Enforced Invisibility: Toward New Theories of Accountability for the United States' Role in Endangering Asylum Seekers

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INTRODUCTION

Under the Trump Administration, a series of immigration practices were implemented across the southern border that dramatically heightened the existing enforced invisibility regime and nearly eviscerated asylum protection.[1] This invisible wall was fortified by an intricate web of policies, informal memoranda, and agreements with other countries. Examples include: the ill-named Migrant Protection Protocols ("MPP"),[2] metering,[3] the asylum transit ban,[4] the Humanitarian Asylum Review Process ("HARP"),[5] the Prompt Asylum Claim Review ("PACR"),[6] and asylum cooperation agreements with Guatemala, Honduras, and El Salvador.[7] In another act that resonated with the historical use of public health emergencies to demonize immigrants,[8] the Trump Administration relied on a rarely used health emergency power to indefinitely suspend asylum processing through the MPP program and to expel migrants at the southern border without even allowing them to seek asylum protection.[9] Masked behind names

[1] Throughout this article, I use the term "enforced invisibility regime," to refer to the externalized border enforcement mechanisms that have worked together to intentionally render asylum seekers at the southern border invisible. This interconnected web of policies has simultaneously shielded the U.S. from liability for its role in intentionally harming asylum seekers.

[2] *See infra* notes 41–64 and accompanying text.

[3] *See infra* notes 82–86 and accompanying text.

[4] *See infra* notes 65–74 and accompanying text.

[5] *See infra* notes 75–81 and accompanying text.

[6] *See infra* notes 75–81 and accompanying text.

[7] *See infra* notes 87–94 and accompanying text.

[8] *See, e.g.*, *infra* notes 129–131 and accompanying text (describing the pretextual fear of typhoid to justify de-lousing immigrants at the southern border).

[9] On March 20, 2020, the Department of Health and Human Services ("HHS") issued an emergency regulation which permits the Director of the Centers for Disease Control ("CDC") to "prohibit . . . the introduction" of individuals when the Director believes that "there is serious danger of the introduction of [a communicable] disease into the United States." Dep't. Of Health & Hum. Servs., Notice of Order Under Section 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020). Citing the new CDC authority, the Border Patrol began expelling individuals who arrived at the U.S.-Mexico border, without giving them the opportunity to seek asylum. This ongoing practice, known as "Title 42 Expulsions," continues to be widely used under the Biden Administration. *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border [https://perma.cc/S5FC-6VVR] (stating that more than 1.2 million such expulsions have been carried out since the pandemic began, "even though ports of entry remain open with nearly 11 million people crossing the southern border every month and thousands flying into the United States every day").

connoting mercy and efficiency, all of these programs operated in concert to disappear asylum seekers at the southern border with only minimal traces of justice or due process. But this invisibility project did more than just hide asylum seekers from public sight. It also shielded the U.S. policies from public view. To use a term coined by libertarian scholar Clyde Wayne Crews, Jr., the Trump Administration relied largely on "regulatory dark matter" in erecting this invisible wall at the southern border.[10] Through the use of a vast array of internal guidance memos, bulletins, circulars, and "thousands of other such documents that are subject to little scrutiny or democratic accountability," the Trump Administration carried out its border enforcement scheme in ways that were "hard to detect, much less measure."[11] Simultaneously, by relying on third countries to enforce its immigration laws, the U.S. intentionally further obscured its own role in the foreseeable harms that ensued.

The Biden Administration attempted to disassemble significant components of the invisible wall at the southern border. Within its first two weeks in office, the Biden Administration issued Executive Orders to: (1) immediately end the HARP and PACR programs;[12] (2) call on the Department of Homeland Security to promptly review and determine whether to terminate or modify the MPP, Title 42 expulsions, asylum transit ban, and expedited removal;[13] (3) make clear its intention to suspend and terminate its cooperation agreements with Guatemala, El Salvador, and Honduras;[14] and (4) "implement a multi-pronged approach toward managing migration through North and Central America that reflects the Nation's highest values."[15]

However, the change in administration does not mean we can move on from these policies. As noted above, the Biden Administration continues to use the antiquated public health emergency power to

In addition, the Trump Administration indefinitely suspended all MPP hearings during the pandemic, leaving more than 20,000 people stranded in extreme danger in Mexico or forced to abandon their cases and return home.

[10] Sarah Stillman, *The Race to Dismantle Trump's Immigration Policies*, NEW YORKER (Feb. 1, 2021), https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies [https://perma.cc/G8W8-4F9K].

[11] *Id.* (noting "dark matter and dark energy make up most of the universe, rendering the bulk of existence beyond our ability to directly observe").

[12] Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8270 (Feb. 5, 2021). The Executive Order also directed DHS to review the adjudication of gang-based and domestic violence-based asylum claims. *Id.* at 8271.

[13] *Id.* at 8269-70.

[14] *Id.* at 8270.

[15] *Id.* at 8267.

rapidly expel noncitizens at the southern border without even providing an opportunity to seek asylum.[16] Those expelled without any opportunity to seek protection continue to face grave danger or death.[17] Moreover, the Supreme Court ruled that the MPP must be reinstituted at the southern border while litigation challenging the President's revocation of the MPP proceeds in the Circuit Court of Appeals.[18] A durable solution to the worst abuses of the Trump Administration, and the ongoing harms during the current administration, will require an understanding of the historical roots of rendering asylum seekers invisible. The prior administration's anti-immigrant enforcement policies and enforced invisibility regime are part of a larger architecture that needs to be dismantled.[19] Just as the prior administration tapped

[16] Since President Biden assumed office, Title 42 USC has been used to expel most people encountered at the border. In the first four full months of the Biden administration, sixty-four percent of all people encountered by the Border Patrol at the border were expelled under Title 42. *See* AM. IMMIGR. COUNCIL, RISING BORDER ENCOUNTERS IN 2021: AN OVERVIEW AND ANALYSIS 6 (July 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/rising_border_encounters_in_2021.pdf [https://perma.cc/EXY3-MRRT].

[17] As of June 17, 2021, Human Rights First reported 3,250 kidnappings and other attacks, including rape, human trafficking, and violent armed assaults, against asylum seekers and migrants who were expelled at the southern border since President Biden assumed office in January 2021. *See* HUM. RTS. FIRST, UPDATE: GRAVE DANGERS CONTINUE FOR ASYLUM SEEKERS BLOCKED IN, EXPELLED TO MEXICO BY BIDEN ADMINISTRATION 1 (2021), https://www.humanrightsfirst.org/sites/default/files/FailuretoProtectUpdate.06.21.pdf [https://perma.cc/ZZ2B-VM2L].

[18] Biden v. Texas, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021), https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf [https://perma.cc/3H8Q-VX8T]. Justice Alito denied the President's request for an injunction of the Circuit Court's order to reinstate the MPP. According to Justice Alito's short order, "[t]he applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Id.* See also note 167 discussing the Fifth Circuit's refusal to lift its injunction, even after the Secretary of the Department of Homeland Security issued a more comprehensive memo ending the MPP.

[19] In addition to the heightened border enforcement, the Trump Administration dramatically broadened the class of noncitizens prioritized for deportation throughout the interior of the country. Pursuant to the Executive Order on Enhancing Public Safety in the Interior of the United States, issued on January 25, 2017, noncitizens subject to deportation include: anyone charged with a criminal offense, who committed acts that constitute a criminal offense, who engaged in fraud or willful misrepresentation, who has abused any program related to public benefits, who is subject to a final order of removal, but has not departed, or who otherwise poses a risk to public safety. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). This increase in enforcement efforts fueled the expansion of immigrant detention throughout the U.S. *See* EUNICE HYUNHYE CHO, TARA TIDWELL CULLEN & CLARA LONG, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 5 (2020),

into and gave greater voice to pre-existing systemic racism in America, externalization policies that pushed vulnerable asylum seekers into known danger while stripping them of virtually all of their guaranteed constitutional and international human rights were possible because they recognized that racism and exploited the enduring historic fear and willingness to criminalize immigrants, particularly at the southern U.S. border. They were also possible because of a domestic law regime that has allowed the U.S. to insulate itself by pushing its border management to third countries, while simultaneously immunizing itself from potential litigation for the harms that result. Moreover, the harm caused by these policies has not been resolved. Notwithstanding the tremendous hope that these desperately needed changes inspire, the impact of the prior Administration's externalization policies on asylum seekers and their families may not be fully known for years. In addition to the countless asylum seekers who lost their lives as a result of being forced into danger in Mexico or Northern Triangle nations, thousands more will likely suffer ongoing trauma based on the serious harm endured and witnessed as a result of the invisibility regime.[20]

This Article employs a historical and race-based lens to analyze the various components of the multi-faceted forced invisibility regime. As the new Administration begins to construct a more humane immigration policy going forward, it is essential that international human rights and constitutional rights are not limited to the U.S.'s physical land border. Although some of the most egregious externalization policies that were put in place during the Trump Administration may end, the U.S. has engaged in harsh immigration policies for years in an attempt to deter asylum-seekers from arriving at our borders.[21] Moreover, as the number of migrants arriving at the

https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf [https://perma.cc/7LUD-S9PS] (finding that, under the Trump Administration, forty new immigrant detention facilities opened and eighty-one percent of the detained population are held in facilities owned or at least operated by private companies).

[20] *See generally* PHYSICIANS FOR HUM. RTS., FORCED INTO DANGER: HUMAN RIGHTS VIOLATIONS RESULTING FROM THE U.S. MIGRANT PROTECTION PROTOCOLS (2021), https://phr.org/wp-content/uploads/2021/01/PHR-Report-Forced-into-Danger_Human-Rights-Violations-and-MPP-January-2021.pdf [https://perma.cc/WDK5-4EWL] (documenting trauma experienced by asylum seekers in the MPP).

[21] To give just a few examples, in 1993, the U.S. Supreme Court authorized the U.S. interdiction and forced repatriation (without any opportunity to seek protection) of Haitian asylum seekers at sea. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 159 (1993). In 2002, President George W. Bush (with bipartisan support from Congress) created the Department of Homeland Security, which today includes agencies like Immigration and Customs Enforcement ("ICE") and Customs and Border Protection

southern border continues to climb, the pressure to engage in externalization policies will similarly mount.[22] Indeed, while the Biden Administration has tried to end the MPP and other egregious border externalization policies, it continues to engage in Title 42 expulsions at the southern border, thereby repelling asylum-seekers without providing an opportunity to seek asylum protection.[23] Thus, the need to guarantee basic rights[24] to asylum seekers — regardless of their physical location — both preceded and will succeed this ugly chapter of American immigration policy. Extending this overdue protection and establishing U.S. accountability for the intentional harms caused by this regime is necessary to disincentivize removing asylum seekers from public sight. To this end, this Article suggests borrowing standards from international law and torts law to restrain the U.S.'s extraterritorial immigration policies and provide meaningful remedies to those who have already been intentionally harmed.

Indeed, the Refugee Convention itself was drafted in response to the reality that nations around the world had closed their eyes, and their borders, to atrocity and the desperate need for protection.[25] Over the years since the U.S. ratified the U.N. Protocol for the Protection of Refugees[26] and enacted the Refugee Act[27] to ensure that an obligation to comply with an international human rights agreement was also codified as a statutory right, there has been a push towards removing asylum seekers from sight. Once out of sight, the U.S. has proceeded in what it

("CBP"), notorious for their long histories of abuse. President Barack Obama conducted more court-ordered removals than any of his predecessors by far. Likewise, the Obama administration built some of the detention centers in which migrant families are still held.

22 CNN reported that the number of migrants apprehended or turned back at the southern U.S. border in June was the highest in at least a decade. *See* Geneva Sands, *US-Mexico Border Arrests in June Are the Highest in At Least a Decade*, CNN (July 14, 2021, 5:00 ET), https://www.cnn.com/2021/07/14/politics/us-mexico-border-arrests-june-decade/index.html [https://perma.cc/WEV3-MM94].

23 *See, e.g.*, HUM. RTS. FIRST, FAILURE TO PROTECT: BIDEN ADMINISTRATION CONTINUES ILLEGAL TRUMP POLICY TO BLOCK AND EXPEL ASYLUM SEEKERS TO DANGER (2021), https://www.humanrightsfirst.org/sites/default/files/FailuretoProtect.4.20.21.pdf [https://perma.cc/PK4R-SF92] (noting the "misuse" of Title 42 by the Biden administration).

24 "Basic rights" are derived from international human rights conventions, domestic statutory law, or the U.S. Constitution.

25 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

26 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

27 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1231(b)(3) (2018)).

perceives to be a law-free zone.[28] Whether through increased detention within the nation, pushing asylum seekers back to Mexico, or entering into agreements with other countries to divert them, removing asylum seekers from public sight has diminished human rights, due process, and, ultimately, substantive protection. While this perception of dark law-free zones where rights do not attach is erroneous and has been challenged in court, the damage has been done, and the strategic goal of pushing asylum seekers from sight has been achieved. By making the connection between externalization efforts and policies that have eroded access to asylum at the southern border and the dramatic growth in detaining immigrants within the country, this Article explores the symbiotic relationship between visibility and rights.

Undoing the externalization of asylum protection will require an understanding of where these efforts began and an assessment of the most recent examples of enforced invisibility within a broader history. While policies like the MPP are the result of Trump's cruel enforcement agenda, in reality, the pattern began much earlier. Accountability will require a public reckoning with that history, the intentional harms that have occurred, and the U.S.'s role in causing this harm. But it will also require effective legal remedies in order to vindicate the rights of those who were harmed by inhumane border externalization policies. This will require a broader vision of the U.S.'s legal responsibility for injuries that have resulted from its immigration externalization policies and a willingness to peel back some of the layers of immunity that have prevented victims from accessing the U.S. legal regime. Alternately, it will require creative use of international forums to argue for the U.S.'s legal responsibility for such harms. Looking to international law and torts law can help re-focus attention on the intentionality of the harm that has been caused by external border controls.

Part I unpacks each component of the most recent and glaring examples of the invisibility regime at the southern U.S. border.[29] Part II examines the historical racial impulses and normative notions that helped to lay the foundation for such policies.[30] Part III critiques the successes and limitations of litigation challenging various components of the border externalization project.[31] Part IV examines the ways in which the goal of border protection eclipsed the need for refugee

[28] Other large, refugee-receiving countries like Australia, and countries in the European Union, have done this as well.

[29] *See infra* Part I.

[30] *See infra* Part II.

[31] *See infra* Part III.

protection.[32] Part V proposes new models for accountability to help reconceptualize the intentional harm that is motivating the invisibility regime.[33] The Article concludes that borrowing from torts, international human rights, and human rights accountability models is essential to name and hold the U.S. responsible for the enforced invisibility regime that nearly eviscerated asylum protection. Only by naming the intentional harm and holding the U.S. accountable can we avoid circling back to rebuilding the invisible wall in the future.

I. DECONSTRUCTING THE WEB OF POLICIES THAT COMPRISE THE INVISIBILITY REGIME AT THE SOUTHERN BORDER

All of the components of the forced invisibility regime at the southern border are ostensibly aimed at deterring illegal migration and reducing the number of migrants admitted. For many years, and through Democratic and Republican administrations alike, the media has stoked fear with images and stories of migrant caravans descending upon our southern border.[34] The public narrative is that we need border externalization initiatives, or we will be "overrun" by migrants at the southern border.[35] Viewed through this frame, the narrative that emerges is that if we treat asylum seekers humanely and allow them to enter the U.S. while their claims for protection proceed, no one will appear for court hearings, choosing instead to make themselves invisible within the U.S.

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[32] *See infra* Part IV.

[33] *See infra* Part V.

[34] The media wasted no time resuming migrant caravan stories as soon as President Biden took office. *See, e.g.*, Jason Beaubien, *Migrant Caravan: Thousands Move into Guatemala, Hoping To Reach U.S.*, NPR (Jan. 18, 2021, 3:50 PM ET), https://www.npr.org/2021/01/18/958092745/migrant-caravan-thousands-move-into-guatemala-hoping-to-reach-u-s [https://perma.cc/QL9U-G56Z] (reporting that Guatemalan security forces were attempting to block thousands of Honduran migrants from heading north towards Mexico and the U.S. border in the wake of President Biden's election and the hope for a more humane approach to migration).

[35] John Burnett, *Controlling the Border Is a Challenge. Texas Gov. Abbott's Crackdown Is Proving That*, NPR (Aug. 6, 2021, 6:18 PM ET), https://www.npr.org/2021/08/06/1025253908/controlling-the-border-is-a-challenge-texas-gov-abbotts-crackdown-is-proving-that [https://perma.cc/V4QE-D7XB] (reporting that Governor Abbott has responded to complaints from border residents and ranchers who say they are being "overrun" by migrants with a new initiative called "Operation Lone Star." The state initiative includes jailing asylum seekers, making disaster declarations, and building a border wall. It also includes ordering state highway patrol to interdict any vehicles — even commercial buses — suspected of carrying unauthorized migrants, though that action has been blocked by a federal judge).

But this view is rooted in fear rather than facts. As per a report based directly on data collected through the U.S. Department of Justice's Executive Office for Immigration Review ("EOIR"), the body that adjudicates asylum cases in removal proceedings, sixty-nine percent of asylum seekers were denied protection in 2019.[36] Nevertheless, ninety-nine percent of non-detained asylum seekers appeared for every court hearing.[37] If the concern is that asylum seekers will overwhelm the adjudicative system, the solution lies in addressing the root causes of migration so that people are not forced to flee to the U.S. in order to seek safety.[38]

The U.S. spends billions of dollars annually detaining immigrants, and this money could be used instead to address the root causes of migration in the Central American nations from which asylum seekers are fleeing. For example, for Fiscal Year 2021, the Trump Administration sought $4.1 billion in taxpayer funding in order to expand ICE's daily detention capacity to 60,000 people on any given day.[39] In contrast, on his first day in office, President Biden acknowledged that helping to safeguard human rights protections in Central America must be part of U.S. immigration reform.[40]

A. Migrant Protection Protocols ("MPP")

According to the Merriam-Webster dictionary, a border is defined as, "an outer part or edge."[41] However, the U.S. has been engaged in externalizing its borders to limit asylum protection for at least forty years in an effort to prevent asylum seekers of color from even accessing our actual borders. For example, in 1981, the U.S. entered into an interdiction agreement with Haiti that authorized the U.S. Coast Guard to interdict Haitian vessels on the high seas, detain the passengers, and

[36] *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/ [https://perma.cc/H3HF-ML5Y].

[37] *Id.*

[38] *See, e.g.*, Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, 18 HASTINGS RACE & POVERTY L.J. 178, 185-228 (2021) (setting forth the root causes of migration from El Salvador to include: historic inequality, corruption, lack of respect for rule of law, violence against women, gang violence, impunity, and climate change).

[39] CHO ET AL., *supra* note 19, at 5.

[40] *See, e.g.*, U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (1st Sess. 2021) (including Biden's $4 billion four-year plan that aims to decrease violence, corruption and poverty in El Salvador, Guatemala, and Honduras, the home countries of many of the asylum seekers who have arrived at the U.S.-Mexico border in recent years).

[41] *Border*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/border (last visited Sept. 15, 2021) [https://perma.cc/KKF7-BLTT].

push the vast majority of the Haitian asylum seekers back to the very nation they fled.[42] When it comes to its southern border, the U.S. has secured cooperation from Mexico and Central American nations to prevent asylum seekers from arriving since at least 1989.[43] For example, that year, the Immigration and Naturalization Service ("INS") reported on "cooperation with the Government of Mexico to stem the flow of Central Americans through that country, including the establishment of checkpoints along the transit corridors and the deportation of intercepted Central Americans."[44] Indeed, for over thirty years, the U.S. has sought to insulate its southern border by pressuring Mexico to control Central American migration across its border with Guatemala.[45] The Trump Administration built upon this solid foundation to shield the entire southern border from asylum seekers.

One of the newest incarnations of the invisible wall is the ill-named Migrant Protection Protocols ("MPP"), more accurately known as the Remain in Mexico program.[46] Through this program, more than 60,000 asylum seekers were pushed back into Mexico to await asylum hearings.[47] The invisibility of the program played out in different ways.

[42] Interdiction Agreement Between the United States of America and Haiti, U.S.-Haiti, Sept. 23, 1981,33 U.S.T. 3559, 3559-60; Sale v. Haitian Ctrs. Council, 509 U.S. 155, 159 (1993) (upholding the legality of an Executive Order mandating the U.S. Coast Guard to turn back Haitian asylum seekers at sea because the Court held that neither Article 33 of the Refugee Convention or section 243(h) of the Immigration and Nationality Act applied to asylum seekers intercepted on the high seas); Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 638-43 (2009).

[43] For a comprehensive history of the U.S. externalization efforts at the border, see generally Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION HUM. SEC. 190 (2016).

[44] *Id.* at 200-01.

[45] *Id.* at 201.

[46] On January 25, 2019, Secretary of the Department of Homeland Security Nielsen issued a memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols," in which she provided guidance for the implementation of the Migrant Protection Protocols announced on December 20, 2018. The memo refers to the MPP as "an arrangement between the United States and Mexico to address the migration crisis along our southern border." *See* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs., Kevin K. McAleenan, Comm'r, U.S. Customs & Border Prot., Ronald D. Vitiello, Deputy Dir. & Sr. Off. Performing the Duties of the Dir., U.S. Immigr. & Customs Enf't (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/C5AC-6BE4] [hereinafter Memorandum from Kirstjen M. Nielsen].

[47] In addition to the clear invisibility of removing asylum-seekers from public sight while they await their hearings, the MPP also vested individual CBP agents with broad

On one level, forcing asylum seekers to remain in Mexico during their proceedings removed them from the public's sight. Notwithstanding the grave danger they faced in Mexico,[48] or the direct U.S. role in placing them into that known danger, the asylum seekers remained largely invisible and the U.S. role in causing the harm was obscured behind the façade of "migrant protection."

As per the U.S.-Mexico agreement that accompanied the MPP program, the nations committed to a joint venture to control immigration.[49] For its part, Mexico agreed to take "unprecedented steps to increase enforcement to curb irregular migration, to include the deployment of its National Guard throughout Mexico, giving priority to its southern border."[50] Both the United States and Mexico committed to strengthening bilateral cooperation, including information sharing and coordinated actions to better protect and secure the U.S./Mexico border.[51] While the U.S. offered to provide "tens of millions of dollars" to Mexico to feed and house the asylum seekers in the MPP program,[52]

discretion as to whether to send a person or family back under MPP, leading to inconsistent practices. Moreover, CBP officers did not ask asylum seekers if they were afraid of returning to Mexico. Rather, the burden remained on the asylum seeker to affirmatively do so. If an asylum seeker affirmatively expressed fear of returning to Mexico, the CBP agent was obligated to refer the asylum seeker to an Asylum Officer for an interview about their fear. Individuals generally were held in CBP custody for these interviews. They were not allowed access to an attorney and may remained handcuffed throughout the interview process. Moreover, the burden of proof for the initial MPP interviews was significantly higher than for the credible fear interviews asylum seekers face in expedited removal at the border. In MPP, asylum seekers had to convince the officer that the likelihood of facing persecution on account of a protected ground was "more likely than not" as compared with the lower "reasonable fear" burden for credible fear interviews under expedited removal. *See* Innovation L. Lab v. Wolf, 951 F.3d 1073, 1088-89 (9th Cir. 2020).

[48] The parts of Mexico where asylum seekers remained are notoriously some of the most dangerous parts of the world. As documented by Human Rights First, "[a]s of February 19, 2021, there have been at least 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico by the Trump Administration under this illegal scheme. Among these reported attacks are 341 cases of children returned to Mexico who were kidnapped or nearly kidnapped." *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger*, HUM. RTS. FIRST, https://www.humanrightsfirst.org/campaign/remain-mexico (last visited Sept. 22, 2021) [https://perma.cc/S7GB-H6K8].

[49] *See* Nielsen, *supra* note 46.

[50] Joint Declaration and Supplementary Agreement on Migration, Mex.-U.S., June 7, 2019, T.I.A.S. No. 19-607.

[51] *Id.*

[52] According to the Washington Post, "[t]o shelter, feed and care for an increasing number of Central Americans who could wait months in Mexico for an asylum decision,

it appears that the promised funding was never provided. However, the U.S. still wielded significant financial pressure as it conditioned not imposing a threatened five percent tariff on Mexican exports on Mexico's willingness to enter into the immigration enforcement agreement.[53]

As part of the MPP program, the U.S. detained asylum seekers at the border, processed them, scheduled their removal hearings, returned them to Mexico, and required them to come back to the port of entry to attend their court hearings.[54] While initially the U.S. instituted the MPP in only one or two ports of entry, the government quickly expanded it across the southern border, to include the most dangerous parts of Mexico. For example, the MPP spread to Tamaulipas, a region the U.S. State Department ranks at its highest level of danger.[55] This level four ranking is the same designation used for Syria and Afghanistan.[56] Moreover, the U.S. State Department has travel warnings issued for all six of Mexico's northern border states, urging citizens not to travel to Tamaulipas, to reconsider travel to Baja California, Chihuahua, Coahuila, and Sonora, and to exercise increased caution in Nuevo Leon,

the United States [was] willing to provide 'tens of millions' of State Department dollars that have gone unspent as a result of plunging refugee admissions, officials said." *See* Nick Miroff, Kevin Sieff & John Wagner, *How Mexico Talked Trump Out of Tariff Threat with Immigration Crackdown Pact*, WASH. POST (June 10, 2019), https://www.washingtonpost.com/immigration/trump-mexico-immigration-deal-has-additional-measures-not-yet-made-public/2019/06/10/967e4e56-8b8e-11e9-b08e-cfd89bd36d4e_story.html [https://perma.cc/EZ79-TQ9W].

[53] Jill Colvin, Matthew Lee & Luis Alonso Lugo, *Trump Says Tariffs on Mexico Suspended Indefinitely*, AP NEWS (June 8, 2019), https://apnews.com/article/e18f85f3f23f4fdea76831c80540af15 [https://perma.cc/7Q8D-5HRL] (announcing that former President Trump had suspended plans to impose tariffs on Mexico, tweeting that the country "has agreed to take strong measures" to stem the flow of Central American migrants into the United States).

[54] Complaint for Declaratory and Injunctive Relief at ¶ 23, Tercios v. Wolf, No. 20-cv-00093 (S.D. Tex. June 4, 2020). The memorandum further provided that individuals subjected to the Protocols were to be transported by ICE Enforcement and Removal Operations ("ERO") "from the designated port of entry to the court facility for the scheduled removal hearings before an immigration judge and back to the port of entry for return to Mexico by CBP after such hearings." Memorandum from Ronald D. Vitiello, Deputy Dir. & Sr. Off. Performing the Duties of the Dir., to Exec. Assoc. Dirs. & Principal Legal Advisor (Feb. 12, 2019) [hereinafter Memorandum from Ronald D. Vitiello].

[55] Tijuana and Ciudad Juárez — where CBP has returned the majority of migrants as part of the MPP — were the two cities with the highest homicide rates in Mexico for 2018. *Las 50 Ciudades Más Violentas del Mundo 2018*, SEGURIDAD, JUSTICIA Y PAZ (Mar. 12, 2019), http://seguridadjusticiaypaz.org.mx/files/estudio.pdf [https://perma.cc/Q5A3-RV4B].

[56] *Id.*

all due to high levels of violent crime and gang activity.[57] According to the U.S. warning, anyone who chooses to travel to "high risk" areas such as Tamaulipas "should make a will, designate a family member to negotiate with kidnappers, and establish secret questions and answers to verify that the traveler is still alive when kidnappers reach out to family."[58]

The MPP also vested Customs and Border Patrol ("CBP") with complete discretion as to whether to place asylum seekers in the MPP program, making the process even less transparent and heightening the risk that asylum seekers in need of protection would be pushed back over the border and out of sight.[59] Notwithstanding the dramatic import of the MPP, the Trump Administration did not propose regulations or receive public input; the program was established solely via press releases and memorandum.[60]

Even for those asylum seekers who were fortunate enough to have a day in court in the U.S., their hearings most often occurred in tent courts, still obscuring public view.[61] The Immigration Judges appeared via video teleconference, and the asylum-seekers remained largely invisible to these judges.[62] With the onset of the Covid-19 pandemic,

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[57] *See Mexico International Travel Information: Travel Advisory*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html (last updated Apr. 6, 2021) [https://perma.cc/66US-CHW4].

[58] *See High-Risk Area Travelers*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/high-risk-travelers.html (last updated Nov. 6, 2019) [https://perma.cc/64M3-7UL2].

[59] *See* Memorandum from Ronald D. Vitiello, *supra* note 54, at 1-2 ("Processing determinations, including whether to place an alien into ER or INA section 240 proceedings (and, as applicable, to return an alien placed into INA section 240 proceedings to Mexico under INA section 235(b)(2)(C) as part of MPP), or to apply another processing disposition, will be made by U.S. Customs and Border Protection ("CBP"), in CBP's enforcement discretion.").

[60] *See, e.g.*, Memorandum from Kirstjen M. Nielsen, *supra* note 46.

[61] Michelle Hackman & Alicia A. Caldwell, *Immigration Tent Courts at Border Raise Due-Process Concerns*, WALL ST. J. (Dec. 14, 2019, 9:00 AM ET) https://www.wsj.com/articles/immigration-tent-courts-at-border-raise-due-process-concerns-11576332002 [https://perma.cc/3DW8-V4B4] (describing shipping containers with televisions being used as "tent courts" for asylum seekers at the Texas-Mexico border).

[62] Over a decade ago, Professor Muneer Ahmad described the limited use of interpreters in immigration court as resulting in a system in which, "[t]he client is effaced, reduced to a mute, dark figure, uncomprehending of all that transpires around her." Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1028 (2007). More recently, scholars have critiqued the impact of video hearings for detained asylum seekers, noting that they result in not just

the Trump Administration suspended hearings for MPP cases, leaving asylum seekers stranded in dangerous conditions in Mexico for an indefinite period of time.[63]

Finally, border patrol agents who sought to push asylum seekers back across the southern border had many options beyond the MPP. The Trump Administration's new policies vested these agents with a tool-box full of different mechanisms for keeping asylum seekers out, including the Asylum Transit Ban, the Humanitarian Asylum Review program ("HARP"), and the Prompt Asylum Case Review Program ("PACR"),[64] metering, and asylum cooperation agreements. As explained in further detail below, these other programs added to the opacity by targeting and removing from public sight various groupings of vulnerable asylum seekers based solely on their route of transit or country of origin. The web of invisibility operated like a shell game — border patrol agents placed the asylum seekers under one shell but had the flexibility to shift them to another one if necessary, to maintain invisibility.

B. The Asylum Transit Ban

Legally enabling Border Patrol agents to push asylum seekers back across the southern border endangered their lives. It also created a dystopian reality as the asylum seekers suffered grave human rights abuses while waiting to be summoned back to the U.S. for a hearing. This situation was a far cry from the Refugee Convention's goal of ensuring that there be surrogate state protection when the home country fails to protect its nationals from persecution on account of a protected ground.[65] It was also at odds with Congressional intent in enacting the Refugee Act to bring the U.S. into conformity with its

dehumanization from the Judge's perspective, but also in the asylum seeker's diminished sense of worth and disinterest in seeking protection from deportation. The MPP extended the dehumanization even further as asylum seekers were forced to live in hiding outside of U.S. borders and then, even when they were allowed in to access the U.S. adjudication regime, they were most often subjected to video hearings.

[63] *See supra* note 9 and accompanying text.

[64] *See* AM. IMMIGR. COUNCIL, 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 7 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf [https://perma.cc/G5CU-G648].

[65] Refugee Convention, *supra* note 25, at 6276 (obligating signatory states not to return one to a country where their life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group).

protection obligations as a signatory to the U.N. Protocol on Refugees.[66] However, the U.S.'s commitment to invisibility has gone even deeper. A web of overlapping policies that similarly externalized protection added even harsher scenarios to this reality. The Asylum Travel Ban removed the possibility of asylum protection for the vast majority of asylum seekers at the southern border, based on their travelling through other countries without seeking and being denied asylum before arriving in Mexico.[67] Unlike the need to decide at the first encounter whether to subject an asylum seeker to the MPP, the Asylum Transit Ban could be applied at any point (even at the conclusion of proceedings).[68] This meant that even if an asylum seeker were allowed into the U.S. to seek protection, the Immigration Judge could still find that the ban on asylum applied at the end of the court proceedings.[69] A CBP officer could also choose to apply the Asylum Transit Ban at the outset, as an alternative to the MPP, ending the possibility of asylum protection.[70] In this case, the policy directed the officer to screen the person to determine whether they had a "reasonable fear" of persecution or torture.[71] If the applicant passed this heightened screening and the officer determined their fear was "reasonable," they were placed into full removal proceedings in immigration court.[72] But once in removal proceedings, the Asylum Ban purported to limit the individual's access to asylum, only allowing for the less robust protections of withholding of removal or protection under the Convention Against Torture ("CAT"). [73] Notwithstanding the incredible

[66] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (codified as amended in scattered sections of 8 U.S.C.).

[67] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified in 8 C.F.R. pts. 208, 1003, 1208).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] 8 C.F.R. section 1208.31(c) defines a "reasonable fear" of persecution or torture as arising if the noncitizen establishes "a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal."

[72] 8 C.F.R. § 1208.31(e) (2021) ("If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 1208.16.").

[73] AM. IMMIGR. COUNCIL, *supra* note 64. Thankfully the Asylum Transit Ban has been enjoined by the Ninth Circuit as of this writing. *See* E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 855-56 (9th Cir. 2020).

impact of barring access to asylum for anyone at the southern border who traveled through another country without seeking and being denied protection, the Asylum Ban was implemented as a final interim rule, taking effect prior to the notice and comment period required under the Administrative Procedures Act.[74]

C. Prompt Asylum Claim Review ("PACR") and Humanitarian Asylum Review Process ("HARP")

As if arming immigration officials and judges with the power to push back or deny asylum protection to those arriving at the southern border were not enough, CBP quickly layered on two additional programs: the Prompt Asylum Claim Review ("PACR") program and the Humanitarian Asylum Review Process ("HARP").[75] Asylum seekers who were subjected to these programs were held at CBP short-term detention facilities throughout the entire expedited removal process.[76] This was a notable change from past practice as asylum seekers had never before been held in CBP custody during their initial asylum interviews.[77] The HARP and PACR programs operated almost identically[78] and posed the same due process concerns, dramatically curtailing access to attorneys, evidence, family members and

[74] The DOJ and DHS issued a joint interim rule. *See* 8 C.F.R. §§ 208, 1003, 1208 (2019).

[75] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-144, SOUTHWEST BORDER: DHS AND DOJ HAVE IMPLEMENTED EXPEDITED CREDIBLE FEAR SCREENING PILOT PROGRAMS, BUT SHOULD ENSURE TIMELY DATA ENTRY (2021); Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POLICY (Feb. 27, 2020), https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum [https://perma.cc/3N53-LJKU] [hereinafter *Border Bars Virtually All*].

[76] *See* Chishti & Bolter, *Border Bars Virtually All*, supra note 75.

[77] American Immigration Council Staff, *Asylum Is in Danger After Court Upholds Rushed Screening Process at the Border*, IMMIGR. IMPACT (Dec. 14, 2020), https://immigrationimpact.com/2020/12/14/asylum-pacr-harp-court-decision/?emci=d575078a-6041-eb11-a607-00155d43c992&emdi=236f12ac-cb42-eb11-a607-00155d43c992&ceid=4507403#.X-DPu9hKhPZ [https://perma.cc/W2LF-2P56].

[78] In October of 2019, DHS issued two guidance memoranda that instituted new programs for expedited processing of asylum petitions for individuals who were subject to expedited removal and who had either traveled through another country on their way to the United States or are Mexican nationals. Pursuant to the "Prompt Asylum Claim Review" ("PACR") process and the "Humanitarian Asylum Review Process" ("HARP"), such asylum seekers are afforded only one full calendar day to prepare for the initial screening stage of the statutory asylum application process, known as the credible fear interview. *See* Policies Affecting Asylum Seekers at the Border, American Immigration Council (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border [https://perma.cc/8NTZ-FPMQ].

meaningful judicial review.[79] In fact, data revealed in a congressional hearing showed that out of more than 4,700 asylum seekers placed into PACR and HARP, just thirty-one of them were able to retain a lawyer.[80] And, only nineteen to twenty percent of asylum seekers who were subjected to PACR/HARP passed their initial asylum interviews, compared to a pass rate of seventy-four percent previously.[81]

D. Metering

Through a process known as "metering," asylum-seekers who were not completely closed out or funneled into lesser protection, were told that U.S. ports of entry were full.[82] Although the U.S. had engaged in some degree of metering or maintaining waitlists of asylum seekers at a few ports of entry since 2015, the process became institutionalized across the entire southern border under the Trump Administration.[83] As part of the Trump Administration's Zero Tolerance policy that criminalized and prosecuted asylum seekers, resulting in family separation, asylum seekers were pushed to ports of entry along the southern border.[84] Once at a port of entry, the Trump Administration worked to cut off access to asylum processing by pushing back asylum

[79] For example, under either program, asylum seekers were given only thirty minutes to an hour to contact a lawyer or family members before the credible fear interview. After that, they were not permitted any further phone calls outside of CBP detention. If they did not pass the credible fear interview, the immigration judge appeal occurred over the telephone. In general, the brief phone call was the only opportunity asylum seekers were given to contact anyone for support. According to lawyers who represented asylum seekers in HARP or PACR, they were unable to communicate with their clients during this process, unless their client managed to contact them during the brief window where they were permitted to use the telephone. Furthermore, even if the individuals had evidence supporting their asylum claims in their belongings, they were often unable to access it because their belongings remained locked up during their time in CBP custody. AM. IMMIGR. COUNCIL, *supra* note 64.

[80] American Immigration Council Staff, *supra* note 77.

[81] *Id.*

[82] Weekend Edition Saturday, *Metering at the Border*, NPR, at 1:04 (June 29, 2019, 8:03AM ET), https://www.npr.org/2019/06/29/737268856/metering-at-the-border [https://perma.cc/W8PX-9C2U] ("Asylum-seekers that show up there, they tell them they have to turn around and go put their name on a waitlist, basically, back in Mexico and wait for their turn to request asylum.").

[83] STEPHANIE LEUTERT, ELLIE EZZELL, SAVITRI ARVEY, GABRIELLA SANCHEZ, CAITLYN YATES & PAUL KUHNE, ASYLUM PROCESSING AND WAITLISTS AT THE U.S.-MEXICO BORDER 18 (2018), https://usmex.ucsd.edu/_files/asylum-report_dec-2018.pdf [https://perma.cc/764M-UWDS].

[84] *Id.* at 1.

seekers into Mexico and telling them that the ports were full.[85] The Trump Administration failed to keep track of these asylum seekers or accurately record the order of their requesting access to asylum.[86]

E. Asylum Cooperative Agreements

The final layer of the border invisibility regime involved agreements with the primary regional asylum-producing nations to receive asylum-seekers from neighboring countries. On July 26, 2019, the United States and Guatemala entered into an Asylum Cooperative Agreement ("ACA"), allowing the U.S. to transfer non-Guatemalan asylum seekers from the southern U.S. border to Guatemala.[87] Within the next two months, the U.S. entered into similar agreements with Honduras and El Salvador.[88]

In section 208(a)(2)(A) of the INA, Congress authorized the federal government to enter into agreements to return asylum seekers to "safe third countries."[89] However, in order for a country to qualify as such, it must be one that does not return asylum seekers to countries in which their life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group.[90] It must also be a country that offers, "access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."[91] In light of the reality that these three Northern Triangle countries are some of the most dangerous in the world, combined with the fact that none of the countries has a functioning and fair asylum adjudication system, these agreements do not comport with the U.S. obligations under the INA.

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[85] *Id.* at 3.

[86] *See id.* at 18. Noting that the waitlist process was carried out in a haphazard way with various entities keeping lists as to the order in which an asylum seeker could hope to make their claims. A federal district court judge in the Southern District of California found that the metering practice violated the APA and the Due Process Clause because the INA requires the government to process asylum seekers at the border, without exception. *See* Al Otro Lado, Inc. v. Mayorkas, No. 17-cv-02366, 2021 WL 3931890, at *18 (S.D. Cal. Sept. 2, 2021).

[87] Agreement on Cooperating Regarding the Examination of Protection Claims, Guat.-U.S., July 26, 2019, T.I.A.S. No. 191115 (entered into force Nov. 15, 2019).

[88] *DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement*, U.S. DEP'T OF HOMELAND SEC. (Dec. 29, 2020), https://www.dhs.gov/news/2020/12/29/dhs-announces-guatemala-el-salvador-and-honduras-have-signed-asylum-cooperation [https://perma.cc/HYD5-HB99].

[89] Immigration and Nationality Act 208, 8 U.S.C. § 1158(a)(2)(A) (2018).

[90] *Id.*

[91] *Id.*

In addition to the known perilous conditions facing asylum-seekers who were forced to remain in Mexico, the U.S. adjudication system exacerbated this danger, directly placing asylum seekers at heightened risk.[92] For the very small number of asylum seekers who managed to access the U.S. asylum regime, the Attorney General simultaneously churned out an unprecedented number of decisions to dramatically narrow the substantive law in this area.[93] Finally, the Department of Homeland Security promulgated new regulations to narrow the possibility of asylum, especially for those fleeing gang or domestic violence or harm by other non-government actors.[94]

II. ROCK, PAPER, SCISSORS: WHY PAPER PREVAILED OVER INTERNATIONAL HUMAN RIGHTS AND DOMESTIC LEGAL OBLIGATIONS

The obligation to offer protection to those fleeing persecution or torture is firmly established as a matter of international and domestic law. Under international law, the Refugee Convention and Convention against Torture prohibit returning a person to a country where they would be persecuted on account of their race religion, nationality, political opinion, or membership in a particular social group,[95] or tortured for any reason.[96] The United States ratified both Conventions

[92] For example, in Laredo, Texas, asylum seekers who were waiting in Mexico were given early morning court appearances in the U.S. In order to be in court early in the morning, asylum seekers had to line up at the bridge to access the U.S. border in the middle of the night. There are very few shelters for asylum seekers in Nuevo Laredo, on the other side of the U.S.-Mexico border. Due to the extraordinarily high crime rate and prevalence of gangs, these shelters have a policy against opening their doors during the night. This left asylum seekers with early morning hearings with no option other than to sleep on the street the night before so that they could line up in time to cross the border, clearly putting themselves at heightened risk of harm. Moreover, the U.S. physically returned the asylum-seekers to Mexico to the same spot at the same time each day, resulting in frequent kidnappings and attacks. For similar accounts, see *Publicly Reported Cases of Violent Attacks on Individuals Returned to Mexico Under the "Migrant Protection Protocols"*, HUMAN RIGHTS FIRST (Feb. 19, 2021), https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks2.19.2021.pdf [https://perma.cc/2WT3-LT45].

[93] *See, e.g.*, L-E-A-, 27 I & N Dec. 581 (A.G. 2019) (limiting family as a cognizable social group); A-B-, 27 I & N Dec. 316 (A.G. 2018) (narrowing the ability for victims of domestic violence or gang-based harm to qualify for asylum).

[94] *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (June 15, 2020) (to be codified at 8 CFR pts. 208, 235, 1003, 1208, 1235).

[95] Refugee Convention, *supra* note 25.

[96] G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

and Congress enacted legislation to implement the U.S.'s corresponding obligations into domestic law.[97] Furthermore, Article 14 of the Universal Declaration on Human Rights sets forth a right to seek asylum.[98]

Notwithstanding this firm legal footing, the U.S., and other large refugee-receiving nations, have been actively involved in externalized border enforcement measures aimed at undermining the right to seek protection. This Section explores the human rights and domestic legal obligations that govern the U.S.'s refugee policies and the three underlying issues that weakened what was intended to be a robust protection regime. First, international human rights law is premised on the State as the guardian of rights. Second, the Refugee Protection Regime is based in part on notions of charity rather than duty. Third, externalized border enforcement measures play into historical racism in immigration enforcement, particularly as applied to geographic and demographic targets.

A. The State as Guardian of Rights

After the Second World War, renowned political theorist Hannah Arendt eloquently spoke of "the right to have rights"[99] and was at the forefront of a human rights regime that tied human rights to the State. The refugee protection and human rights model that developed is based on the idea that States are only obligated to uphold the human rights of individuals within their borders and under their jurisdiction. The problem with human rights being dependent on a State entity is that it has led to a world order in which nations block access to their territory in order to evade human rights obligations.[100] Specifically for those in need of surrogate State protection after fleeing danger, States have undertaken an array of activities aimed at keeping asylum seekers

[97] G.A. Res. 39/46, *supra* note 96; Refugee Convention, *supra* note 25. For domestic legislation, see Refugee Act, *supra* note 27.

[98] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[99] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (San Diego: Harcourt Books, 1994).

[100] *See* Asher Hirsch & Nathan Bell, *What Can Hannah Arendt Teach Us About Today's Refugee Crisis?*, UNIV. OF OXFORD FAC. OF L.: BORDER CRIMINOLOGIES BLOG (Oct. 10, 2017), https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/10/what-can-hannah [https://perma.cc/X6PQ-TRSA].

outside of their territories.[101] This paradigm shift was aptly described as a move from "refugee protection" to "border protection."[102]

Moreover, the traditional notion of statehood itself is outdated. States now outsource significant public functions to private entities. With the internet, globalization, and the rise of companies as significant economic players, the role of States is now different than that which existed when the State was placed at the center of protection obligations under international law.[103]

B. Can Charity Undermine Legal Duty?

Moreover, States often behave as if protecting refugees is more of a philosophical, ethical, or religious duty than a legal obligation. They approach protection of foreigners as an act of mercy or charity to be extended more generously when times are good and to be retracted during times of economic, national security, or health-based crisis. Although the legal regime has codified refugee protection and many human rights norms, the evolution from charity to right continues to impact how foreigners are viewed in society and how protection obligations are interpreted. As the philosopher Heidrun Friese noted, "[h]ospitality, considered primarily as a human virtue grounded in religious conviction — an ethical and moral commandment, is increasingly incorporated into the spheres of law and jurisdiction, political deliberation, public administration, systems of welfare, and policing."[104] In the context of immigration, this evolution of hospitality from a holy commandment to a lawful right and a duty to accommodate the stranger, also defines membership and demarcates the status of strangers and aliens. This includes "the tensions between membership and exclusion, hospitality and hostility, closeness and distance, equality and asymmetry."[105]

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101 *Id.*

102 Ascher Lazarus Hirsch & Nathan Bell, *The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime*, 18 HUM. RTS. REV. 417, 422 (2017) (quoting JENNIFER HYNDMAN & ALISON MOUNTZ, ANOTHER BRICK IN THE WALL? NEO-*REFOULMENT* AND THE EXTERNALIZATION OF ASYLUM BY AUSTRALIA AND EUROPE 253 (2008)).

103 *See, e.g.*, Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003) (noting that the advent of national and transnational private actors in public services has called into question the state-centric notion of protection obligations under international law).

104 Heidrun Friese, *The Limits of Hospitality*, 32 PARAGRAPH 51, 57 (2009).

105 *Id.*

The externalization of borders and criminalization of immigrants converged to create a lens of illegality that is used to view immigrants. This lens transcends our border and extends all the way into countries of transit and of origin.[106] Once asylum seekers have been villainized as criminal lawbreakers, it becomes easier for States to play upon the public's diminished sense of duty or hospitality.

C. The Racial Impulses Motivating Invisibility

The racial impulses of secreting away refugees have deep historical roots. For example, Australia's current policies requiring refugees arriving by sea to remain offshore for processing resonates with its historical White Australia policy.[107] Similarly, in the U.S., there is a long history of removing immigrants of color from sight, and often, from U.S. soil. Chinese were barred from immigrating to the U.S. from the 1880's until after World War II.[108] All Asians were deemed ineligible for citizenship from 1790 through 1952.[109] The immigration law contained

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[106] *See, e.g.*, Cecilia Menjívar, *Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization*, 10 ANN. REV. L. & SOC. SCIS. 353, 363 (2014).

[107] *See* Behrouz Boochani, Opinion, *White Australia Policy Lives on in Immigrant Detention*, N.Y. TIMES (Sept. 20, 2020), https://www.nytimes.com/2020/09/20/opinion/australia-white-supremacy-refugees.html [https://perma.cc/57RJ-43M5]. The White Australia policy was in effect from 1901-1973 and prohibited non-White people from immigrating to Australia. Australia now pays the country of Papua New Guinea to detain its asylum seekers who are intercepted at sea. *Id.*

[108] *See, e.g.*, Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58. Passed by the 47th Congress, this law suspended immigration of Chinese laborers for ten years; permitted those Chinese in the United States as of November 17, 1880, to stay, travel abroad, and return; prohibited the naturalization of Chinese; and created the section 6 exempt status for teachers, students, merchants, and travelers. These exempt classes would be admitted upon presentation of a certificate from the Chinese government. *Id.* Ten years later, Congress passed the Act to Prohibit the Coming of Chinese Persons into the United States of May 1892 27 Stat. 25 ("Geary Act"). This Act allowed Chinese laborers within the U.S. to travel to China and reenter the United States, but its provisions were otherwise more restrictive than preceding immigration laws. *See id.* This Act required Chinese to register and secure a certificate as proof of their right to be in the United States. Imprisonment or deportation were the penalties for those who failed to have the required papers or witnesses. *Id.* During World War II, when China and the United States were allies, President Franklin D. Roosevelt signed an Act to Repeal the Chinese Exclusion Act, to Establish Quotas, and for Other Purposes, 57 Stat. 600-1 (1943). This Act of December 13, 1943, also lifted restrictions on naturalization. *Id.* However until the Immigration Act of October 1965, 79 Stat. 911, numerous laws continued to have a restrictive impact on Chinese immigration.

[109] *See* Naturalization Act of 1790, Pub. L. No. 1-3, ch. 3, 1 Stat. 103 (repealed 1975) (limiting citizenship to "free White persons").

race-based quotas until the civil rights movement of the 1960's put pressure on Congress to remove them.[110] During World War II, in retaliation for the bombing of Pearl Harbor by the Japanese, the U.S. forced approximately 120,000 Japanese Americans out of their homes and off of their property and into internment camps.[111] During the Great Depression, the U.S. forced more than one million Mexicans and Mexican Americans living in the U.S. over the southern border and into Mexico.[112] Although the immigration laws in the U.S. may appear facially neutral today, immigrants of color are the primary population subject to detention and deportation.[113]

The recent efforts to prohibit immigrants from accessing U.S. territory at the southern border must be analyzed within this context of race-based animus permeating immigration law, and particularly evident in externalization efforts.[114] Such racially motivated undertones are equally evident in the externalization efforts at the southern border of the European Union.[115]

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[110] Even though the explicit race-based quotas were removed from the immigration law, it continues to have a disparate impact on racial minorities and people of color continue to be disproportionately excluded from entering the U.S. *See, e.g.*, KEVIN JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 90 (2007).

[111] President Franklin Roosevelt signed Executive Order 9066 on February 19, 1942, after the bombing of Pearl Harbor in WWII. This Order authorized U.S. agents to forcibly inter people of Japanese descent in isolated camps. Exec. Order 9066, 28 C.F.R § 74.3 (1942).

[112] FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (Univ. of N.M. Press rev. ed. 2006) (noting that more than sixty percent of those subjected to forced repatriation to Mexico were U.S. citizens).

[113] Former President Trump also referred to immigrants from non-white countries as "shit hole countries" or "rapists and murderers." Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/ [https://perma.cc/E4W4-7YLZ]; Ali Vitali, Kasie Hunt and Frank Thorp V, *Trump Referred to Haiti and African Nations as 'Shithole' Countries*, NBC NEWS (Jan. 11, 2018, 2:19 PM PST), https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946 [https://perma.cc/DMC6-9RPR].

[114] *See, e.g.*, Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 769 (2000) (noting as just one example of racism in border enforcement that historically ". . . the Border Patrol apprehend[ed] about 91% of Mexican illegal immigrants but only 28% of illegal Canadian immigrants." As Ogletree concludes, "even within a policy context that prioritizes border enforcement, that enforcement is applied selectively, with greater resources and effort being expended to patrol the Mexican border").

[115] Perhaps the clearest evidence of this was Colonel Gaddafi of Libya's threat that, "[t]omorrow Europe might no longer be European, and even black, as there are millions

For example, the European Court of Human Rights ("ECHR") has countenanced Morocco and Spain's race-based hostility toward Sub-Saharan African migrants attempting to seek asylum protection in Spain. In N.D. and N.T. v. Spain, the ECHR held that Spain's action in immediately expelling Sub-Saharan asylum seekers without an opportunity to seek protection did not violate the European Convention on Human Rights' prohibition on collective expulsion or the right to an effective remedy.[116] The ECHR found that lawful opportunities to seek protection existed such that the asylum seekers were to blame for endangering themselves by attempting to enter Spanish territory unlawfully.[117] In reaching this unanimous decision, the ECHR ignored the well-documented reality that Sub-Saharan African asylum seekers are routinely arrested and abused when attempting to seek protection in Morocco, thus making the ability to seek asylum through a lawful means illusory.[118] Moreover, Morocco's actions in arresting and forcibly pushing back Sub-Saharan African migrants approaching the border with Spain is pursuant to its cooperation agreement with Spain.[119] In

who want to come in . . . . We don't know what will happen, what will be the reaction of the white and Christian Europeans faced with this influx of starving and ignorant Africans . . . . We don't know if Europe will remain an advanced and united continent or if it will be destroyed, as happened with the barbarian invasions." *Gaddafi Wants EU Cash to Stop African Migrants*, BBC (Aug. 31, 2010), https://www.bbc.com/news/world-europe-11139345 [https://perma.cc/BW9T-9WJW]; *see also* John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. REV. 1768, 1771 (2021) ("[T]he European Union's (EU) borders today are nothing less than a reiteration of the global color line; they 'must be understood as racial borders.'" (quoting Nicholas De Genova, *Europe's Racial Borders*, MONITOR RACISM (Jan. 2018), http://monitoracism.eu/europes-racial-borders%20%20 [https://perma.cc/692B-HETH])).

116 N.D. v. Spain, App. Nos. 8675/15, 8697/15, ¶ 239 (Feb. 13, 2020), http://hudoc.echr.coe.int/eng?i=001-201353 [https://perma.cc/B9BS-R4T6].

117 *Id.* at ¶ 242.

118 *See Pushbacks in Melilla:* ND and NT v. Spain, FORENSIC ARCHITECTURE (June 15, 2020), https://forensic-architecture.org/investigation/pushbacks-in-melilla-nd-and-nt-vs-spain [https://perma.cc/7GD9-2TFR] ("According to witness testimony, the consulate in Nador [Morocco] is not accessible to Black Sub-Saharan nationals and there were no applications by Sub-Saharan nationals at any Spanish embassies in Morocco between 2015 and 2018.").

119 *See The EU is Boosting Its Support to Morocco with New Programmes Worth €389 Million*, EUR. COMM'N (Dec. 20, 2019), https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6810 [https://perma.cc/RQA3-6SR4]. In 2019 alone, Morocco claims to have stopped 70,000 migrants from entering Spain. *Tarajal and the Legacy of Racism in Spain's Migration System*, PICUM (Feb. 8, 2021), https://picum.org/tarajal-and-the-legacy-of-racism-in-spains-migration-system/ [https://perma.cc/BAM4-LYJA]; *see also* Olivia Sundberg Diez, *What You Don't Hear About Spain's Migration Policy*, EU OBSERVER, (Feb. 13, 2020, 07:07 AM) https://euobserver.com/opinion/147429?fbclid=IwAR2iWRXjPwLpKQ53hu8aVG9n5DZrz9w-KcCoi3I0jd9gH3yKj-HaDTHb4kE

language that resonates with American jurisprudence, the ECHR turned a blind eye to Spain's knowledge and encouragement of Morocco's efforts to deter Sub-Saharan asylum seekers from reaching Spain's borders.[120] By failing to acknowledge the interrelationship between Spain and Morocco when it comes to externalized border controls, as well as the racism that makes seeking asylum illusory for Black migrants in Morocco, the ECHR undermined the guarantee of human rights protection at the border.

Australia and the U.S. similarly have a history of engaging in extraterritorial efforts aimed at disappearing asylum-seekers. Both nations target third countries with dismal human rights records and vulnerability to financial incentives to carry out the wealthier nations' immigration enforcement demands. Both nations engage in externalization policies that embody cruelty by design. In the case of Australia, it has contracted with Manus Island (and Nauru) to detain asylum seekers apprehended at sea. The deplorable conditions of detention are intentional, aimed at deterring others from attempting to seek asylum in Australia via boats.[121] As one visitor to Nauru recounts,

> These centers sit beyond the public's awareness. Reporters are banned from entering them and are unlikely to receive a visa anyway. All complaints or concerns regarding operations within the center are directed to the DIBP. There is no independent authority overseeing procedures in Nauru or Manus Island. Because the Australian government ruled that the Australian Human Rights Commission's jurisdiction does not extend beyond the country's borders, the commission has been barred from the offshore detention centers. The only way for Australians to know what is happening inside the centers is if

[https://perma.cc/F3FT-JUFY] (noting that Morocco is able to do so, in part, by conducting regular raids against sub-Saharan migrants in camps near Ceuta and Melilla) ("These raids have become more frequent and increasingly violent, leading to at least one recent reported death. In earlier incidents, the Moroccan navy has shot at people attempting to sail to Spain, killing a young Moroccan woman. As with Libya, the argument that Morocco is a safe country, and a reliable recipient of EU funding is becoming harder to uphold.").

120 *See Pushbacks in Melilla:* ND and NT v. Spain, *supra* note 118.

121 *See, e.g.*, Mark Isaacs, *The Intolerable Cruelty of Australia's Refugee Deterrence Strategy*, FOREIGN POL'Y (May 2, 2016, 4:08 PM), https://foreignpolicy.com/2016/05/02/australia-papua-new-guinea-refugee-manus-nauru/ [https://perma.cc/2LKN-NWM3] ("In Australia, deterrence is justified as "humanitarian" because it supposedly saves lives at sea. As a consequence, willful atrocity has become the status quo. The inhumane treatment at the detention centers is no accident; it's exactly the point. Cruelty and isolation have become Australia's strategy.").

> workers speak out. But these workers face up to two years in jail for breaching mandatory non-disclosure agreements. Luckily, whistle-blowers — social workers, doctors, security guards, lawyers, public servants — continue to denounce the awful practices.[122]

The U.S., like Australia, has relied on detaining asylum seekers outside of its borders, or locking them away within, because the lack of transparency has allowed the government to proceed with minimal attention to guaranteed rights. Asylum seekers in detention are dramatically less likely to have access to counsel, and thereby significantly more likely to be deported.[123] For those who are denied access to the country, it is that much more likely that their rights will be violated. As with the war on terror, the very purpose of the Guantanamo detention regime was to put prisoners beyond the reach of lawyers, oversight, and the law.[124] Just like companies who send production to less developed nations to avoid worker protection laws,[125] or the U.S. practice of extraordinary rendition where prisoners are tortured in other countries, it is clear that liability that only attaches within the U.S. creates perverse incentives for externalization regimes. While the Biden Administration is trying to end the MPP and has enacted cooperation agreements with northern triangle nations, it's essential to understand the role of race and invisibility that brought the U.S. to the precipice of near total abandonment and evisceration of refugee protection. It is also essential to re-envision liability in such a way that there is no longer an incentive to externalizing borders.

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[122] *Id.*

[123] *See, e.g.*, LORI A. NESSEL & FARRIN R. ANELLO, DEPORTATION WITHOUT REPRESENTATION: THE ACCESS-TO-JUSTICE CRISIS FACING NEW JERSEY'S IMMIGRANT FAMILIES (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805525 [https://perma.cc/6ADU-8M5B] (finding that, in New Jersey, only thirty-three percent of noncitizens who were detained throughout their removal proceedings were represented by counsel, as compared to seventy-nine percent of noncitizens who were never detained. Among people who were detained throughout their proceedings, those with counsel avoided deportation forty-nine percent of the time, whereas those who were unrepresented avoided removal only fourteen percent of the time. This disparity also paralleled that found in a Northern California Report).

[124] JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 1-2, 203-04 (2006).

[125] *See* Robert E. Lighthizer, Opinion, *The Era of Offshoring U.S. Jobs is Over*, N.Y. TIMES (May 11, 2020), https://www.nytimes.com/2020/05/11/opinion/coronavirus-jobs-offshoring.html [https://perma.cc/PP7T-NATP] (opining that the pandemic and tougher trade policies are ending the era in which "[c]ompanies could avoid U.S. labor and environment standards by manufacturing abroad while still enjoying unfettered, duty-free access to our market").

1. Externalizing a Historically Racialized Border

Before turning to the treatment of asylum seekers at the southern border, it is important to take a step back and examine the racialized nature of the U.S./Mexico border itself. The fear of asylum seekers flooding the southern border is layered onto and inherently connected with the historical racialized nature of the southern border, dating all the way back to the U.S.'s annexation of northern Mexico.

As articulated by Senator John Calhoun during congressional hearings regarding the annexation of northern Mexican territory by the U.S. in 1848,

> [W]e have never dreamt of incorporating into our Union any but the Caucasian race-the free white race. To incorporate Mexico, would be the very first instance of the kind of incorporating an Indian race; for more than half the Mexicans are Indians . . . Ours, sir, is the Government of a white race . . . . And yet it is professed and talked about to erect these Mexicans into a Territorial Government and place them on equality with the people of the United States. I protest utterly against such a project. Are we to associate with ourselves as equal, companions, and fellow citizens, the Indians and mixed race of Mexico? Sir, I should consider a thing as fatal to our institutions.[126]

Set against this backdrop, immigration policy reinforced the notion that the southern border was not just a geographical one but also a cultural and racial boundary. To cross it was to embody illegality.[127] This sense of illegality and danger has played out in different ways over the years. As has been noted, lynching was initially used as part of an anti-immigrant initiative to maintain a White America.[128] In another example, for decades, U.S. health authorities used toxic chemicals and

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[126] CONG. GLOBE, 30th Cong., 1st Sess. 98 (1848).

[127] *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 67 (William Chafe et al. eds., 2004).

[128] *See* KEN GONZALES-DAY, LYNCHING IN THE WEST: 1850-1935 (2006); Alex Mikulich, *The Hidden Border of Whiteness and Immigration*, JESUIT SOCIAL RSCH. INST., https://jsri.loyno.edu/hidden-border-whiteness-and-immigration?q=hidden-border-whiteness-and-immigration (last visited Oct. 10, 2021) [https://perma.cc/H877-UCZK] ("Lynching cannot be marginalized as an isolated Southern practice. Lynching was practiced *first* against Mexican, Native American, and Chinese immigrants in the West, and then migrated East where it was used to enforce Jim Crow.").

shaved heads to "delouse" Mexicans seeking to cross the border into the United States.[129]

As one such worker who crossed the border to work each day recounted,

> At the customs bath by the bridge . . . they would spray some stuff on you. It was white and would run down your body . . . they would shave everyone's head . . . men, women, everybody. They would bathe you again with cryolite . . . The substance was very strong.[130]

Although the U.S. health authorities initially justified this degrading and dangerous treatment of Mexicans as necessary to stop the feared spread of lice and typhoid, the process continued for decades, well after the typhoid fear had subsided.[131]

By 1924, amidst the racial animus that animated U.S. immigration policy, Congress enacted the Border Patrol Act. This Act created Border Patrol agents vested with the authority to arrest without warrant "any alien who, in his presence or view, is entering or attempting to enter the United States in violation of any law, or regulations made in pursuance of law, regulating the admissions of aliens, and to take any such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States."[132] Indeed, the Border Patrol has embodied a culture of racism throughout its history.[133] Many agents came from organizations with a history of racial violence and brutality, including the Ku Klux Klan and the Texas Rangers.[134] Over the years, there have been consistent reports of agents using racial slurs, sexual comments,

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[129] NGAI, *supra* note 127.

[130] DAVID DORADO ROMO, RINGSIDE SEAT TO A REVOLUTION, AN UNDERGROUND CULTURAL HISTORY OF EL PASO AND JUÁREZ: 1893-1923, at 237 (2005); Weekend Edition Saturday, *The Bath Riots: Indignity Along the Mexican Border*, NPR, at 5:08 (Jan. 28, 2006, 9:28 PM ET), https://www.npr.org/templates/story/story.php?storyId=5176177 [https://perma.cc/L9GF-GPUN].

[131] ROMO, *supra* note 130 at 243.

[132] Asia-Pacific Economic Cooperation Business Travel Cards Act of 2017, Pub. L. No. 115-79, § 4(a), 131 Stat. 1260 (codified at 6 U.S.C. § 211(c) (2018)); Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 802(a), 130 Stat. 199 (codified at 6 U.S.C. § 211 (2018)); Homeland Security Act of 2002, Pub. L. No. 107-296, § 411, 116 Stat. 2179 (codified at 6 U.S.C. § 211 (2018)).

[133] KATY MURDZA & WALTER EWING, AMERICAN IMMIGRATION COUNCIL, THE LEGACY OF RACISM WITHIN THE U.S. BORDER PATROL (2021), https://www.americanimmigrationcouncil.org/research/legacy-racism-within-us-border-patrol [https://perma.cc/D532-8TDF].

[134] *Id.*

and other offensive language.[135] Multiple lawsuits and studies have documented the Border Patrol's use of racial profiling and agents have maintained connections to the white supremacist movement.[136] The externalization policies impacting asylum seekers must be understood within this historical context of racism at the border.

2. Detention and Invisibility

Although the Trump Administration came close to entirely dismantling the refugee protection regime at the southern border and took the systemic racism within the immigration regime to an extreme, the groundwork was laid well-before the Trump Administration. To take just one example, Sheriff Joe Arpaio prided himself on how harshly he treated immigrants in Arizona.[137] He proudly referred to one of the detention centers built in the middle of the desert as "a concentration camp."[138] And for years, Democrats and Republicans alike, supported the mass criminalization and detention of immigrants who posed no danger to society.[139]

John Sandweg, acting head of ICE during the Obama Administration, has expressed remorse about how many people ICE detained during his tenure and now advocates for alternates to detention for the vast majority of undocumented immigrants who pose no threat to public safety.[140] In an insightful admission into the politics of detention,

[135] *Id.*

[136] *Id.*

[137] *See, e.g.*, Hector E. Sanchez, Opinion, *A Torturer on U.S. Soil: Arizona's Sheriff Arpaio*, NPR (Aug. 27, 2009, 1:54 PM ET), https://www.npr.org/templates/story/story.php?storyId=112296948 [https://perma.cc/G9KR-S9WC] (noting how Sheriff Arpaio imprisoned undocumented workers, most of whom were not yet convicted of a crime but were awaiting trial. When his mass imprisonment of undocumented workers outpaced prison capacity, he built tents in the middle of the Arizona desert, where temperatures can reach up to 130 degrees. He boasted that, by depriving detained immigrants of basic necessities and cutting the cost of each meal to thirty cents, "it costs more to feed the dogs." On many occasions, he also marched hundreds of undocumented migrants, chained together, through the streets and the desert. On one of these occasions, he forced detained immigrants to march in front of the media wearing only pink underwear and flip-flops).

[138] Jeremy Raff, *'So What? Maybe It's a Concentration Camp*,' ATLANTIC (Feb. 23, 2018), https://www.theatlantic.com/politics/archive/2018/02/how-joe-arpaio-inspired-the-immigration-acrackdown/554027/ [https://perma.cc/J8MV-YA8G].

[139] *See id.*

[140] *Id.* He now suggests that detention should be limited to the approximately 5,000 actual "public-safety threats." For "your run-of-the mill undocumented immigrant," however, Sandweg now prefers "safer, more humane ways of doing this that are no less tough," like ankle-monitoring technology and supervised-release programs. *Id.*

Sandweg notes that "the public likes to hear 'detention,' It sounds tough . . . It's billions of dollars for a talking point."[141] Indeed, as Cesar Cuahtemoc Garcia Hernandez points out, during Sandweg's leadership of ICE, its officers detained approximately eighty percent of the migrants they apprehended, notwithstanding that the agents had the legal authority to release them in most cases.[142]

As Cuauhtemoc Garcia Hernandez notes, using physical relocation as a way to punish those who are deemed undesirable has deep roots in both the criminal justice and immigration contexts.[143] In pre-colonial days, private companies in England shipped serious offenders across the Atlantic.[144] Meanwhile, legal disapproval of migrants was effectuated through forcibly relocating them.[145] Over time, imprisonment became the vehicle for removing offenders from society, and forced confinement took hold as society's way of expressing disapproval towards migrants.[146]

In the context of the growing detention system, Cuauhtemoc Garcia Hernandez notes that "[w]ithout cutting off immigration prisons at their root, they will continue to resurrect themselves.[147] So long as the federal government is committed to a security-first philosophy that imagines migrants as dangerous outsiders—aliens—who pose an existential threat to the nation itself, then it makes all the sense in the world that it will turn to the power of confinement."[148]

III. EFFORTS TO CHALLENGE AND SHED LIGHT ON THE INVISIBILITY REGIME

A. Challenging the MPP

Among the various border externalization policies, the MPP seemingly presents the most straightforward case for holding the U.S. responsible for harm that occurs beyond its physical borders. Under the MPP, the U.S. took the affirmative action of exercising its jurisdiction by placing asylum seekers into legal proceedings in the U.S. and then *de*

141 *Id.*

142 CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 123 (2019).

143 *Id.* at 148.

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.* at 147.

148 *Id.*

facto detaining them on the other side of the border. Under existing domestic law remedies, the U.S.'s actions arguably violated the due process and equal protection guarantees of the Fifth Amendment, the statutory right to seek asylum and to have a pro bono lawyer involved, the Administrative Procedures Act ("APA") prohibition on arbitrary and capricious government action,[149] and the INA's statutory scheme for removal procedures. Even so, the legal challenges yielded mixed results and the MPP remains in place as of this writing.[150] These uneven outcomes suggest that the legality of the invisibility regime remains very much unsettled, and a number of decisions suggest that courts could sanction similar efforts in the future.

Specifically, in federal court litigation, asylum seekers and advocacy groups claimed that the MPP (a) exceeded the government's legal authority to return noncitizens to contiguous foreign territory in violation of 8 C.F.R. § 235.3(d), which limits applications of that authority to noncitizens who arrived in the U.S. at ports of entry; (b) violated the APA as a substantive rule issued without providing a notice and comment period; (c) was arbitrary and capricious under the APA because, among other reasons, its true purpose was to endanger all asylum seekers (rather than furthering its stated goal of discouraging fraudulent claims and protecting legitimate asylum seekers); (d) contravened the Equal Protection Clause in that the MPP was motivated

[149] Pursuant to the APA, a reviewing court "shall set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law." 5 U.S.C. § 706(2) (2018).

[150] MPP proceedings were indefinitely suspended as part of a rarely used health emergency power, leaving thousands of asylum seekers in danger in Mexico. *See A Guide to Title 42 Expulsions at the Boarder, supra* note 9, at 1. Upon assuming office, President Biden directed the DHS to design a plan for terminating the MPP and the agency formally ended the program on June 1, 2021. https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [https://perma.cc/2W2R-7JF6]. However, on August 13, 2021, the U.S. District Court for the Northern District of Texas determined in *Texas v. Biden* that the June 1, 2021, memo was not issued in compliance with the APA and INA and ordered DHS to "enforce and implement MPP in good faith." *See* Texas v. Biden, No. 2:21-cv-067, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021). On October 29, 2021, after a comprehensive review, the Secretary of Homeland Security issued a new memorandum terminating MPP, which DHS will implement as soon as practicable after issuance of a final judicial decision to vacate the Texas injunction. Homeland Security, *Court Ordered Reimplementation of the Migrant Protection Protocols*, https://www.dhs.gov/migrant-protection-protocols (last visited Jan. 13, 2022) [https://perma.cc/FB87-TZZS]. But until then, DHS is continuing to comply with the Texas injunction requiring good-faith implementation and enforcement of the MPP. *Id.*

by animus and discriminatory intent against Central Americans and other people of color; (e) impermissibly exposed asylum seekers to persecution in Mexico, in violation of the U.S. government's duty of non-refoulement; and (f) violated the statutory and constitutionally guaranteed right to counsel.[151]

Notwithstanding the strength of these arguments and the success the plaintiffs had initially in obtaining a nationwide injunction of the MPP before the Ninth Circuit Court of Appeals, the Supreme Court swiftly lifted this injunction and was scheduled to hear arguments in the case in February.[152] The Biden Administration acted quickly to end the MPP, and the Supreme Court agreed to the Biden Administration's request to remove the case from its calendar, avoiding a final decision from the highest court on the legality of the MPP.[153] However, Texas brought suit to challenge the termination of the MPP and secured an injunction which the Supreme Court declined to stay, resulting in a mandate to reinstitute the MPP.[154] An examination of the litigation highlights the vulnerability of the U.S. protection regime and the difficulties in relying solely on existing constitutional, statutory, and administrative law remedies.[155]

In *Innovation Law Lab v. Nielsen,* a District Court Judge in the Northern District of California issued a preliminary injunction against the MPP, finding that the plaintiffs were likely to prevail in showing that the MPP failed to adhere to the requirements of the APA.[156] While

[151] Bollat Vasqeuz v. Wolf, No. 1:20-CV-10566-IT, 2020 WL 1821825, at *1 (D. Mass. Apr. 10, 2020).

[152] Wolf v. Innovation L. Lab, 140 S. Ct. 1564 (2020) (mem.) (Only Justice Sotomayor would have denied the government's application for a stay of the injunction. The brief order did not include any reasoning. However, the U.S. Solicitor General argued that allowing the injunction to take effect would lead to tens of thousands of migrants attempting to enter the U.S., creating an "immediate and unmanageable strain" on the U.S. immigration system).

[153] Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021).

[154] State v. Biden, No. 21-CV-067-Z, 2021 WL 3603341, at *1 (N.D. Tex. Aug. 13, 2021). A District Court Judge in Texas found that the termination of the MPP was arbitrary and capricious in violation of the APA. *Id.* at *22. The District Court enjoined the termination of the MPP and the U.S. Supreme Court refused to grant a stay of that injunction. Biden v. Texas, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021); *Biden*, 2021 WL 3603341, at *27-28. The injunction requires the Administration to reinstitute the MPP at the southern border while the case proceeds on the merits before the Fifth Circuit Court. *Id.* at *27.

[155] *Id.*

[156] Innovation L. Lab v. Nielsen, 366 F. Supp. 3d 1110, 1114-15 (N.D. Cal. 2019) ("[T]his injunction turns on the narrow issue of whether the MPP complies with the Administrative Procedures Act ("APA"). The conclusion of this order is only that plaintiffs are likely to show it does not, because the statute DHS contends the MPP is

the injunction was initially stayed by a panel of the Ninth Circuit Court of Appeals before it could take effect,[157] a different panel of the Ninth Circuit Court of Appeals reinstated the District Court's injunction against the MPP.[158] The panel agreed with the District Court that the MPP was inconsistent with both (a) the clear statutory language regarding which groups of arriving noncitizens could be returned to a contiguous territory; and (b) the government's longstanding and consistent past practice in this regard.[159] According to the panel, because the plaintiffs were "arriving aliens," under the statute, the applicable statutory provision did not authorize their return to a contiguous territory.[160]

The panel also held that the MPP violated the binding nonrefoulement provisions of the United Nations Refugee Convention and United Nations Protocol on Refugees, as agreed to by the U.S. and codified through 8 U.S.C. § 1231(b).[161] The plaintiffs pointed to specific aspects of the MPP that undermined the U.S. duty not to return someone to a country where their life or freedom would be threatened on account of a protected ground.[162]

designed to enforce does not apply to these circumstances, and even if it did, further procedural protections would be required to conform to the government's acknowledged obligation to ensure aliens are not returned to unduly dangerous circumstances."). As the Court clearly articulated, its ruling did not address whether Congress could authorize DHS to return asylum seekers to Mexico pending final determinations as to their admissibility, or whether DHS might be able to carry out the MPP in a legal manner should it provide adequate safeguards. *Id.* at 1115.

157 Innovation L. Lab v. McAleenan, 924 F.3d 503, 158 (9th Cir. 2019).

158 Innovation L. Lab v. Wolf, 951 F.3d 1073, 1095 (9th Cir. 2020).

159 *Id.* at 1094-95. *Compare* 8 U.S.C. 1225(b)(1) (2018) (describing the inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled), *with* 8 U.S.C. 1225(b)(2) (2018) (describing the inspection of other aliens).

160 *Wolf*, 951 F.3d at 1084. The panel relied on both a plain meaning reading of § 1225(b) and the Government's longstanding and consistent practice to hold that a § (b)(1) applicant may not be "returned" to a contiguous territory under § 1225(b)(2)(C), which is a procedure specific to a § (b)(2) applicant. *Id.*

161 *Id.* at 1081-82. The U.S. is obligated not to return anyone in need of protection to a nation where their life or liberty would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group. *Id.* at 1088.

162 Specifically, the MPP imposed a much higher burden of proof on asylum seekers at their initial interviews than is required for those facing expedited removal. *Id.* at 1088-89 (comparing the "more likely than not" standard for MPP with the much lower "credible fear" standard for those in expedited removal). In addition, asylum seekers in MPP had to volunteer their fear of return as compared to the role of the asylum officer in assessing fear during a credible fear interview under Expedited Removal. *Id.* The MPP also deprived asylum seekers of procedural rights that are otherwise guaranteed to

While the government argued that the procedural protections within the MPP were sufficient to guarantee that the nonrefoulment obligations would not be violated, the panel rejected this notion. The panel pointed to a dearth of evidence to support the government's claims that (a) requiring asylum seekers to volunteer their fear of returning to Mexico was sufficient (as compared with an officer inquiring into the fear); (b) being returned to Mexico posed little danger; and (c) that any violence that returned aliens would face in Mexico was unlikely to be violence on account of a protected ground.[163] As for the remaining requirements for granting a preliminary injunction, the panel found a significant likelihood that the individual plaintiffs would suffer irreparable harm if the MPP were not enjoined; uncontested evidence in the record established that non-Mexicans returned to Mexico under the MPP risked substantial harm, even death, while they awaited adjudication of their applications for asylum. Finally, the panel concluded that the balance of factors favored plaintiffs.[164]

However, within approximately forty-eight hours, the U.S. Supreme Court stayed the Ninth Circuit injunction, leaving the MPP in place until the final hearing before the U.S. Supreme Court.[165] The Trump Administration then utilized the Covid pandemic to suspend all MPP hearings, leaving tens of thousands of asylum seekers who had been pushed back in indefinite limbo in perilous conditions in Mexico.[166] Even though President Biden acted to end the MPP shortly after assuming office, more than 60,000 asylum seekers who were already in limbo in the MPP remained in danger in Mexico.[167]

asylum seekers in removal proceedings (for example, advance notice of, and time to prepare for, the hearing with the asylum officer; the right to the assistance of a lawyer during the hearing; or the right to any review of the asylum officer's determination). *Id.*

[163] *Id.* at 1090.

[164] *Id.* at 1093. The panel did not reach the question as to whether the MPP violated the APA in that it was not promulgated as a formal rule with a notice and comment period. *Id.*

[165] The government argued that a stay was necessary to avoid the irreparable injury that would be caused by large numbers of asylum seekers being allowed to enter the U.S. (and disappearing) while their claims proceeded. Innovation L. Lab v. McAleenan, 924 F.3d 503, 510 (9th Cir. 2019). Notwithstanding the overwhelming evidence that asylum seekers appear for court proceedings, the Court granted the stay. *Id.* As noted *supra*, the case has since been removed from the calendar because the Biden Administration ended the MPP.

[166] AM. IMMIGR. COUNCIL, THE "MIGRANT PROTECTION PROTOCOLS" 1 (2021).

[167] In February 2021, DHS announced it would allow asylum seekers with active MPP cases waiting in Mexico to be processed and paroled into the United States so they could pursue their asylum claims. *DHS Announces Process to Address Individuals in*

The Department of Homeland Security ("DHS") policy of viewing asylum seekers as blame-worthy villains was on full display in this case. On a familiar note, the government argued that Congress intended to force asylum seekers to wait in Mexico because of their undesirability.[168] According to the government, the asylum seekers who arrived at the border without documentation or with fraudulent documentation were undesirable because they might have engaged in fraud to make it to the U.S. and seek safety.[169] According to DHS, Congress would not have wanted for this class of asylum seekers to be allowed into the country while other asylum seekers, specifically those addressed under another subsection of the INA, waited in Mexico.[170] The panel rejected and pointed out the absurdity of the government's argument since that subsection differs in that it includes those with controlled substance violations whom, the court concluded, Congress might have logically intended to remain in Mexico.[171] But the discussion as to which group of asylum seekers is more blameworthy and less desirable exposes what animated the government's tightening of immigration enforcement measures directed at asylum seekers.

Mexico with Active MPP Cases, DEP'T OF HOMELAND SEC. (Feb. 11, 2021), https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases [https://perma.cc/ET4C-FRNT]. By June 2021, DHS expanded eligibility to include other MPP asylum seekers who had their cases terminated or were removed en absentia. *DHS Announces Expanded Criteria for MPP-Enrolled Individuals Who Are Eligible for Processing into the United States*, DEP'T OF HOMELAND SEC. (June 23, 2021) https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing [https://perma.cc/ZG3E-5TFQ]. However, on August 24, 2021, the U.S. Supreme Court refused to stay an injunction from a lower court that found Biden's termination of the MPP did not comport with the requirements of the Administrative Procedures Act. Biden v. Texas, No. 21A21, 2021 WL 3732667 (Aug. 24, 2021). The high court's decision required the Biden administration to restart the program while its appeal continues to play out in court. *Id.* In another challenge to the MPP termination, the Fifth Circuit entered a permanent injunction requiring DHS to reinstate and maintain the MPP until Congress appropriates the necessary funding for DHS to detain all noncitizens subject to mandatory detention under section 1225 and until the agency adequately explained a future termination. Secretary Mayorkas issued a new more comprehensive termination memo on October 29, 2021, but the Fifth Circuit maintained its injunction. The Biden administration restarted the program in a more limited capacity in December 2021 and issued a new more comprehensive termination memo. It has again sought review by the Supreme Court. Biden v. Texas, 20 F.4th 928 (5th Cir. 2021), *petition for cert. filed*, 2021 WL 6206109 (U.S.) (No. 21-954).

168 Wolf v. Innovation L. Lab, 140 S. Ct. 1, 32 (2020).

169 *Id.* at 25, 32.

170 *Id.*

171 *Id.* at 32-34.

In another challenge to the MPP, *E.O.H.C. v. Secretary of DHS*, a similar government purpose is evident as it argued that the federal courts were precluded from reviewing challenges to the MPP until there was a final removal order.[172] In this challenge, a Guatemalan father and daughter argued, among other things, that returning them to Mexico as per the MPP separated them from their lawyer in violation of their constitutional and statutory right to counsel.[173] While the District Court dismissed all of the challenges on jurisdictional grounds, the Third Circuit reversed, finding that holding off on ruling on the challenges to the MPP would render them meaningless.[174] By doing so, the Circuit Court pierced through the government's invisibility regime. The Third Circuit's use of the "now or never doctrine" acknowledged the reality that awaiting a final removal order in Mexico in order to challenge the MPP itself would likely make judicial review illusory.[175]

Litigants also had some success with procedural due process and APA-based challenges to the MPP.[176] The INA guarantees a right to counsel in removal proceedings, as long as there is no expense to the government or undue delay. Under the MPP, this right was routinely undermined. Indeed, ninety-eight percent of MPP asylum seekers went forward without counsel. And, ninety-eight percent of MPP asylum seekers were ordered deported.[177]

The statutory right to seek asylum also includes a host of rights that are essential in order to exercise that right. For example, there is a statutory right to counsel (at no expense or unreasonable delay to the government); a right to gather and present evidence; a right to be

[172] E.O.H.C. v. Sec'y of U.S. Dep't of Homeland Sec., 950 F.3d 177, 181-82 (3d Cir. 2020).

[173] *Id.* They also argued that the MPP violated the rights to be free from torture under the U.N. Convention Against Torture and persecution on account of a protected ground as per the Refugee Convention and Protocol. *Id.* Finally, they argued that subjecting the child to MPP violated the Flores settlement agreement. *Id.*

[174] *Id.* at 187-88 (relying on the "now or never" doctrine). The Third Circuit did find that the District Court rightly dismissed the right to counsel claim as premised on the statute (because it is part of removal proceedings) but not the constitutional rights to counsel claim based on the 5th Amendment guarantee of due process. *Id.*

[175] *Id.*

[176] *See, e.g.*, Doe v. McAleenan, 415 F. Supp. 3d 971, 979 (S.D. Cal. 2019) (granting petitioners' motion for temporary restraining order on the basis that the defendants wrongfully denied the petitioners of their right of access to retained counsel in violation of their statutory rights under the APA and their rights under the Fifth Amendment).

[177] Complaint at 2, Innovation L. Lab v. Wolf, 951 F.3d 1073 (9th Cir. 2020) (No. 19-15716).

informed as to proceedings; a right to have equal access to asylum.[178] Significantly, this right to counsel (at no expense to the government) is not grounded solely in the INA, but also in the Fifth Amendment Due Process Clause of the U.S. Constitution.[179]

In *Doe v. McAleenan*, plaintiffs relied on the Fifth Amendment Due Process clause and the APA to challenge the failure to allow for counsel in preparation for and during the MPP nonrefoulment interviews.[180] The District Court agreed, granting a class-wide injunction and holding that plaintiffs demonstrated a likelihood of success on their APA claims regarding access to counsel.[181] As per the injunction, the Court ordered that all class members be given access to their attorneys in preparation for their nonrefoulment interviews and telephonic access during the actual nonrefoulment interviews.[182]

This litigation shows that while asylum seekers had some initial success in attacking the MPP's implementation, particularly its procedural irregularities, the broader legality of the government's effort to disappear asylum seekers at the southern border with only minimal traces of justice or due process remains an open question. Thus, even with the Biden Administration's actions aimed at ending the MPP, our legal system must reckon with the legal and normative implications of a program that largely succeeded in placing tens of thousands of asylum seekers outside the borders of justice.

B. Metering and Asylum Transit Ban

Asylum seekers similarly challenged the Trump Administration's Asylum Transit Ban and so-called metering efforts, which effectively cut off access to asylum processing by pushing back asylum seekers into

[178] *See* Arroyo v. U.S. Dep't of Homeland Sec., No. SACV 19-815, 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019) (finding telephonic access to attorneys insufficient as "a healthy counsel relationship in the immigration context requires confidential in-person visitation, especially where an immigrant must be forthcoming about sensitive matters such as past trauma, mental health issues, and criminal history").

[179] *See, e.g.*, 8 U.S.C. § 1158(d)(4) (2018) (referring to right to counsel for applying for asylum); 8 U.S.C. § 1229a(b)(4)(A) (2018) (providing right to authorized counsel in removal proceedings); 8 U.S.C. § 1362 (2018) (providing right to counsel in removal proceedings); Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause and codified [in the INA]."); Torres v. U.S. Dep't of Homeland Sec., 411 F. Supp. 3d 1036, 1061 (C.D. Cal. 2019) ("[T]he right to counsel codified in the INA extends beyond the removal proceeding itself.").

[180] Doe v. McAleenan, 415 F. Supp. 3d 971, 977 (S.D. Cal. 2019).

[181] *Id.* at 974.

[182] *Id.*

Mexico at ports of entry, telling them that the ports were full, but failing to accurately implement any real wait-listing policy.[183] For example, in *Al Otro Lado Inc. v. McAleenan*, plaintiffs challenged the government's metering policy and the impact of the subsequent Asylum Transit Ban on asylum seekers who had already complied with metering.[184] The Asylum Transit Ban ("Asylum Ban") required non-Mexican nationals who entered, attempted to enter, or arrived at a port of entry at the southern border on or after July 16, 2019, to first seek asylum in Mexico, subject to narrow exceptions.[185] The plaintiffs were non-Mexican nationals who arrived at the border prior to July 16, 2019, but followed existing regulations requiring them to return to Mexico to await their opportunity to seek asylum.[186] The Court held that the plaintiffs had arrived at a port of entry prior to July 16, 2019, and therefore were not subject to the asylum ban.[187] Although this ruling hinged on the facts of the plaintiffs' migration, like the MPP litigation, the case exposed the government's broader strategy of enforced invisibility in that it endeavored to place its treatment of asylum seekers wholly beyond the reach of the courts. Specifically, the government invoked the political question doctrine to argue that because of "[d]efendants' coordination with a foreign national to regulate border crossings," the case was not justiciable.[188] Although the Court noted that some allegations "touch on coordination with Mexican government officials[,]" it rejected the government's argument and held that this coordination was "merely an outgrowth of the alleged underlying conduct by U.S. Officials."[189]

Asylum seekers also successfully challenged the Trump Administration's efforts to exclude asylum seekers from legal protection in *East Bay Sanctuary Covenant v. Barr*.[190] There, a panel of the Ninth

183 Al Otro Lado, Inc. v. McAleenan, 423 F. Supp. 3d 848, 857 (S.D. Cal. 2019).

184 *Id.*

185 Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829-30 (July 16, 2019).

186 *Al Otro Lado, Inc.*, 423 F. Supp. 3d at 857-58.

187 *Id.* at 858. Significantly, the plaintiffs alleged that the government's policy to restrict the flow of asylum seekers at the San Ysidro Port of Entry began in 2016. *Id.* at 859. According to plaintiffs, the government formalized this policy in spring 2018 in the form of the border-wide Turnback Policy, an alleged "formal policy to restrict access to the asylum process at POEs by mandating that lower-level officials directly or constructively turn back asylum seekers at the border," including through pretextual assertions that POEs lack capacity to process asylum seekers. *Id.*

188 *Id.*

189 *Id.*

190 E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 838 (9th Cir. 2020).

Circuit Court of Appeals affirmed the district court's grant of a preliminary injunction against enforcement of the Asylum Ban across the entire southern border.[191] The government defended the asylum ban by asserting that it was consistent with the existing statutory bars to asylum for those that can be removed to a safe third country or who have been firmly resettled in another country before arriving in the U.S.[192] The panel disagreed and held that the Asylum Ban violated the APA. Specifically, as per the panel, the Asylum Ban did "virtually nothing" to ensure that a third country was a safe option.[193] The panel pointed out the glaring inconsistencies between the Asylum Ban and the statutory provisions. The court recognized that far from guaranteeing that asylum seekers returned under the Asylum Ban would be sent to a safe third country, the Asylum Ban merely required that the country be a "signatory" to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, neither of which requires a signatory to submit to any meaningful procedures to ensure its obligations are discharged.[194] Moreover, the court noted that, unlike the safe third country statutory provision, the Asylum Ban didn't require a formal agreement between the United States and a third country, nor did it require a "full and fair" procedure for applying for asylum in that country.[195] Finally, the panel quickly disposed of the government's claim that asylum seekers who passed through Mexico should be regarded as firmly resettled.[196] As the panel noted, there was no reason to think that asylum seekers at the southern border intended to settle in Mexico or had received an offer of resettlement, as required by the firm resettlement bar.[197] Moreover, the panel explained that the Asylum Ban would make the protection provided by the existing statutory bars for safe third country and firm-resettlement superfluous.[198]

The panel also concluded that the Asylum Ban was arbitrary and capricious because: 1) evidence in the record contradicted the

[191] *Id.*

[192] *Id.* at 846; *see* 8 U.S.C. § 1158(a)(2)(A) (2018) (precluding asylum for one who can be removed to a safe third country); 8 U.S.C. § 1158(b)(2)(A)(vi) (2018) (barring a grant of asylum to one who was firmly resettled in another country prior to arriving in the United States).

[193] *E. Bay Sanctuary Covenant*, 964 F.3d at 846-47.

[194] *Id.* at 847.

[195] *Id.* at 841.

[196] *Id.* at 848.

[197] *Id.*

[198] *Id.*

government's conclusion that asylum seekers had safe options in Mexico;[199] 2) DHS and DOJ had not justified the underlying assumption that an asylum seeker at the southern border who failed to apply for asylum in a third country was, for that reason, not likely to have a meritorious asylum claim; and 3) DHS/DOJ failed to adequately consider the effect of the Asylum Ban on unaccompanied minors.[200] While the District Court had also found the Asylum Ban arbitrary and capricious based on being implemented without a notice and comment period, the panel had not reached that issue.[201]

Once again, the Trump Administration's litigation position sheds light on its view of unfettered discretion with respect to asylum and its broader commitment to dismantling the asylum protection regime. While litigation successes blunted the worst of the initiatives during the Trump Administration, it is essential to unpack the underlying (mis)perceptions that fueled the enforced invisibility regime. For example, the government conflated the discretionary nature of an asylum grant with an erroneous assertion that it had discretion as to which categories of applicants were eligible to seek asylum.[202] However, as the panel noted in rejecting this assertion of overall discretionary authority, it would render the "consistent with" language in § 1158(b)(2)(C) superfluous.[203]

In finding that the public interest tipped in favor of the plaintiffs, the panel relied on the district court's assessment that the public had an interest in "ensuring that 'statutes enacted by [their] representatives'

[199] *Id.* at 849-50. The panel cited the District Court findings that, "[i]n sum, the bulk of the administrative record consists of human rights organizations documenting in exhaustive detail the ways in which those seeking asylum in Mexico are (1) subject to violence and abuse from third parties and government officials, (2) denied their rights under Mexican and international law, and (3) wrongly returned to countries from which they fled persecution. Yet, even though this mountain of evidence points one way, the agencies went the other — with no explanation." *Id.* at 851.

[200] *Id.* at 850.

[201] *Id.* at 845.

[202] *Id.* at 849.

[203] *Id.* As the panel noted, under the canons of statutory construction, it is bound to avoid an interpretation that would produce superfluity. The panel also relied on legislative history to conclude that Congress never intended for such superfluity. ("The legislative history of IIRIRA emphasizes the importance Congress attached to the constraints on the Attorney General's discretion to prescribe criteria for asylum eligibility. When enacting IIRIRA, Congress went out of its way to insert the 'consistent with' language into § 1158(b)(2)(C), adding it to an earlier draft of IIRIRA that had not contained that language." *Id.*). *Compare* H.R. REP. NO. 104-469, at 80 (1996) (providing rules for asylum status in 1995), *with* H.R. REP. NO. 104-828, at 164 (1996) (providing identical rules for asylum status in the case of an alien granted asylum in 1996).

[were] not imperiled by executive fiat."[204] The government's willingness to quickly enact a rule that signified a "major change in policy — perhaps the most significant change to American asylum policy in a generation"[205] without even assessing the risk that effectively dismantling the asylum regime at the southern border would mean to vulnerable asylum seekers demonstrated the lengths the Trump Administration was willing to go to and the depth of this broader invisibility project.

C. PACR/HARP

Asylum seekers also challenged other aspects of the Trump Administration's efforts to limit their access to legal advocacy and due process. Specifically, in *Las Americas Immigrant Advocacy Center et al v. Wolf*, asylum seekers in the HARP/PACR programs who were required to remain detained during their initial asylum interviews alleged that the detention unlawfully interfered their ability to consult with "a person or persons of [their] choosing prior to" the initial asylum interview, as guaranteed by 8 U.S.C. section 1225(b)(1)(B)(iv); 8 C.F.R. section 208.30(d)(4).[206] Plaintiffs also alleged that the HARP/PACR programs were adopted in an arbitrary and capricious manner in violation of the APA, and that it deprived them of not only the procedural safeguards conferred by the INA and the Convention Against Torture but also their Fifth Amendment due process rights.[207]

The Court rejected all of the claims.[208] It held that the government's actions in implementing PACR/HARP were not arbitrary or capricious.[209] It also held that the detention-placement policy at issue did not violate Congressional mandates regarding access to counsel.[210] Finally, the Court found the detention policies comported with the minimal Constitutional guarantees of due process for noncitizens seeking admission to the country.[211] Even though the Court found that asylum seekers subject to detention and expedited asylum interviews pursuant to the HARP and PACR programs were "severely limited in

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[204] *E. Bay Sanctuary Covenant*, 964 F.3d at 855 (quoting Maryland v. King, 567 U.S. 1301, 1301 (2012)).

[205] *Id.* at 861 (Miller, J., concurring in part and dissenting in part).

[206] Las Ams. Immigrant Advoc. Ctr. v. Wolf, 507 F. Supp. 3d 1, 9 (D.D.C. 2020).

[207] *Id.*

[208] *See id.* at 40.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 39.

their ability to locate and communicate with counsel, and it might well be next to impossible for them to otherwise prepare for the critical credible fear assessment,"[212] it nevertheless found this harsh reality to be consistent with Congressional intent in enacting the expedited removal process.

IV. WHEN THE GOAL OF PROTECTING THE BORDER SUBLIMATES THE OBLIGATION TO PROTECT REFUGEES

The numerous policies targeting persons seeking asylum in the United States over the last four years raise broader normative questions about the durability of legal protections for this most vulnerable group. While the legal regime protecting refugees is well established, recent experience shows how the United States has used border protection priorities to easily sublimate it. Even where courts have restrained and held back aspects of the government's efforts, in the interim, asylum seekers have suffered, and their rights have been violated. To bring the U.S. back into conformity with the true meaning of the Refugee Convention in this context requires a rebalancing of protection and security interests.

When national security priorities have led to the diminishment of non-citizens' rights in other periods, scholars have debated the appropriate means for restoring law and rendering visible those whom the government attempted to place beyond the reach of the law's protection. For example, in the context of the global war on terror, scholars and jurists have debated whether the U.S. Constitution has extraterritorial effect, or whether the U.S. is exercising extraterritorial jurisdiction through its actions in other countries.[213] Some scholars have argued that the indefinite detention of alleged terrorists at Guantanamo should be seen as demonstrating U.S. extraterritorial jurisdiction; the focus should not be on whether the victims of such harm can seek protection under the U.S. Constitution.[214]

Similarly, debates and arguments necessarily arise in the context of the United States' border policies, particularly as they affect asylum seekers. For example, the U.S.'s significant deployment of immigration

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[212] *Id.* at 18.

[213] *See, e.g.*, Craig Martin, Kiobel*, Extraterritoriality, and the "Global War on Terror*," 28 MD. J. INT'L L. 146 (2013) (examining how the federal courts have considered extraterritoriality in cases arising in the global war on terror).

[214] *Id.* at 170-71 ("The seizure, interrogation, and detention [at Guantanamo] constituted an exercise of U.S. jurisdiction that began in foreign territory and in respect of foreign nationals, for alleged conduct that had occurred in foreign territory.").

enforcement personnel and resources into Mexico and Central America belies the notion that a hard land border continues to exist between the U.S. and Mexico. As a former Chief of U.S. Border Patrol testified, "Defendants' suggestion that the border constitutes a bright line between the United States' de jure and de facto control over U.S. territory and genuinely foreign territory ignores the realities of the U.S.-Mexico border. CBP officials regularly operate in Northern Mexico, and the United States exercises significant control over the entire border region, Mexico's de jure sovereignty notwithstanding.[215] U.S. border security policy "extends [the nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many."[216]

The U.S.'s economic, political, and military power transcends the southern border, as should the Constitutional requirement that the government not deprive asylum seekers of due process.[217] Just as constitutional law has been held to have extraterritorial effect in certain limited circumstances, such as when the Fourth Amendment is at issue,[218] refugee law must also be given extraterritorial effect to retain its meaning in light of border externalization efforts. The MPP provided the clearest example of where the U.S. should be held accountable because it exercised jurisdiction and forced asylum seekers to wait in Mexico; akin to detaining asylum seekers, or holding non-citizens at Guantanamo. While, as is clear in the litigation discussion above, asylum seekers have brought constitutional challenges to the MPP, the courts by and large relied on the APA, the INA, and the U.S. obligations under the Refugee and Torture Conventions, to decide the claims, leaving the applicability of substantive constitutional guarantees

[215] *E.g.*, *Securing Our Borders — Operational Control and the Path Forward: Hearing Before the Subcomm. on Border & Mar. Sec. of the Comm. on Homeland Sec.*, 112th Cong. 8-11 (2011) (prepared statement of Michael J. Fisher, Chief of U.S. Border Patrol) (discussing U.S. Customs and Border Protection's extensive efforts to secure the nation's borders).

[216] *Id.* at 8; Eva L. Bitran, Note, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 244-47 (2014) (collecting historical examples showing the U.S. "exerts and has exerted powerful influence over northern Mexico").

[217] *See* Immigration Law Professor Amicus Brief in Opposition to Defendant's Motion to Dismiss at 15, Al Otro Lado v. Wolf, 336 F.R.D. 494 (S.D. Cal. 2020) (No. 17-cv-02366-BAS-KSC), 2020 WL 924129, at *25.

[218] *See, e.g.*, Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 757, 801 (2020) (describing the different approaches that the Supreme Court has used to determine the extraterritorial reach of constitutional rights).

unclear. Notwithstanding the courts' avoidance of the constitutional question, MPP likely ran afoul of several constitutional provisions.

Border externalization mechanisms send asylum seekers into known danger in violation of their Fifth Amendment due process rights to life and liberty. The Fifth Amendment to the U.S. Constitution protects an individual's liberty interest in bodily security.[219] Due process has been held to protect noncitizens from government conduct that "shocks the conscience" or actions that place an individual in substantial risk of harm, which surely has been the case with the MPP.[220] By affirmatively placing individuals in a known position of danger, creating or increasing the potential for harm, the U.S. violated this substantive due process right.[221]

Moreover, motivated by racial bias and animus against Central American asylum-seekers, the MPP and other externalization policies and procedures put into place along the southern border also likely violated asylum seekers' rights to equal protection under the Constitution. The Trump Administration clearly articulated this racial animus towards Central Americans arriving at the southern border.[222]

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[219] U.S. CONST. amend. V.

[220] Irish v. Maine, 849 F.3d 521, 526 (1st Cir. 2017); Complaint for Declaratory and Injunctive Relief at 78, Turcios v. Wolf, 828 F. App'x 496 (10th Cir. 2020) (No. 4:20-cv-1982) [hereinafter *Turcios* Complaint]; *see* Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001); *see also* Complaint for Injunctive and Declaratory Relief at 109-14, Nora v. Wolf, No. 20-cv-00993 (D.D.C. Apr. 16, 2020) [hereinafter *Nora* Complaint] (alleging that the Defendants' conduct was "so egregious and outrageous that it shocks the conscience" and that the Defendants violated the Plaintiffs' due process rights by adopting and applying the MPP).

[221] Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir. 2006).

[222] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977); *Turcios* Complaint, *supra* note 220, at 82. As per the plaintiffs' memo in support of a motion for a preliminary injunction in *Lemus v. Wolf*, MPP is motivated by animus and discriminatory intent against Central Americans and other people of color, in violation of the Equal Protection Clause. Memorandum of Law in Support of Motion for Preliminary Injunction at 2, Lemus v. Wolf, No. 20-10009 (D. Mass. Jan. 22, 2020), https://www.aclum.org/sites/default/files/field_documents/as_filed_memorandum_in_support_of_motion_for_preliminary_injunction.pdf [https://perma.cc/6BRZ-NKHB]. President Trump has repeatedly communicated his animus towards Central American asylum seekers seeking protection in the United States. He has suggested harming them by electrifying the border wall, fortifying it with an alligator moat, installing spikes on top to pierce human flesh, and having soldiers shoot migrants' legs to slow them down and keep them out of the United States. Eugene Scott, *Trump's Most Insulting – and Violent – Language is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/ [https://perma.cc/J6JQ-ZLQK]. President Trump has also asked why the United States would accept more people from Haiti, El Salvador, and other nations predominately inhabited by people of color, rather than

Notwithstanding the strength of the constitutional arguments, the externalization efforts are intended to shift the physical border outwards in ways that affect legal protections.[223] Bifurcating the asylum seeker's physical location from the place where their claim to protection is heard in court undermines their ability to establish any type of political membership in the United States, while simultaneously limiting their movement abroad, since they must remain close to the border for their court hearings. As Fatma Marouf has noted, "[i]nstead of extending access to justice through the asylum process, it perpetuates the injustice of exclusion and segregation. If left unchecked, such extreme manipulation of the border as a legal construct could result in a law-free zone where human rights are routinely violated with no judicial review."[224]

Once the Trump Administration employed a national security lens for its border enforcement actions, it was able to rely on the plenary power doctrine to claim virtually unfettered discretion in its actions.[225] Pursuant to the plenary power doctrine, the power to regulate immigration rests with the executive and congressional branches, with

people from countries like Norway. Jen Kirby, *Trump Wants Fewer Immigrants from "Shithold Countries" and More from Places Like Norway*, VOX (Jan. 11, 2018, 5:55PM EST) https://www.vox.com/2018/1/11/16880750/trump-immigrants-shithole-countries-norway [https://perma.cc/Z7YF-RDQX]. MPP is a product of that animus. It implements President Trump's specific demand that that DHS keep out Central American asylum seekers, and it does so by intentionally harming asylum seekers. It has also been accompanied by a slew of measures designed to discredit and dismantle the asylum system and restrict every kind of legal immigration. Katherine C. McKenzie, Eleanor Emery, Kathryn Hampton & Sural Shah, *Eliminating Asylum: The Effects of Trump Administration Policies* (Aug. 24, 2020), https://www.hhrjournal.org/2020/08/eliminating-asylum-the-effects-of-trump-administration-policies/ [https://perma.cc/MW9Z-W7C3]. Because MPP is the product of invidious animus, the Equal Protection Clause prohibits it from continuing.

[223] Marouf, *supra* note 218, at 845.

[224] *Id.* at 847-48.

[225] *See id.* at 854 (noting that the simultaneous outward and inward expansion of the legal border enhances government control and creates new forms of subordination) ("While both Verdugo and Boumediene offer hope of Constitutional protections that stretch beyond the territorial border, they leave many questions unanswered. Courts have struggled to determine whether, when, and how to apply the 'substantial connections' and 'functional' tests in the border enforcement context and beyond . . . . The Supreme Court, however, has so far declined to provide further guidance, deciding to sidestep tough questions about whether a constitutional right applies by jumping to the question of whether a remedy exists. Without further guidance from the Court, we are likely to see more conflicting decisions. As courts contend with these complex questions, they should be wary of demands for reflexive deference and think hard before abdicating judicial review.").

an extremely limited role for the judiciary.[226] Unfortunately, when constitutional challenges in immigration cases are framed through a national security lens, it's clear that the plenary power doctrine has largely withstood the test of time.[227]

Imposing constitutional restraints upon the Executive at the border is notoriously difficult with family separation being a recent momentous exception.[228] Moreover, the Court has sanctioned government efforts in the past to continually push the border outward.[229] Given the uncertainty of constitutional arguments and the Courts' lack of appetite for them, we should look to other areas of legal responsibility like tort and international law in order to hold the U.S. accountable for harm caused by its externalization policies.

V. THE PATH FORWARD: TOWARDS A NEW MODEL FOR ACCOUNTABILITY

Accountability, as I use the term, requires establishing a shared understanding of the grave harms caused by the border externalization policies, as well as the U.S. role in causing this harm. By apportioning responsibility for this harm, the goal is to create deterrence so that this does not occur in the future. The nation also needs to develop shared norms in its treatment of those seeking protection at the southern border. In addition to the litigation brought in an attempt to stop the Trump Administration's assault on asylum, we need a broad strategy for making visible the efforts to externalize and render invisible asylum seekers; this should be multi-faceted and include tort, international law, and human rights mechanisms. There are potential challenges with

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226 *See, e.g.*, Ekiu v. United States, 142 U.S. 651, 660 (1892) ("As to [persons facing exclusion], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, *are* due process of law." (emphasis added)); Chae Chan Ping v. United States, 130 U.S. 581, 602 (1889) (providing that the power to regulate immigration lies with the legislative and executive departments of the government).

227 Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 26 (2015) (arguing that the U.S. Supreme Court's jurisprudence reveals both an eroding of the plenary power doctrine with regards to procedural due process and an adherence to the doctrine in substantive constitutional rights).

228 Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2348-49 (2019) (noting the unusualness of the district court's willingness in *Ms. L.* to restrain the Executive given that "broad delegations of power to the President and agencies at the border are routinely upheld by courts").

229 *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (upholding the U.S.'s interdiction and forcible repatriation of Haitian asylum seekers on the high seas).

each, but also real possibilities for recognizing the knowable or intentional harm to migrants. These mechanisms are necessary because other forms of legal challenge do not name and respond to the known and avoidable harm inflicted. The following Sections outline these avenues and the multiple challenges they present.

A. Using a Torts Law Lens to Re-envision U.S. Culpability for Violating Asylum Seekers' Rights

Border externalization policies can no longer be assessed solely through challenges to immigration policy because they are rooted in harm; we have to come up with solutions that recognize the intentional harm. The broad-based and sustained legal and moral attack on the Trump Administration's family separation policy is illustrative of the need to name and focus on the intentional nature of the harm caused by inhumane immigration policies.[230] Numerous national and international organizations and experts aptly described the treatment of children at the border as torture.[231] Tragically, more than two and a half years after the Trump Administration officially ended its family separation policy and a federal court ordered the reunification of all separated children with their parents, hundreds of children remain apart from their parents.[232] Moreover, thousands of children and

[230] STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 2 (2020), https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519 [https://perma.cc/AX2K-RGFK] (containing the House Judiciary Committee's findings after a twenty-one-month investigation into the development and execution of the Trump Administration's family separation policy, which resulted in more than 2,500 migrant children becoming unnecessarily separated from their parents. The investigation revealed the family separation policy lasted far longer than is commonly known and was marked by reckless incompetence and intentional cruelty. The committee also found that, "administration officials knew that the government lacked the capacity to track separated family members and moved forward with separations anyway . . . ").

[231] In the words of Juan Mendez, the UN Special Rapporteur on Torture, "The physical, psychological and developmental harms to children implicit to the immigration detention environment can amount to torture or cruel, inhuman or degrading treatment." Charles Oberg, Coleen Kivlahan, Ranit Mishori, William Martinez, Juan Raul Gutierrez, Zarin Noor & Jeffrey Goldhagen, *Treatment of Migrant Children on the US Southern Border Is Torture*, 147 PEDIATRICS 1, 5 (2020).

[232] According to a December 2, 2020, status report filed jointly by the American Civil Liberties Union and Trump administration lawyers, immigrant advocates are still trying to track down 628 missing parents three years after the Trump Administration began separating migrant families at the southern border. Joint Status Report at 8, Ms. L v. U.S. Immigr. & Customs Enf't, No. 18cv428 (S.D. Cal. 2020).

parents have suffered a degree of trauma that may never go away.[233] It is clear that if there is to be accountability for the intentional harm caused by the Trump Administration's border externalization programs, a great deal of ongoing litigation and advocacy will be required. Looking to advocacy and novel claims can help render people treated as invisible to be viewed as persons under the law.

As a conceptual matter, there is an intrinsic appeal to using torts law to reconceptualize the U.S. role in immigration enforcement, particularly with regards to its extraterritorial efforts. Immigration regulation is increasingly taking place outside of national sovereign borders, and countries such as the U.S. are working in concert with other nations to enforce their immigration policies.[234] The model for liability for harm caused by immigration policies must also shift outward beyond territorial borders. Tort law's focus on the intentionality of the harm offers important conceptual guidance in addressing immigration externalization policies in which the cruelty at stake is by design. For example, when CBP agents handcuffed and drove asylum seekers back over the southern border to Mexico to await their next hearing, false imprisonment comes to mind.[235] When the CBP agents transported the asylum seekers at the same time on the same day each week, with the awareness that the gangs would target them because they always arrived on the same day and time, those CBP agents acted with reckless disregard in creating a known danger.

While the U.S. has not been held responsible for deportations that led to harm or death, these actions pursuant to the MPP were undertaken while the U.S. still had jurisdiction over these asylum-seekers' claims. Beyond the MPP, it has recently come to light that the DHS was involved in forcibly transporting Honduran nationals in Guatemala back to the Honduran border.[236] The Foreign Affairs Committee of the United

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[233] Brittny Mejia, *Physicians Group Releases Report on Psychological Effects of Family Separation*, L.A. TIMES (Feb. 25, 2020, 4:00 AM PT), https://www.latimes.com/california/story/2020-02-25/family-separation-trauma [https://perma.cc/B5A9-4DSC] (citing a report by Physicians for Human Rights that documents the ongoing trauma families are experiencing months after being reunited).

[234] *See* Nessel, *supra* note 42, at 628.

[235] Adam Isacson *Weekly U.S.-Mexico Border Update: 2021 Migrant Encounters, Reports on Boarder Agencies' Inhumane Culture, Remain in Mexico Protested, Senate Appropriation*, WOLA ADVOC. FOR HUM. RTS. IN THE AMS. (Oct. 22, 2021), https://www.wola.org/2021/10/weekly-u-s-mexico-border-update-2021-migrant-encounters-reports-on-border-agencies-inhumane-culture-remain-in-mexico-protested-senate-appropriation/ [https://perma.cc/BJQ8-9VYV].

[236] S. FOREIGN RELS. COMM. DEMOCRATIC STAFF, 116th Cong., DHS RUN AMOK? A RECKLESS OVERSEAS OPERATION, VIOLATIONS, AND LIES 2 (2020), https://www.foreign.

States Senate expressed concern that these actions could open the U.S. to liability, but limited its concern to a potential car accident.[237] If there would be liability for an automobile accident if the unmarked van carrying Hondurans against their will crashed, why wouldn't there equally be liability for the false imprisonment of the Honduran nationals? Or criminal liability for kidnapping? What about intentional infliction of emotional distress? In *Hernandez v. Mesa*, the Supreme Court held that a CBP officer's action in shooting and killing a teenager from across the border with Mexico did not give rise to liability under a Bivens constitutional law claim.[238] This ruling foreclosed any potential damages for the family of the victim since all torts law claims were barred as well.[239] This situation highlights the need for a new liability regime to address invisibility and hold the government accountable for intentional harm inflicted across the border.

1. Holding the U.S. Accountable for "Enabling Torts"

While tort law is traditionally focused upon the relationship between the tortfeasor and the victim, there has been some movement towards recognizing torts carried out by third parties. Under this theory of "enabling torts," an actor who "sets the stage" for a third party's bad acts with a foreseeable expectation that another person will suffer harm is responsible alongside the primary wrongdoer if that harm in fact occurs.[240] Enabling tort claims typically require a showing that: (1) the defendant is "strategically placed to take precautions reducing the risk"; (2) there is a pre-existing relationship between the defendant and the plaintiff, or the defendant herself helped to create the conditions under which the third party is enabled to harm the plaintiff; (3) the primary wrongdoer is judgment-proof and the enabling defendant has deep(er) pockets; and (4) "an additional moral intuition" is present, such that the court recognizes something akin to a moral duty to act on the part of the defendant.[241] According to the Restatement, an actor's conduct "can lack reasonable care insofar as it foreseeably combines with or

senate.gov/imo/media/doc/DHS%20Run%20Amok%20-%20SFRC%20Democratic%20Staff%20Report.pdf [https://perma.cc/U9XZ-EJV9].

237 *See id.* at 8.

238 *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2006-07 (2017).

239 *See id.* at 2007-08.

240 Naima Farrell, Note, *Accountability for Outsourced Torts: Expanding Brands' Duty of Care for Workplace Harms Committed Abroad*, 44 GEO. J. INT'L L. 1491, 1504 (2013) (citing Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 442-43 (1999)).

241 Farrell, *supra* note 240, at 1504-05.

permits the improper conduct of the [harmed individual] or a third party."[242]

Applying the four-part analysis for enabling torts to the U.S.'s role in external border enforcement measures at the southern border yields a close fit. Using the MPP as an example, the U.S. was strategically placed to take precautions to reduce the risk of harm caused by the MPP by discontinuing the policy and processing asylum seekers in a humane way. Even while the MPP was in place, the U.S. could have provided funding for safe housing for asylum seekers who were forced to wait in Mexico as their asylum cases proceeded in the U.S. This would have ensured that asylum seekers did not fall victim to the pervasive and well-documented kidnappings, rapes, and murder. The U.S. also could have ensured that asylum seekers were not returned to the most dangerous parts of Mexico, like Tamaulipas. CBP officers could easily have ensured that asylum seekers were returned to different locations at different times on different days so as to minimize the likelihood of asylum seekers falling prey to drug cartels and gangs. Turning to the second prong, clearly the U.S. helped to create the conditions under which the third party was enabled to harm the plaintiff. For example, in the case of the MPP, it was the U.S.'s actions in pushing asylum seekers into dangerous parts of Mexico that created the conditions that allowed a third party to harm asylum seekers. More specifically, it was the CBP action in returning asylum seekers (after court hearings) to the same spot in Mexico on regular set days and times that made them such easy prey for gangs and drug cartels. Specifically, those returned via the MPP were easily identifiable based on their missing shoelaces and belongings in government-issued plastic bags.[243] This is equally true with regards to the Asylum Cooperation Agreements between the U.S. and the Northern Triangle nations.[244] It was the U.S.'s actions in entering into these agreements that helped to create the conditions that harmed asylum seekers. By entering into these agreements, asylum seekers were forced to seek protection in nations that had no ability to process claims or offer protection. The third factor to consider is whether the primary wrongdoer is judgment proof. In part, this would

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[242] *Id.* at 1506 (quoting RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 19 (AM. L. INST. 2012)).

[243] *See* Memorandum of Law in Support of Motion for Preliminary Injunction at 21, Lemus v. Wolf, No. 20-10009 (D. Mass. Jan. 22, 2020), https://www.aclum.org/sites/default/files/field_documents/as_filed_memorandum_in_support_of_motion_for_preliminary_injunction.pdf [https://perma.cc/6BRZ-NKHB].

[244] *See DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement*, *supra* note 88.

depend on who we view as the primary wrongdoer. Is it the individual who has engaged in the act of violence against the asylum seekers, or the country of Mexico, who allows violent crime to go unpunished? Of course, as has been documented, in some instances, Mexican government authorities are the individuals who directly engaged in harm.[245] Regardless of whether the harm is viewed as caused by individual tortfeasors or Mexico, an argument can be made that Mexico, and the Northern Triangle nations do not have the ability to offer redress for human rights violations that have occurred as a result of US externalized border enforcement. Clearly, the U.S. offers the "deep pockets" whether financially or in terms of being able to offer protection. Finally, asylum seekers who have been harmed by the U.S.'s external border enforcement measures certainly present a special moral issue. The U.S. is bound by international law and domestic law to allow individuals who have fled persecution to seek protection in the U.S. In the case of the MPP, by assuming jurisdiction over asylum cases, the U.S. has a moral duty to ensure that it is not subjecting asylum seekers to known danger while their cases proceed. The duty to protect refugees more generally is also a moral one, dating back to notions of hospitality.

2. The Federal Torts Claims Act Shields the U.S. from Torts Abroad

Even if aggrieved asylum seekers were able to utilize an enabling tort theory to sue the U.S. for harms such as kidnapping, rape, and murder that occurred as a result of being forced to wait in extraordinarily dangerous conditions, this would only address monetary damages, rather than providing a way to vindicate legal rights. As such, it would only offer a partial remedy meant to supplement rather than supplant the legal challenges to the invisibility regime. Moreover, as a practical matter, even if a court were to recognize the enabling tort theory in this context, absent reform, the viscosity of the layers that insulate the U.S. from accountability for harms committed abroad would likely eviscerate the opportunity for torts litigation. The Federal Tort Claims Act ("FTCA")[246] authorizes monetary recovery for damages, loss of property, personal injury or death in suits where damages occurred as

[245] *See Mexico: Abuses Against Asylum Seekers at U.S. Border*, HUM. RTS. WATCH (Mar. 5, 2021, 1:00 AM EST), https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border [https://perma.cc/W658-WH2S]; Ashoka Mukpo, *Asylum-Seekers Stranded in Mexico Face Homelessness, Kidnapping, and Sexual Violence*, ACLU (Sept. 18, 2019), https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/asylum-seekers-stranded-mexico-face [https://perma.cc/8Q3H-DZ3K].

[246] 28 U.S.C. § 1346 (2018); Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2018).

a result of the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[247] Under the FTCA, an asylum seeker could bring an action for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights committed by investigative or law enforcement officers of the United States Government, interpreted to generally include DHS officers.[248]

Indeed, the FTCA has been instrumental in litigation challenging unjust immigration enforcement actions. For example, several mothers and children relied on the FTCA to sue the U.S. for the harm caused by its family separation policy.[249] However, asylum seekers who can make the connection between the torts inflicted upon them and the U.S.'s enabling role in creating the harm will be confronted with another layer of invisibility emanating from the FTCA's statutory exclusion for harm arising in a foreign country.[250]

Human rights attorneys have argued for a more nuanced interpretation of the FTCA's exception for "harm arising in a foreign country" such that U.S. government officials would not be entitled to immunity for acts or omissions carried out in the U.S. that cause harm in a foreign country. However, the Supreme Court has rejected this approach, leaving the U.S. shielded from liability in such circumstances.

In *Sosa v. Alvarez,* a Mexican national relied on the FTCA and the ATS to sue the U.S. and others alleging that the federal Drug Enforcement Agency ("D.E.A.") arranged in the U.S. for his abduction in Mexico to attend trial in the U.S.[251] He also alleged that the U.S. conduct constituted false imprisonment — a violation of the law of

[247] 28 U.S.C. § 1346(b)(1) (2018).

[248] 8 U.S.C. § 1357(a)(2) (2018); 28 U.S.C. § 2680(h) (2018). *See also* TRINA REALMUTO & EMMA WINGER, WHOM TO SUE AND WHOM TO SERVE IN IMMIGRATION-RELATED DISTRICT COURT LITIGATION 3-4 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/whom_to_sue_and_whom_to_serve_in_immigration-related_district_court_litigation.pdf [https://perma.cc/U5F5-PARM].

[249] Complaint at 2-3, C.M. v. United States, No. 19-cv-05217 (D. Ariz. Sept. 19, 2019).

[250] 28 U.S.C. § 2680(k) (2018).

[251] Sosa v. Alvarez-Machain, 542 U. S. 692, 697 (2004). In *Sosa*, the D.E.A. approved a plan to hire Mexican nationals to abduct the plaintiff and bring him against his will into the U.S. to turn him over to the D.E.A. to stand trial. *Id.* at 698.

nations — and thereby actionable under the ATS.[252] The majority of the Supreme Court dismissed the claims under both the FTCA and ATS.[253] As articulated by the majority, the FTCA claim against U.S. officials fell within the exception to the normal waiver of sovereign immunity for acts in other countries.

The majority noted that, in enacting the FTCA, Congress was motivated by a desire to decloak the U.S. of its sovereign immunity when torts cases were at issue and, with certain specific exceptions, to make the Government liable in tort just as a private individual would be under like circumstances.[254] However, one of those exceptions is for "[a]ny claim arising in a foreign country,"[255] and the majority found the false arrest in Mexico to match perfectly with that exception. The majority noted that various Courts of Appeal have relied on the "headquarters doctrine" to conclude that the foreign country exception does not exempt the United States from suit for acts or omissions occurring in the U.S. but with their operative effect in another country.[256] Indeed, in this case, the Ninth Circuit Court of Appeals found that the headquarters doctrine "fit like a glove" based on the D.E.A. actions in the U.S. that led to the arrest in Mexico.[257] In light of the careful planning that the D.E.A. undertook in the U.S. in order to effectuate the arrest in Mexico, the Ninth Circuit easily found that the claim did not "arise in" a foreign country.[258] Ultimately, however, the majority warned that, "[t]he headquarters doctrine threatens to swallow the foreign country exception whole."[259]

In her concurring opinion, Justice Ginsburg agreed that the claim fell within the exception to the waiver to sovereign immunity.[260] However, she interpreted the words "arising in," as they appear in U.S.C. section 2680(k), to signal the "place where the act or omission occurred," rather than the "place of injury."[261] Nevertheless, Justice Ginsburg urged the adoption of a "last significant act or omission" rule and noted

252 *Id.* at 698.

253 *Id.* at 692-94. The majority dismissed the FTCA claim because the arrest was authorized by the D.E.A. *See id.* at 699.

254 *Id.* at 700.

255 *Id.* (citing 28 U.S.C. 2680(k) (2018)).

256 *Id.* at 701.

257 *Id.* at 702.

258 *Id.*

259 *Id.* at 703.

260 *Id.* at 751 (Ginsburg, J., concurring).

261 *Id.* at 752.

that such a rule would override the headquarters doctrine.[262] As she concluded, "[b]y directing attention to the place where the last significant act or omission occurred, rather than to a United States location where some authorization, support, or planning may have taken place, the clear rule . . . [would assure] . . . the genuine limitation Congress intended it to be."[263] It appears that, in torts claims against the U.S. for harm suffered abroad as a direct result of U.S. immigration externalization enforcement efforts, sovereign immunity would serve as a shield under either the majority's rejection of the headquarters' approach or Justice Ginsburg's "last significant act or omission" approach.

3. The Alien Torts Statute

Claims brought against the U.S. for human rights torts abroad have met with a similar fate. Under the Alien Torts Statute ("ATS"), federal courts have jurisdiction over claims brought by non-U.S. citizens alleging violations of laws of nations or international treaty obligations, including certain human rights violations.[264] The ATS was rarely used until 1980, when two Paraguayan nationals relied on the statute to sue a Paraguayan government official in *Filartiga v Pena-Irala*, claiming that he had tortured their family member.[265] The success in using the ATS in *Filartiga* opened the door to robust human rights litigation in U.S. courts, and soon the ATS was internationally regarded as one of the most important tools for vindicating human rights.[266] Unfortunately, this door did not remain ajar for long.

In *Sosa v. Alvarez-Machain,* a majority of the U.S. Supreme Court held that a violation of the laws of nations encompasses "a narrow class of international norms," which are considered settled rules of international law by the general assent of civilized nations.[267] Such claims must be universal, definable, and obligatorily prohibited.[268] According to the majority, arbitrary detention did not qualify as a violation of the laws of nations because it had not attained the status of

[262] *Id.* at 760.

[263] *Id.*

[264] 28 U.S.C. § 1350 (2018).

[265] Filartiga v. Pena-Irala, 630 F.2d 876, 878-80 (2d Cir. 1980).

[266] *See* WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF *FILÁRTIGA V. PENA* 8 (2007) (estimating that 100 cases were filed under the ATS in the period between the court decisions in *Filártiga* and *Sosa*).

[267] *See Sosa*, 542 U.S. at 729.

[268] *See id.* at 731-32.

binding customary international law.[269] Despite recognizing that arbitrary arrests are prohibited in international human rights instruments, the court warned that the plaintiff's definition was so broad and vague that it would open the door to any claim predicated on even a slightly problematic arrest.[270] Instead, the court held that "civilized nations" have only recognized prolonged arbitrary detention under color of law as a violation of the laws of nations.[271]

The Supreme Court ruled in an ATS case for the second time in *Kiobel v. Royal Dutch Petroleum*.[272] However, this time it significantly narrowed the scope of the ATS's application for international human rights violations. Considering whether a claim could be brought for violations occurring abroad, the court relied upon the presumption against extraterritoriality, which states that U.S. laws should not apply in other countries absent an explicit provision to that effect.[273] The court held that the ATS provided federal jurisdiction only to claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application," and that because the defendants were foreign corporations and the harms occurred abroad, this presumption was not overcome.[274]

While the *Kiobel* and *Jesner* decisions imposed serious limitations on the option of using the ATS for human rights violations occurring outside US territory, both cases involved suits against private foreign entities.[275] The ATS remains significant for asylum seekers challenging detention conditions within the U.S.[276] The question remains as to

[269] *See id.* at 737.

[270] *See id.* at 738.

[271] *See id.* at 732-37.

[272] Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 112-13 (2013).

[273] *See id.* at 124.

[274] *Id.* at 124-25. The U.S. Supreme Court again narrowed the scope of the application of the ATS in 2018 with its decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (although not directly relevant here, the Court held that the imposition of liability on foreign corporations is not proper under the separation of powers doctrine, because foreign policy, which is under the domain of the executive branch, would be implicated if foreign corporations were allowed to be sued in U.S. courts). *See id.* at 1408.

[275] *Jesner*, 138 S. Ct. at 1394; *Kiobel*, 569 U.S. at 113.

[276] *See, e.g.*, Jama v. U.S. Immigr. and Naturalization Serv., 343 F. Supp. 2d 338, 345 (D.N.J. 2004) (Detained asylum seekers filed a complaint against the government and the company running the private detention center under contract with the U.S. Immigration and Naturalization Service ("INS") (now "Immigration and Customs Enforcement "ICE"). While all of the defendants asserted that they were shielded by sovereign immunity, the Court held that neither the INS officials, the private prison corporation, or its guards were entitled to the protections of sovereign immunity. The

whether noncitizens could successfully utilize the ATS to sue the U.S. government for its role in human rights violations that occur abroad as a result of policies developed and implemented within the U.S. Certainly, U.S. immigration externalization policies "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[277] Equally, asylum seekers who have been subjected to rape, kidnapping, or murder should be able to show that such conduct violates "a narrow class of international norms," which are considered settled rules of international law by the general assent of civilized nations. However, to date, courts have relied on the political question doctrine and sovereign immunity to reject most ATS suits against U.S. officials for human rights violations (including torture and detainee abuse under the "war on terror").[278] The U.S. has also invoked the state-secrets privilege to bar courts from hearing specific evidence that may threaten national security if made public.[279] While, on its face, the state secrets doctrine should not apply to human rights abuses caused by U.S. immigration enforcement actions, the government has historically relied on national security grounds in immigration matters to shield itself from

Court based its denial of sovereign immunity on the finding that the private prison company was a contractor with the government and exercised near total control over running the detention facility).

[277] *See Kiobel*, 569 U.S. at 124-25.

[278] Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. MIA. INT'L & COMP. L. REV. 285, 297 (2017). *See generally* Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 205, 222-24 (2005) (explaining how the executive branch's authority over foreign policy influences domestic courts' reliance on sovereign immunity in ATS lawsuits).

[279] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1931 (2007); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 134-35 (2006); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101-02 (2005) (noting that in the period between 1977 and 2001, "there were a total of fifty-one reported cases in which courts ruled on invocation of the privilege").

accountability and oversight.[280] This continues with respect to its southern border enforcement actions.[281]

As this Section demonstrates, there is a tension between immunity and accountability. On the one hand, the U.S. wants to ensure that it is not opening itself up to litigation for acts that occur outside its borders. On the other hand, the immunity undercuts accountability as it curtails asylum seekers' ability to bring legal actions against the U.S. for harms that occur abroad as a result of U.S. immigration policies. Litigation is a crucial vehicle for holding nations responsible for violations of shared norms and furthers accountability in various ways. Utilizing the judicial system helps to shed light on abuses that are otherwise taking place without public awareness. Monetary liability through litigation also provides an incentive for improved behavior. This tension between immunity and accountability could be ameliorated by amending the FTCA to narrow the exception for harm that occurs in a foreign country.[282] The Court could also take a broader approach in its interpretation of the term "arising in a foreign country." While neither of these options are likely in the current political climate, and given the conservative make-up of the Court, using a torts lens to recognize and name the intentionality of the U.S. effort to insulate itself from all liability by making asylum seekers invisible and separating them from access to justice remains an important step.

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[280] *See, e.g.*, Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (discussing how the Attorney General, in acting for the President, is permitted to exclude foreigners based on confidential information that may not be disclosed without prejudicing public interest); U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950) (where the Attorney General, acting on behalf of the President, barred some foreign brides of members of the armed forces on the vague basis of security reasons); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017) (declining to recognize a remedy under *Bivens* for the prolonged detention of undocumented persons at a federal jail in New York City under abusive conditions after the September 11th attacks).

[281] *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020) (citing national security concerns to reject a Bivens remedy sought by the family of a Mexican teenager killed by a Border Patrol officer who shot the adolescent as he played on the Mexican side of the border).

[282] *Cf.* Farrell, *supra* note 240, at 1494 (proposing "a limited expansion of the current U.S. employment-based liability regime to hold multinational firms . . . to a duty of reasonable care to prevent violations of core labor standards throughout their global supply chains. Under this framework, a multinational firm that purchased goods or services that were produced in violation of certain fundamental labor standards would be liable if the multinational firm had notice of the violations, had power to deter them, and failed to take reasonable steps to do so. This duty derives from existing common law principles and developments in the law of tort.").

B. Borrowing from International Human Rights Law

International human rights law is premised on the notion that it is the duty of the State to protect human rights. But advocates, scholars, and some tribunals have recognized the inherent dangers in limiting the State's duties to those in its territory. In light of globalization, there are a number of new legal theories aimed at recognizing overlapping jurisdiction in cases where more than one State is responsible for human rights violations. While some of these theories nevertheless limit causation to a showing that the State at issue had near total control over the cause of the harm, there is a growing willingness to loosen this stronghold by looking instead to whether the State at issue was complicit in causing the harm. While this area of international law is developing in the context of economic and social harm, it provides an important lens for evaluating extraterritorial border enforcement and State liability when it is complicit in violating asylum seekers human rights.

1. Acknowledging the Interconnected Role of States During Migration

Refugee law is premised on the notion of a binary relationship between the home country (who has breached its obligation to protect its own citizen) and the host country (who may now be obligated to offer surrogate protection). Increasingly, however, multiple nations play a role in creating danger for refugees. This is especially true in light of border externalization policies where the host country relies on additional countries to enforce its immigration laws. Given the reality that multiple countries often work in concert to deter asylum seekers, new models for shared responsibility and liability for harm caused during migration is essential.

In the international law arena, tribunals are similarly grappling with the correct way to allocate liability when migrants are harmed, considering the reality that multiple States now work in concert to enforce immigration laws. One test focuses on assessing whether a State has "effective control" even though the harm is carried out outside of its borders.[283] The other test looks instead to whether the State is complicit in causing the harm outside of its borders.

[283] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 208 (Feb. 26), https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf [https://perma.cc/S8HD-49ZA] (clarifying that the relevant test for the attribution of conduct occurring extraterritorially is that of effective control).

Under the effective control doctrine, a State can be liable for human rights violations occurring while it has "effective control" over a territory or person.[284] In the context of externalized border policies, the original receiving state can transfer asylum seekers to other territories for processing as long as it ensures that they will not be returned to the host country from that territory or harmed while there. This includes during periods of detention or while in transit as long as the original receiving State retains effective control of the asylum seekers' circumstances.[285]

This "effective control" standard has also been utilized in the international criminal law context to argue for U.S. responsibility for the U.S. Coalition Forces' torture and abuse of Iraqi detainees.[286] Article 28 (1) of the ICC Statute provides that commanders who either knew or should have known of the offenses committed, and who failed to take all "necessary and reasonable measures within [their] power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution" shall be criminally responsible for crimes committed under their effective command and control, or effective authority and control, as a result of their failure to exercise control properly over his or her forces.[287] Similarly, Article 28(2) provides that other superiors (i.e., civilian officials), may be responsible for crimes committed by their subordinates if all three of these conditions are met: (1) the superior either knew, or consciously disregarded, information which clearly indicated that the subordinates were committing or about to commit such crimes; (2) the crimes involved acts within the effective responsibility and control of the superior; and (3) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress the crimes or to submit the matter for investigation and prosecution.[288]

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[284] *Id.*

[285] *See* Vassilis P. Tzevelekos & Elena Katselli Proukaki, *Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?*, 86 NORDIC J. INT'L L. 427, 441-42 (2017).

[286] *See Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, HUM. RTS. WATCH (Apr. 23, 2005), https://www.hrw.org/report/2005/04/23/getting-away-torture/command-responsibility-us-abuse-detainees#_ftnref365 [https://perma.cc/4CYN-8P87].

[287] INT'L CRIM. CT., ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 19-20 (1998), https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [https://perma.cc/D3D3-2RJ9].

[288] Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, AM. SOC'Y OF INT'L L. (May 21, 2004), https://www.asil.org/insights/volume/8/issue/10/international-legal-issues-surrounding-mistreatment-iraqi-detainees [https://perma.cc/2JPQ-KQJY].

The European Court of Human Rights has also carved out an exception to territorial jurisdiction when "as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of *an area* outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control[.]"[289]

However, in practice, this "effective control" doctrine falls short in recognizing the extraterritorial duty multiple states may owe when failing to protect asylum seekers from harm.[290] For example, the International Court of Justice ("ICJ") found that the U.S. did not have effective control over the Contras it financed in Nicaragua. Although the Court found that the financial support and training by the U.S. may have established factual harm, it was insufficient for establishing legal causation under the effective control doctrine.[291]

The U.S. also hasn't recognized this "effective control" doctrine in its jurisprudence. Moreover, even States that do recognize this doctrine often distinguish the refugee law context, arguing that the right of non-refoulement implicates national security concerns and the sovereign right of a state to control its borders in ways that other human rights treaties do not.[292]

In arguing for overlapping state responsibility for migrants during transit through multiple countries, one scholar suggests that the route of migration should be viewed not as a line but rather as a chain with interconnecting links.[293] By acknowledging the interconnected roles of states during migration, we can move away from the outdated model that assumes only one state is obligated to protect an asylum seeker's human rights and towards a model of overlapping jurisdiction and responsibility for protection.

As international law scholars have articulated, when trying to determine the responsibility of one State for a human rights violation in another State, it is necessary to establish that the conduct of that State

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289 Wells C. Bennett, *The Extraterritorial Effect of Human Rights: The ECHR's* Al-Skeini *Decision*, LAWFARE (July 12, 2011, 10:33 AM) (citing Al-Skeini v. United Kingdom, App. No. 55721/07 (July 7, 2011)), https://www.lawfareblog.com/extraterritorial-effect-human-rights-echrs-al-skeini-decision [https://perma.cc/27ZD-4N6G].

290 *See* Tzevelekos & Proukaki, *supra* note 285, at 448-49.

291 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 61 (June 27), https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [https://perma.cc/78AP-Y955].

292 Jill I. Goldenziel, *Checking Rights at the Border: Migrant Detention in International and Comparative Law*, 60 VA. J. INT'L L. 156, 171 (2019).

293 Tzevelekos & Proukaki, *supra* note 285, at 442.

(whether through act or omission) was sufficiently close or significant, or that it was reasonable to expect that the foreign State could foresee the negative impact on human rights.[294] Alternately, a "but-for test" can be used to determine when one State is responsible for human rights violations that occurs extraterritorially.[295] In other words, if a State had not acted in a particular way, the human rights violation would not have occurred. The advantage of this but-for test is that the geographic location of the injury (within or outside of the State) is not taken into account.

Scholars have also suggested that complicity may be a more appropriate test for assessing liability when multiple states play a role in causing human rights violations. An approach focused on complicity would take into account all the composite parts of acts or omissions that lead to human rights violations, rather than addressing them as just one large, comprehensive component.[296] By using a complicity approach, the fact that there may not be one clear actor who had effective control will not relieve other complicit actors of liability.[297]

This approach to conduct-based jurisdiction (focusing on acts or omissions that take place within a State but that cause harm abroad) has also been used in contexts beyond human rights litigation. For example, in the context of transnational securities litigation, courts in the U.S. have justified the conduct test on the ground that "fraud is essentially a universal evil that the United States, as the leader of the global securities market, has a duty to stamp out."[298] Certainly, abusing guaranteed human rights is a universal evil such that the U.S. should have a similar duty to stamp out.

Both the conducts doctrine and the effects doctrine further the same purpose of expanding the scope of jurisdiction when one State acts in such a way that causes harm abroad. But they are not unqualified doctrines and are mitigated by a number of factors aimed at assuring that the exercise of jurisdiction will be reasonable, including the extent to which the activity at issue (if committed abroad) has substantial,

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[294] Sigrun I. Skogly, *Causality and Extraterritorial Human Rights* Obligations, *in* GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW 233, 237 (Malcolm Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds., 2013).

[295] *Id.* at 239.

[296] *Id.* at 247.

[297] *See id.*

[298] John D. Kelly, *Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 L. & POL'Y INT'L BUS. 477, 491 (1997).

direct, and foreseeable effect on the territory; the connections between the regulating state and the person mainly responsible for the regulated activity; the type of activity to be regulated; and the importance of such regulation.[299]

Given the long history of the U.S. exerting pressure on Mexico and Central American nations to carry out immigration enforcement measures to curtail migration to the U.S. border, and the penumbra of border externalization initiatives that have inflicted harm on asylum seekers abroad, it is essential to expand the scope of U.S. jurisdiction for harms that result.

2. New Partnerships Necessitate New Legal Theories

As the U.S. enters into "partnerships" with other nations to control migration, there must also be new models of shared responsibility for human rights violations. Human rights law was based on the concept of the State and nations being responsible for safeguarding human rights within their borders. But as migration control has been separated from the State and often involves multiples States, new models for shared accountability are necessary. Under international human rights law, if a state transfers an individual to a third country, it has a duty of due diligence to ensure that the individual's rights will not be violated in the transfer or upon entry to the country of transfer.[300] This demonstrates a move away from territoriality and towards overlapping responsibility.[301]

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[299] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (AM. L. INST. 2021) (setting forth relevant factors to consider in determining whether jurisdiction is reasonable include: (a) the extent to which the activity at issue takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections (e.g., nationality, residence, or economic activity) between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal or economic system; (f) the extent to which regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state).

[300] Tzevelekos & Proukaki, *supra* note 285, at 444.

[301] *See id.* at 448 ("If a state, acting in breach of non-refoulement, transfers a migrant to a third state where she experiences serious human rights violations directly caused by state authorities, both the sending and the receiving state will be concurrently liable. One state because it has directly caused the wrongful result, breaking thereby the

Although it has not been pursued yet, a Northern Triangle country such as El Salvador, Guatemala, or Honduras could potentially sue the U.S. before the International Court of Justice ("ICJ") for violating its nationals' rights under the Refugee Convention. The Refugee Convention and the U.S. Protocol on Refugees (to which the U.S. is a signatory) provide for jurisdiction before the ICJ.[302] Of course, it seems counter-intuitive that a home country with endemic human rights violations that cause its nationals to flee would pursue litigation against the U.S. for violating these same individuals' right to surrogate state protection. More realistically, a Northern Triangle country like El Salvador could rely on the ICCPR to sue the U.S. before the ICJ for its mistreatment of Salvadoran migrants. Such litigation could also be brought against the U.S. and Mexico for their joint role in violating migrant rights. It may also seem unlikely that a host country with such a dismal record of human rights violations would litigate to protect the human rights of its migrants. However, Northern Triangle nations like El Salvador are dependent upon remittances for a sizeable portion of their economies.[303] If the U.S. and/or Mexico are allowed to violate human rights norms and decrease migration, this has a direct negative economic impact on nations like El Salvador. Therefore, even taking a cynical approach, Northern Triangle nations might have a self-interest in pursuing litigation against the U.S. and/or Mexico. Litigation before the ICJ could be one prong of a broad effort to hold the U.S. accountable for the intentional harms caused by its border externalization policies.

The Hight Court of Australia has had two opportunities in recent years to address Australia's liability for harms that occur as a result of its border externalization programs. In the first case, *Plaintiff S99 v. Minister for Immigration and Border Protection*, the Federal Court of Australia held that Australia owed a specific duty of care to people in its third-country detention programs.[304] In this case, the Court was faced with a refugee who was raped and in need of an abortion while held on Nauru Island as a result of Australia's third country refugee processing agreement.[305] While Australia was willing to allow the plaintiff to go to

negative dimension of the human right at question, and the other because of its failure to prevent that breach, violating thereby the positive dimension of the same right.").

302 Refugee Convention, *supra* note 25, at 6278; Refugee Protocol, *supra* note 26, at 6226.

303 RODRIGO MÉNDEZ MADDALENO, REMITTANCES IN CENTRAL AMERICA: THE ROLE OF CABEI 4 (2021), https://www.bcie.org/fileadmin/user_upload/Remittances_in_Central_America_the_Role_of_CABEI.pdf [https://perma.cc/QA2M-C9NZ].

304 *See Plaintiff S99/2016 v Minister for Immigr. & Border Prot.* (2016) 243 FCR 17, 83 (Austl.).

305 *Id.* at 44-48.

Papa New Guinea for an abortion, she sought to be brought to Australia for a safe procedure.[306] As the Court noted,

> Despite the nomenclature used by the Act to describe her, the applicant remains entitled to the protection of Australian law. Principally, that is because the Minister is bound by the law and . . . the Minister and the applicant are parties to a relationship recognised and enforced by the law out of which legal rights and obligations flow.[307]

Once acknowledging that a tort negligence lawsuit could be brought against Australia, the Court had to determine where the tort occurred. It concluded that "the right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?"[308] In grappling with what the appropriate duty of care should be in novel claims between a plaintiff and a putative tortfeasor, the Court articulated seventeen salient features to consider.[309] In determining that a duty of care existed and its extent, the Court paid particular attention to the degree of control the government had over the plaintiff and her vulnerability.[310]

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306 *Id.* at 51.

307 *Id.* at 26.

308 *Id.* at 61.

309 Salient features to be considered are: (a) the foreseeability of harm; (b) the nature of the harm alleged; (c) the degree and nature of control able to be exercised by the defendant to avoid harm; (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself; (e) the degree of reliance by the plaintiff upon the defendant; (f) any assumption of responsibility by the defendant; (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant; (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff; (i) the nature of the activity undertaken by the defendant; (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant; (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff; (l) any potential indeterminacy of liability; (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff; (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests; (o) the existence of conflicting duties arising from other principles of law or statute; (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law. *Id.* at 70.

310 *See id.* at 72. This is also the approach used by the UK and ECHR with regards to human rights abuses abroad during occupation. *See, e.g.*, EUR. CT. OF HUM. RTS., EXTRA-TERRITORIAL JURISDICTION OF STATES PARTIES TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2018), https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_

However, just two years later in a decision that has been widely condemned by human rights organizations, the High Court of Australia upheld the legality of Australia's third country processing program in the case of *M68/2015 v. Minister for Immigration and Border Protection*.[311] This case involved a Bangladeshi woman who was interdicted at sea and detained in Nauru pursuant to Australia's third country processing program.[312] Upon being transferred to Australia for medical care, plaintiff sued to stop Australia from forcibly returning her to Nauru.[313] She alleged that Australia exercised financial and "effective control" over the restraints on her liberty.[314] However, the High Court upheld the legality of the offshore processing program, finding that Australia had legal authority to move the plaintiff from Australia to Nauru, and to detain her.[315] Even though Australia's role in her detention was deemed, "materially supportive, if not a necessary condition of Nauru's physical capacity to detain the plaintiff," the Court nevertheless held that Nauru, rather than Australia was responsible for detaining the plaintiff.[316] The Court however did require that Australia's participation in the detention regime serve its purported purpose of processing asylum seekers.[317]

The ruling in M68 seems hard to reconcile with S99 and may undermine a broad interpretation of the "effective control" principle in international human rights cases. Notwithstanding Australia's ongoing financial and oversight role in detaining asylum seekers at Nauru, the High Court allowed it to contract out of its human rights duties and liability.[318]

eng.pdf [https://perma.cc/6MXF-BX3W] (providing summaries of various European cases where the court particularly examined the degree of control the government had over the complainant).

311 *Plaintiff M68/2015 v. Minister for Immigr. & Border Prot.* [2016] HCA 1, 2 (Austl.).

312 *Id.* at 1.

313 *Id.* at 4-5.

314 *Id.* at 6.

315 *Id.* at 69.

316 *Id.* at 10.

317 *See id.* at 12-13.

318 *See Australia: 8 Years of Abusive Offshore Asylum Processing*, HUM. RTS. WATCH (July 15, 2021, 6:00 PM EDT), https://www.hrw.org/news/2021/07/16/australia-8-years-abusive-offshore-asylum-processing# [https://perma.cc/38CZ-6F9C] ("[S]ince July 19, 2013, the Australian government has forcibly transferred more than 3,000 asylum seekers who sought to reach Australia by boat to offshore processing camps in Papua New Guinea and Nauru. Individuals and families with children spent years living in substandard conditions in these centers, where they suffered severe abuse, inhumane treatment, and medical neglect.").

Nevertheless, applying the salient features set forth by the High Court to the U.S.'s border externalization programs, like the MPP, provides a new way to articulate the harm that has been caused. Understanding the magnitude of the harm caused by programs like the MPP is essential as the new Administration evaluates (a) what to do with the tens of thousands of asylum seekers who are still in danger in Mexico in the MPP program; and (b) the types of border enforcement initiatives and agreements with other nations that will be instituted to replace the MPP and Trump-era border externalization programs.

It is clear that the U.S. was well aware of the extreme danger awaiting asylum seekers in Tamaulipas. In addition to the U.S. State Department assigning its highest danger ranking to this region, on January 14, 2020, the House Judiciary Committee announced an investigation into the MPP, denouncing it for "exposing thousands of people to threats of murder, sexual violence, and kidnapping as they are forced to wait in extremely dangerous conditions before their asylum claims may be heard."[319] This also demonstrates the severity of the harm at issue, and the vulnerability of the population at risk. Moreover, the Mexican government also recognized the extreme peril. In July 2019, Mexico's ambassador to the United States acknowledged that the Mexican government was not prepared for the expansion of MPP to Tamaulipas because of the extreme dangers there. She warned that, "there are certain areas of Mexico in which the challenges of security are higher . . . [s]o, that is why we have been very careful of not opening up, for example, the return [of migrants to] Tamaulipas."[320] Notwithstanding the clear U.S. knowledge of the imminent risks facing returned asylum seekers, it continued to operate the MPP.

Meanwhile, within the Northern Triangle nations that are at the root of the vast majority of asylum claims for those forced to wait in Mexico, the DHS has been engaged in rounding up and deporting refugees before they even reach Mexico. For example, in Guatemala, DHS was engaged in forcing Hondurans into unmarked vans and driving them back to Honduras.[321]

Among its findings, the staff report for the Committee on Foreign Relations found that "DHS has assumed unprecedented influence over

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[319] Letter from H. Comm. on the Judiciary to Chad Wolf, Acting Sec'y, Dep't of Homeland Sec. (Jan. 14, 2020), https://judiciary.house.gov/uploadedfiles/judiciary_objections_to_mpp.pdf?utm_campaign=349-519 [https://perma.cc/BU6A-LVGB].

[320] *Nora* Complaint, *supra* note 220, at 17 (quoting *CQ Roll Call and the Meridian International Center Holds Discussion on Trade, Immigration and Foreign Affairs*, CQ-ROLL CALL (July 18, 2019)).

[321] SENATE FOREIGN RELS. COMM. DEMOCRATIC STAFF, *supra* note 236, at 6.

U.S. bilateral relations with Guatemala, simultaneously imposing its policies on the Guatemalan government and undermining the State Department's traditional role as the principal steward of U.S. foreign policy."[322] It also found that the DHS conduct put the U.S. at risk of liability.[323]

In order to have accountability for the intentional harms of the forced invisibility regime and to ensure that new border enforcement policies are humane, the would-be receiving country must bear some level of protection responsibility/liability for human rights violations if it plays a substantial role in undermining guaranteed access to protection/causing harm to asylum seekers. Under this model, the U.S. would have obligations to MPP asylum-seekers held in Mexico because they are in known danger pursuant to U.S. policy. The same analysis would be applicable for the U.S. agreements with Honduras, Guatemala, and El Salvador.

CONCLUSION

The Trump Administration's construction of a multi-faceted invisible wall disappeared asylum seekers at the southern border while simultaneously obscuring the U.S. role in causing intentional harm. This enforced invisibility regime nearly eviscerated the U.S.'s long-standing asylum protection system. The Biden Administration has acted to undo many of the most egregious policies at the southern border. But, while many of the individual policies can be easily undone, their roots run deep and must be understood and addressed in order to have accountability for the deep harm these policies inflicted. Indeed, the U.S. has a long history of externalization policies at the southern border and the Trump era initiatives were built upon a solid foundation of pre-existing racism and exclusion in immigration enforcement, particularly at the southern border. Restoring refugee protection and justice will require accountability for past harms. Naming the racial animus and intentional harm connected to these policies is essential. As Jenny Brooke Condon has urged in the context of recognizing family separation as intentional torture, this approach "acknowledges the grave human rights violations inflicted on families while resisting the normalization of broader harm directed at non-citizens throughout the immigration system."[324] Equally essential will be a push for a broader

[322] *Id.* at 3.

[323] *Id.* at 9.

[324] Jenny-Brooke Condon, *When Cruelty Is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37, 40 (2021).

normative framework and new ways to process asylum seekers without stripping them of dignity and visibility.