into effect one by one, the number of refugees stranded on the Mexican side of the border swelled and refugee camps sprang up.

These policies substantially limited the number of asylum-seekers who were able to invoke the right to asylum. Those still could face immigration detention for weeks, months, or even years. Even with the Asylum Ban 2.0 in place, many individuals still could not be deported because the U.S. has a separate form of relief called withholding of removal, which satisfies the United States' non-refoulement obligation. This statutory right, unlike asylum, is not discretionary, but it is much harder to obtain. With the Asylum Ban 2.0, many asylum-seekers were not asylum eligible, but they still had the right to seek withholding of removal, even though few would ultimately receive it. For those not stuck in the Remain in Mexico program, this meant spending long periods in detention awaiting their hearings. Many asylum-seekers gave up and chose deportation rather than imprisonment.

The Obama administration detained immigrants at the border too, but it also released many asylum-seekers, particularly those traveling with children, to await their court date from within the United States (Rizzo, 2018). The Trump administration saw this policy, which became derisively known as "catch-and-release," as providing asylum-seekers a benefit to coming to the United States. Because of the backlog in the asylum system, even someone whose asylum claim was ultimately denied could live and work in the United States for years.

The Trump administration immediately began to release fewer asylum-seekers while they fought their claims. But the administration quickly ran into the same problem that Obama did when it came to families crossing the border. A settlement agreement from the 1990s, called the Flores Settlement Agreement, required the government to release minors detained at the border "without unnecessary delay" (Collins, 2021: 232). With the Flores Settlement Agreement in place, the government had two options: it could release families detained at the border, or it could separate children from their parents, release the children, and detain the parents. The Obama administration decided against separating families, and most families continued to be released after a short period in detention.

After unsuccessfully attempting to withdraw from the Flores Settlement Agreement, the Trump administration made the opposite decision in a policy known as "Zero Tolerance" (Baker and McKinney, 2021: 589). Under Zero Tolerance, parents were separated from their children in order to prosecute them for illegally entering the country. Their children were transferred to the custody of Health and Human Services, and the parents were deported after they were convicted. Thousands of families were separated before public outrage forced the Trump administration to change course. Even after the formal end of Zero Tolerance, the administration continued to use the threat of detention to deter and punish asylum-seekers for seeking protection. Parents were often forced to sign away their children's right to release from detention in order to avoid separation. Single adults continued to be detained at high rates.

The Trump administration also set out to limit who was eligible for asylum in a series of decisions aimed at refugees from Central America. In *Matter of A-B-*, the attorney general overruled a previous decision, making domestic violence victims eligible for asylum. *Matter of A-B-* also attempted to limit access to asylum for victims of gang violence, both by raising the standard for when a state is unable or unwilling to protect someone from persecution, and also by making sweeping statements about how "private violence" would very rarely give rise to an asylum claim (2018). The next year, the attorney general issued *Matter of L-E-A-*, which curtailed the right of people to seek asylum based on family relationships (2019). Together, these two decisions purported to bar the vast majority of Central American asylum claims.

The Trump administration had successfully slowed asylum claims to a trickle when in March 2020, it used the COVID-19 pandemic as a pretext to

end the right to asylum at the U.S.-Mexico border entirely. While the Trump administration resisted calls for domestic restrictions to stem the tide of infections, it wasted no time in shutting down U.S. borders using the same rationale. On March 20, 2020, the Centers for Disease Control and Prevention (CDC) issued an order under Title 42—a statute allowing the CDC to prohibit the entry of individuals with communicable diseases—that completely shut down the U.S.-Mexico border to asylum-seekers (Armstrong, 2021: 361). After four years of trying, it took a global pandemic for Trump to accomplish his goal of ending the right to asylum.

Rethinking Asylum Adjudication and Refugee Processing in the Biden Era

Biden came into office promising to restore the right to asylum, and he quickly reversed many of Trump's immigration policies. His administration withdrew from the agreements with Guatemala, Honduras, and El Salvador, announced an end to the Remain in Mexico program, promised to reunite families separated under Zero Tolerance, rescinded the Asylum Ban 1.0, and stopped construction of the border wall (CIS, 2021). Biden's Department of Justice also rescinded *Matter of A-B-* and *Matter of L-E-A-*, and announced it would undertake rulemaking to clarify the term "particular social group," one of the five protected grounds under U.S. and international law.

Some Trump asylum policies, however, remain in effect. Perhaps most importantly, the Biden administration has not removed the COVID-19-related restrictions, which have led to over 520,000 expulsions at the U.S.-Mexico border from the beginning of the pandemic to February 2021 (AIC, 2021: 3). With the pandemic nearing a conclusion, Biden will be forced to end those restrictions soon. When he does, refugee processing at the border will look much the same as it did before Trump took office. But the Central American refugee crisis will not have abated. The past four years have confirmed that stricter enforcement policies will not stem the tide of migrants from Central America. In fact, before the COVID-19 pandemic, border apprehensions were at their peak in May 2019, when most of Trump's border policies were in effect (Pew Research Center, 2021). They are at nearly record levels again despite an almost total ban on asylum still in effect. There is simply

no evidence that the Trump strategy accomplished anything except increased human suffering.

Although the Biden administration has been slow to act to restore the asylum system to its pre-Trump functioning, his administration has recognized the humanitarian character of migration from Central America. Instead of collapsing economic migration and forced migration, the Biden Administration has suggested that Central Americans should have improved access to safe and orderly means of migration to the United States. The Biden Department of State, for example, has stated that "the United States's strong interest in increasing refugee resettlement from Central America to facilitate safe and orderly migration and access to international protection and avert a humanitarian crisis at the U.S. southern border, means that we will need to increase the overall refugee admissions number." And, while development and humanitarian assistance has long been a part of the U.S. government's approach in Central America, the Biden administration's recently announced "Root Causes Strategy" explicitly describes the renewed approach as "a core component of [the] Administration's efforts to establish a fair, orderly, and humane immigration system" (White House, 2021).

While these efforts trend in the right direction, Biden will need to continue charting a path forward that adheres to humanitarian norms and international legal obligations. This path forward cannot simply be a retread of failed policies. Instead, his administration must be willing to adapt the asylum system to respond to the particular situation in Central America and at the U.S.-Mexico border. This chapter proposes a number of reforms that Biden could make. These reforms fall into four general categories: changes to U.S. asylum law to expand who is eligible for asylum; expanding refugee resettlement from Central America; implementing burden-sharing with Mexico; and reimagining other forms of humanitarian protection under U.S. law.

Expanding Asylum Eligibility

As noted above, the Department of Justice has already rescinded two asylum decisions that had the effect of barring most asylum claims from Central America, but several other decisions, including ones setting a high bar for gang-related claims, remain in effect. The announced rulemaking on particular

social groups provides an opportunity for the United States to acknowledge the realities of violence in Central America and to bring U.S. asylum law in line with international law. More specifically, the new regulations should abandon the three-part test for particular social groups established by the Board of Immigration Appeals and adopt a test that focuses on immutability as the sole factor (Kelly, 2015: 219). The other two requirements—particularity and social distinction—are unnecessary given the nexus requirement. If a persecutor targets an individual "on account of" a particular social group, that individual should not need to prove that the society in question sees the social group as distinct or that it is possible to determine who is in the group and who is not. Both are implied by the persecution itself.

The new regulations should also remove the requirement that a particular social group not be "overbroad." There is nothing in either U.S. or international law that only grants protection to an individual if there are only a certain number of other individuals who need protection. The other protected grounds contain no such restriction. A religious or racial group may constitute a majority of a country without being considered overbroad. With these superfluous requirements removed, it should be crystal clear that gender, with or without an additional factor, is a particular social group. It is immutable and individuals are targeted on that basis, regardless of whether a large portion of the population identifies as one gender or the other.

Finally, the new regulations should make clear that gangs in Central America operate as de facto governmental actors in the region and that violence inflicted because of resistance to gang membership is persecution on account of actual or imputed political opinion.

Expanding Refugee Resettlement in Central America

The U.S. asylum system was simply not designed for mass migration events, and not surprisingly, it is buckling under the pressure of processing hundreds of thousands of claims per year. The United States has a system for handling mass migration events elsewhere in the world: the refugee resettlement system. But the United States has not employed this system to address the Central American refugee crisis, except at the margins. The reasons for this are political, not practical. The stated policy of the United States is

to deter Central American migration, not to manage it. But pretending that a mass migration event is not occurring does not make it so. Nothing the United States has done up to this point has stopped the flow; in fact, recent years have seen ever-increasing numbers of refugees arriving at the border. It is time to recognize reality and begin to implement a management strategy, rather than a deterrence strategy.

A first step could be expanding on existing programs such as the Central American Minors (CAM) program, which permitted minors with parents living legally in the United States to apply for asylum from Northern Triangle countries (NIF, 2021). As designed under Obama, it only allowed a small number of individuals to apply—a minor needed to have a parent who was already a lawful permanent resident. Most minors in that category could already come to the United States as a derivative of their parents, though in many cases, the process was longer. After the program was halted by Trump, Biden has announced that CAM will be reinstated and that it will make new categories of individuals eligible to petition for a minor through the program, including recipients of Temporary Protected Status and recipients of withholding of removal. These expansions will make the program available to a much greater number of children. But Biden should consider expanding the program even further to permit undocumented parents living in the United States to apply for their children abroad to be assessed for resettlement or parole. Without such a policy, unaccompanied children are likely to continue arriving at the U.S.-Mexico border seeking to reunify with family members in the United States.

In addition, the United States needs to work closely with the United Nations High Commissioner for Refugees (UNHCR) and Mexico to begin refugee processing in Mexico to discourage migrants from making the dangerous journey across the U.S.-Mexico border. UNHCR plays a critical role worldwide in administering services in refugee camps and in vetting refugees for resettlement. Beginning in 2016, the agency increased its presence in response to the Central American refugee crisis (UNHCR, 2019). UNHCR also facilitated the Comprehensive Regional Protection and Solutions Framework (MIRPS) between seven Central American countries: Belize, Costa Rica, Guatemala, Honduras, Mexico, and Panama, with El Salvador joining later. But although the United States is by far the largest resettlement country in the region, the United States is not a party to MIRPS. In a 2019 UNHCR report

about its activities in Central America, the United States is mentioned only twice, once to note the high number of Central Americans who are deported from the United States each year (UNHCR, 2019: 8).

Attempts to involve the United States in resettlement efforts have had limited success. A small pilot program called the Protection Transfer Arrangement was initiated in September 2016 with plans for the UNHCR to identify and process up to 200 particularly vulnerable individuals in the Northern Triangle for transfer to Costa Rica to await resettlement in the United States or another country. However, only 140 people had been resettled through the program two years later. The Biden administration should reengage with UNHCR to expand the PTA (UNHCR, 2018: 6).

Such expanded efforts should include refugee processing in Mexico where many Central Americans transit before making the journey to the United States. This will require working with UNHCR to set up refugee processing infrastructure as well as changing resettlement priorities domestically. Right now, only 5,000 of the 62,500 cap for this fiscal year are allocated for refugees from Central and South America, and most of those slots are not taken by refugees from the Northern Triangle. The Administration set as a target the resettlement of only 1,000 refugees from Honduras, El Salvador, and Guatemala (DOS, 2021).

The U.S. refugee program should identify Central America as an area of "special humanitarian concern," which would prioritize Central American refugees for resettlement. Right now, refugees in that priority category include Burmese in Thailand and Congolese in Tanzania, both groups deserving of protection but whose conflicts exist at a much farther remove than the Central American refugee crisis. Prioritizing refugee resettlement from Central America will allow the U.S. to fulfill its international obligations while addressing the crisis unfolding on its doorstep.

Implementing Burden-Sharing with Mexico

Because many Central Americans transit through Mexico on their journey to the United States, any comprehensive solution to the refugee crisis must involve cooperation between the two countries. Right now, there are several obstacles to resettling large number of Central Americans in Mexico. The

first is the inaccessibility of asylum under Mexican law. On its face, the right to asylum under Mexican law is broader than either the U.S. or international definition of refugee. In addition to persecution on account of the five protected grounds, it includes protection for those "who have fled their country because their life, safety, or freedom was threatened by generalized violence, foreign aggression, internal conflict, massive human rights violations, or other circumstances that have gravely disturbed public order" (Kerwin, 2018: 293-96). In practice, however, few asylum-seekers can access the Mexican asylum system. For example, asylum-seekers in Mexico must apply within 30 days of entering the country, and most are not given the opportunity to do so (Kerwin, 2018: 297-98). Instead, they are either ushered to the U.S.-Mexico border to apply in the United States, or they are quickly deported back to Central America.

In addition, many Central American refugees do not want to resettle in Mexico, perceiving it, rightly or wrongly, as a dangerous place without economic opportunity. Many refugees also have preexisting support networks in the United States—family members and friends who previously immigrated to the United States.

The answer to many of these problems is economic aid and law reform. But that alone will not solve the problem. Burden-sharing agreements must find ways to incentivize Central Americans to resettle in Mexico. Incentives could take the form of robust integration programs, or Mexico could agree to resettle family members living undocumented in the United States (perhaps those whose asylum claims were denied) so that families can resettle together. Burden-sharing agreements could also be modeled on the agreement between the European Union and Turkey in response to the Syrian refugee crisis, whereby the E.U. and Turkey agreed to resettle a certain number of Syrian refugees in exchange for economic aid and border control. The Trump administration's efforts in this area mostly involved threatening Mexico with aid cuts and tariffs unless it dealt with the crisis itself. Preliminary talks between Mexico and the United States during the Biden administration indicate a more collaborative approach that will hopefully be more productive.

Reimagining Other Forms of Humanitarian Protection Under U.S. Law

The United States should also consider whether it should create a new form of humanitarian protection outside of the existing asylum system that would not require applicants to prove the technical requirements of asylum. This form of protection could be nationality-specific and omit the requirement of proving asylum eligibility, akin to the Cuban Haitian Entrant Program (CHEP). It could also be temporary, akin to Temporary Protected Status (TPS), a form of protection under current U.S. law that allows the president to grant nationals from certain countries temporary protection from deportation due to circumstances (such as war or natural disaster) in their home countries. It could also lead to permanent status, similar to NACARA. The application process could be streamlined to ease pressure on the overburdened asylum system, with interviews at the border taking the places of years of hearings in immigration court.

A NACARA-like program would require legislative action, which considering the make-up of the current Congress seemly unlikely. However, Biden could use the parole power in much the same way without any legislation at all. The administration could parole individuals who meet certain requirements into the country temporarily and continue to renew the parole as long as the conditions in Central America remain dangerous. Individuals that are granted temporary humanitarian protection could still apply for asylum if they meet the requirements, but would still receive protection even if they cannot show that they meet the technical requirements of asylum, such as proving they were targeted on account of one of the five protected grounds.

Conclusion

The status quo at the U.S.-Mexico border is unsustainable. Biden cannot simply use the same failed strategies, nor is reversing the damage Trump did to the system enough. Instead, the administration must implement creative new solutions that could provide lasting solutions to the Central American refugee crisis.

Bibliography

AIC (American Immigration Council)
2021 *A Guide to Title 42 Expulsions at the Border.* Washington, D.C.
2020 *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*. Washington, D.C.

American Baptist Churches v. Meese
1989-1990 712 F. Supp. 756, 767, 771-72 (N.D. Cal. 1989), continued sub nom. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1990).

Armstrong, Ashley Binetti
2021 "Co-opting Coronavirus, Assailing Asylum," *Georgetown Immigration Law Journal*, no. 35: 361-98.

Baker, Jeffrey R., and Allyson McKinney Timm
2021 "Zero Tolerance: The Trump Administration's Human Rights Violations Against Migrants on the Southern Border," *Drexel Law Review*, no. 13: 581-661.

Biden-Harris Campaign
2020 "The Biden Plan for Securing Our Values as a Nation of Immigrants," https://joebiden.com/immigration.

Caldwell, Patrick E.
2000 "*nacara*: Minotaur or Midas?" *Southern Methodist University Law Review* 53: 1559.

CBP (Customs and Border Protection)
2021 "Southwest Land Border Encounters," July 16, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

CMS (Center for Migration Studies)
2021 "President Biden's Executive Actions on Immigration," https://cmsny.org/biden-immigration-executive-actions/.

Collins, Francis L.
2021 "Geographies of Migration I: Platform Migration," *Progress in Human Geography* 45, no. 4: 866-77.

DOS (Department of State)
2021 "Report to Congress on the Proposed Emergency Presidential Determination on Refugee Admissions for Fiscal Year 2021," https://www.state.gov/proposed-emergency-presidential-determination-on-refugee-admissions-for-fy21.

Hamlin, Rebecca
2014 *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia*. Oxford, U.K.: Oxford University Press.

Harris, Lindsay
2020 "Asylum Under Attack: Restoring Asylum Protection in the United States," *Loyola Law Review*, no. 67: 121-89.

Immigration and Nationality Act
1952 66 Stat. 163, Pub. L. 414 (1952).

INS v. Cardoza-Fonseca
1987 480 U.S. 421 (1987).

Kelly, Linda
2015 "The New Particulars of Asylum's 'Particular Social Group,'" *Whittier Law Review*, no. 36: 219-36.

Kerwin, Helen
2018 "The Mexican Asylum System in Regional Context," *Maryland Journal of International Law*, no. 33: 290-312.

Matter of A-B-
2021 28 I.&N. Dec. 307 (A.G. 2021).
2018 27 I.&N. Dec. 316 (A.G. 2018).

Matter of Acosta
1985 19 I.&N. Dec. 211 (B.I.A. 1985).

Matter of E-A-G-
2008 24 I.&N. Dec. 591 (B.I.A. 2008).

Matter of L-E-A-
2021 28 I.&N. Dec. 304 (A.G. 2021).
2019 27 I.&N. Dec. 581 (A.G. 2019).

Matter of S-E-G-
2008 24 I.&N. Dec. 579 (B.I.A. 2008).

Miroff, Nick
2021 "Biden Administration Allows Media Inside Texas Border Tents Packed with Minors," *Washington Post*, March 30, https://www.washingtonpost.com/national/media-donna-border-tent/2021/03/30/4c8ea342-9189-11eb-9af7-fd0822ae4398_story.html.

nacara (Nicaraguan Adjustment and Central American Relief Act)
1997 111 Stat. 2160, Pub. L. 105-100 (1997).

nif (National Immigration Forum)
2021 "Fact Sheet: Central American Minors (cam) Program," https://immigrationforum.org/article/fact-sheet-central-american-minors-cam- program.

Pew Research Center
2021 "Migrant Apprehensions at U.S.-Mexico Border Are Surging Again," https://www.pewresearch.org/fact-tank/2021/03/15/migrant-apprehensions-at-u-s-mexico-border-are-surging-again.

Refugee Act
1980 94 Stat. 102, Pub. L. 92-212 (1980).

Rizzo, Salvador
2018 "President Trump's Claim that Democrats Created 'Catch and Release' Policies," *Washington Post*, April 4, https://www.washingtonpost.com/news/fact-checker/wp/2018/04/04/president-trumps-claim-that-democrats-created-catch-and-release-policies.

Schoenholtz, Andrew I.
2015 "The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century," *Chicago Journal of International Law* 16: 81.

Scott, Eugene
2019 "Trump's Most Insulting—and Violent—Language Is Often Reserved for Immigrants," *Washington Post*, October 2, https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants.

Settlage, Rachel Gonzalez
2016 "Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of 'a Particular Social Group'," *Georgetown Immigration Law Journal* 30: 287.

Solis, Gustavo
2019 "Remain in Mexico has a 0.1% Asylum Grant Rate," *Los Angeles Times,* December 15, https://www.latimes.com/world-nation/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate.

Stanley, Jason
2018 *How Fascism Works: The Politics of Us and Them*. New York: Random House.

Transactional Records Access Clearinghouse
2021 "MPP Transfers into United States Slow and Nationality Inequities Emerge," Syracuse University, June 17, https://trac.syr.edu/immigration/reports/650/.

U.N. General Assembly
2016 *New York Declaration for Refugees and Migrants*, Resolution A/RES/71/1, October 3, https://www.refworld.org/docid/57ceb74a4.html.
1967 *Protocol Relating to the Status of Refugees*, January 31, United Nations, Treaty Series, vol. 606, p. 267, https://www.refworld.org/docid/3ae6b3ae4.html.
1951 *Convention Relating to the Status of Refugees*, July 28, United Nations, Treaty Series, vol. 189, p. 137, https://www.refworld.org/docid/3be01b964.html.

UNHCR (United Nations High Commissioner for Refugees)
2019 "Expanding Operations in Central America 2919," Geneva, https://reliefweb.int/sites/reliefweb.int/files/resources/2019%20Expanding%20Operations%20in%20Central%20America%20%28February%202019%29.pdf.

Van Selm, Joanne
2014 "Refugee Resettlement," in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona, eds., *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, U.K., Oxford University Press.

Wadhia, Shoba Sivaprasad
2019 "Immigration Litigation in the Time of Trump," *UC Davis Law Review Online*, no. 53: 121-39.

Walsh, Joe
2021 "Border Patrol Arrests Hit A 20-Year High Last Month—But Migration Isn't Necessarily Surging. Here's Why," *Forbes,* July 16, https://www.forbes.com/sites/joewalsh/2021/07/16/border-patrol-arrests-hit-a-20-year-high-last-month---but-migration-isnt-necessarily-surging-heres-why/?sh=620fe8a470b2.

White House
2021 "Fact Sheet: Strategy to Address the Root Causes of Migration in Central America," July 29, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-strategy-to-address-the-root-causes-of-migration-in-central-america/.