

ASYLUM FROM THE NORTHERN TRIANGLE: IS
ASYLUM THE ANSWER FOR
THOSE FLEEING THE MOST VIOLENT COUNTRIES?

Tyler B. Barnes[†]

ABSTRACT

The purpose of this Article is to highlight the issues facing individuals in the Northern Triangle countries¹, the effects it has on immigration, the asylum process in the United States, and a policy recommendation to address the asylum crisis created by the migration from the Northern Triangle countries to the United States. The problem is that the Northern Triangle countries are currently unable to provide a safe and stable environment for their citizens, causing an influx of people fleeing this region in Central America in order to seek asylum in the United States. The US, however, has had a very inconsistent and subjective asylum process that has become even more complicated under the Trump administration. The crisis in the Northern Triangle is not only a human rights issue, but also an international security issue, because of the spread of disease and stress on infrastructure in the United States. The asylum seekers are also increasingly vulnerable to human traffickers and drug cartels. By reforming asylum laws to deliver an objective and clear rule, providing temporary or permanent asylum depending on the circumstances, while simultaneously aiding and holding Northern Triangle countries accountable for the support provided to them, the

[†] Tyler B. Barnes is a 2019 graduate of Regent University School of Law, where he served on the board of the Journal of Global Justice and Public Policy as well as the Virginia Bar Association. As a licensed attorney, he is clerking for The Honorable Clifford L. Athey Jr. in the Court of Appeals of Virginia.

¹ The Northern Triangle is made up of El Salvador, Guatemala, and Honduras. Amelia Cheatham, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/background/central-americas-violent-northern-triangle> (last updated Oct. 1, 2019).

United States can offer a model for how to deal with pressing problems with a balanced approach.

I. INTRODUCTION

You just finished a hard day's work, earning a rest in your recliner, eating dinner, and watching the evening news. It has been hard to watch lately, not just because of the bitterly partisan political climate, but also because of the complete disregard some individuals have for human life. In one weekend in the summer of 2018, 72 individuals were shot in Chicago, 13 of those shootings were fatal.² Heart wrenching headlines like these seem to be all too common, even worse when it affects the most vulnerable in our society: our children.³ On average, over 11 active shooter incidents occur in a year.⁴ Of the 160 active shooter incidents that occurred between 2000-2013, 1,043 individuals were shot, with 486 killed.⁵ After getting your fill of the daily bad news, you turn off the TV and go to bed.

Many can relate to this scenario, sometimes even cutting out or reducing news consumption when it becomes too much to handle. In America, we have the luxury of shutting off the negativity. Even at its worst, at the end of the day, we can rest easy knowing that the "bad guys" will be caught in the end by our brave men and women in law enforcement. The same cannot be said about many living in one of the most violent countries on earth: El Salvador.⁶

Lorena, from San Salvador, El Salvador, cannot afford

² Aamer Madhani, *At least 72 shot, 13 killed in Chicago over violent summer weekend, police department says*, USA TODAY, <https://www.usatoday.com/story/news/2018/08/06/chicago-violence-leaves-71-shot-11-dead-weekend/914141002/> (last updated Aug. 7, 2018).

³ *FBI Releases Study on Active Shooter Incidents*, FBI (Sept. 24, 2014) <https://www.fbi.gov/news/stories/fbi-releases-study-on-active-shooter-incidents>.

⁴ *Id.*

⁵ *Id.*

⁶ Cheatam, *supra* note 1.

the luxury of turning off the negativity at the end of her day.⁷ Living in the slums, she is at the epicenter of violence in the city.⁸ Lorena and her husband, Julio, ran a small store out of their home.⁹ Lorena is a mother of four, running the shop to provide for herself and most importantly for her children.¹⁰ Unfortunately, her family's business soon became a nightmare. In January of 2013, members of the gang who claims the territory where she lives showed up and demanded payment.¹¹ They threatened to kill Lorena and her family if they contacted the police.¹² This is a very real threat that will be followed through, given the past of these gangs.¹³ With nowhere to turn, Lorena and her family agreed.¹⁴

Having four mouths to feed from just a small family owned business, this caused money to become increasingly tight.¹⁵ When cash was running low, Lorena had to hand over their store inventory in order to satiate the demands for tribute from the gang.¹⁶ This went on for months, until it got to the point that Lorena and her family could no longer afford it.¹⁷ A few days after the tribute ceased, they followed through with their threat and gave them a taste of what defiance gets Lorena.¹⁸ Twenty armed gang membered showed up at Lorena's house, banged on the door, and demanded the money immediately.¹⁹ When they refused, the gang proceeded to "threaten[] and assault[] every member of the family,

⁷ Michelle Centeno, *Stolen Childhood: Gang Violence in El Salvador*, UNICEF, <https://www.unicef.org/stories/stolen-childhood-gang-violence-el-salvador> (last updated Nov. 24, 2017).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Jonathan Watts, *One Murder Every Hour: How El Salvador Became the Homicide Capital of the World*, GUARDIAN (Aug. 22, 2015)

<https://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place>.

¹⁴ Centeno, *supra* note 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Centeno, *supra* note 7.

including the children.”²⁰ Lorena was then told that she had 72 hours to provide the United States equivalent of \$10,000 to remain alive.²¹ Lorena and her family did not have anywhere near this amount of money on hand, so their only option was to flee.²²

The family settled in another part of the city which was under the control of a rival gang.²³ While Lorena, Julio, and their children got away from the vicious gang, her close relatives were not so lucky.²⁴ In retaliation for Lorena’s insubordination, one relative was hacked to death and then dismembered, and another shot.²⁵ Even now, Lorena and her family are still threatened and live in a constant state of terror.²⁶

Stories like Lorena’s are all too common in what is known as the “Northern Triangle.”²⁷ This ominous title is given to El Salvador, Guatemala, and Honduras, countries known for their organized crime, gang violence, and poverty.²⁸ Increasing numbers of refugees are fleeing these countries as the violence escalates.²⁹ Many are seeking Asylum in their neighboring countries, including the United States.³⁰ This elevates and requires us to answer, how should the United States handle these victims and what example are we setting for the world by our response?

First, this Article provides background on what is known as the violent “Northern Triangle. Next, the Article

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Cheatham, *supra* note 1.

²⁸ See Silva Mathema, *They are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/> (last updated June 1, 2018).

²⁹ *Id.*

³⁰ *Id.*

describes the origins and activities of MS-13, a vicious street gang which causes havoc across Central and North America. Then the Article provides the procedure of seeking asylum in the United States, and the changing approach the country has taken under the Obama and Trump administrations. Lastly, the Article describes what the law should be in order to most efficiently and effectively handle this humanitarian crisis.

A. *The Northern Triangle*

Stories like Lorena's are not uncommon in the area known as the "Northern Triangle."³¹ This area is made up of El Salvador, Guatemala, and Honduras.³² For years, these countries have been trying to recover from disastrous civil wars.³³ El Salvador's crime problem has even been described as "worse than the war," which is devastating to hear when the end of the war was supposed to bring democracy and a capitalist turnaround.³⁴ The result has turned out not to be what the citizens have hoped for.³⁵ Traveling to El Salvador, Ellen Moodie³⁶ sought to get first-hand accounts of what was going on in the lives of the citizens of El Salvador and how the war has changed their country.³⁷

One of the interviewees, Nelson, stated "[a]fter the peace accords, it's even more terrible."³⁸ He went on to say how his life was in chaos during the civil war in his country.³⁹ His brother even disappeared, feared to have been taken by

³¹ Cheatham, *supra* note 1.

³² *Id.*

³³ *Id.*; ELLEN MOODIE, EL SALVADOR IN THE AFTERMATH OF PEACE: CRIME, UNCERTAINTY, AND THE TRANSITION TO DEMOCRACY 83–84 (2010).

³⁴ MOODIE, *supra* note 33.

³⁵ *Id.*

³⁶ Ellen Moodie is an author and Associate professor at the University of Illinois, focusing on "Central America, violence, crime, [and] human rights." She has received numerous grants and awards, and served as secretary and co-chair of the Central America section of the Latin American Studies Association. Ellen Moodie, U. OF ILL., <https://anthro.illinois.edu/directory/profile/emoodie> (last visited Feb. 2, 2020).

³⁷ See MOODIE, *supra* note 33, at 84–85.

³⁸ *Id.* at 85.

³⁹ *Id.* at 85–87.

militants in the ongoing war in their country.⁴⁰ He encountered violence first hand during the war, being assaulted by what he called “petty thieves,” resulting in an awful experience that could have left him dead.⁴¹ The logical conclusion to draw when the war finished would be that the country would stabilize and come together. The opposite has actually occurred. Nelson said that after the peace accords, these petty thieves organized themselves into groups and did more brazen acts of violence that were much more serious than anything he experienced during the civil war.⁴² In one experience, he described the time a group of armed men took over a bus he was on, resulting in the death of a woman after being shot when she screamed out of desperation.⁴³

Stories like Nelson’s are not uncommon, El Salvador ranks as one of the most homicidal countries in Latin America.⁴⁴ In 2016, El Salvador’s homicide rate was 81.2 per 100,000.⁴⁵ That seems like a lot, but just the year before that, it was up to 104 per 100,000.⁴⁶ Honduras, once known as the murder capital of the world, has seen a decline of killings in recent years, although still not totally under control.⁴⁷ In 2011, Honduras was at 86.5 per 100,000, but has brought it down to 42.8 per 100,000.⁴⁸ Lastly, Guatemala was previously at 46.5 per 100,000, and is now to 27.3 per 100,000.⁴⁹

⁴⁰ *Id.* at 86.

⁴¹ *Id.* at 86-87.

⁴² *Id.* at 87.

⁴³ *Id.*

⁴⁴ David Gagne, *InSight Crime’s 2016 Homicide Round-up*, INSIGHT CRIME (Jan. 16, 2017), <https://www.insightcrime.org/news/analysis/insight-crime-2016-homicide-round-up/>.

⁴⁵ *Id.* See also *El Salvador: Homicides Increased in the First Month of 2018*, LATIN AMERICAN POST (Jan. 26, 2018) <https://latinamericanpost.com/19351-el-salvador--homicides-increased-in-the-first-month-of-2018> (“In the 20 first days of the current year [2018], 220 homicides were registered, 25 more than those calculated during the same period in 2017”).

⁴⁶ Gagne, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*; Gustavo Palencia, *Honduras Murder Rate Fell by More than 25 Percent in 2017: Government*, REUTERS (Jan. 2, 2018), <https://www.reuters.com/article/us-honduras-violence/honduras-murder-rate-fell-by-more-than-25-percent-in-2017-government-idUSKBN1ER1K9>.

⁴⁹ Gagne, *supra* note 44.

It is not surprising that all this violence has given rise to an immigration crisis, with around 265,000 individuals fleeing the Northern Triangle seeking asylum each year.⁵⁰ Many of them were unaccompanied minors, leading to as many as 3.4 million people living in the United States who originated from the Northern triangle, with over half undocumented.⁵¹

B. The Rise of MS-13

Among the violent realities that these asylum seekers had to face, many, if not all, were touched by gang violence in some way. Unfortunately, like the asylum seekers, some of these criminal elements have come into the US and have started the ultra-violent gang “Mara Salvatrucha,” better known as “MS-13.”⁵² Founded in Los Angeles by Northern Triangle refugees in the 1980s, the group quickly stood out from the other Mexican gangs in the area because of their violent past in their war-torn country.⁵³ One of their Mexican rival gangs, the “Mexican Mafia,” took note of their growing violence and integrated Mara Salvatrucha into their alliance, thus creating “MS-13.”⁵⁴

The United States realized in the 1990s that these street gangs were becoming a significant threat, so under Bill Clinton, the government began deporting individuals who were convicted of the kind of crimes that MS-13 commits.⁵⁵

⁵⁰ Cheatham, *supra* note 1.

⁵¹ See Allison O'Connor, Jeanne Batalova & Jessica Bolter, *Central American Immigrants in the United States*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/article/central-american-immigrants-united-states> (last updated Aug. 15, 2019); See also Yermi Brenner, Roberto Forin & Chris Horwood, *The Closing Door: Mixed Flows From Central America Facing Restricted Access to Protection*, MIXED MIGRATION CENTRE, <http://www.mixedmigration.org/articles/the-closing-door-mixed-flows-from-central-america-facing-restricted-access-to-protection/> (last updated Dec. 20, 2018).

⁵² CYNTHIA L. STARITA, MOUNTING THREAT OF DOMESTIC TERRORISM : AL QAEDA AND THE SALVADORAN GANG MS-13 49 (2009); See *The MS-13 Threat: A National Assessment*, FBI (Jan. 14, 2008), https://archives.fbi.gov/archives/news/stories/2008/january/ms13_011408.

⁵³ See STARITA, *supra* note 52, at 49-50.

⁵⁴ *MS13*, INSIGHT CRIME, <https://www.insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile/> (last updated Mar. 11, 2019).

⁵⁵ *Id.*

Unfortunately, this led to a cycle of further gang violence to spread into the Northern Triangle, because once deported, these violent gang members continued their violent ways upon returning to their native country.⁵⁶

MS-13 is still a danger today, with the FBI rating the gang a “medium” threat level, with some areas of the country facing a “high” threat.⁵⁷ The gang operates in at least 42 states, and has 6,000-10,000 members across the country.⁵⁸ Their membership is expanding at a moderate rate, and they commit a wide range of the most violent crimes: “drug distribution, murder, rape, prostitution, robbery, home invasions, immigration offenses, kidnapping, carjacking/auto thefts, and vandalism.”⁵⁹

The sheer brutality of MS-13 is undeniable, with graphic killings still committed by the gang.⁶⁰ In one murder in Maryland, 10 MS-13 members lured a victim to them to later choke and stab him more than 100 times before decapitating him and removing his heart.⁶¹

The gang is also associated with human trafficking in the United States, more recently up and down the Eastern Seaboard.⁶² According to Neil MacBride, U.S. attorney for the Eastern District of Virginia, “we have seen movement to the business side of the gang, with sex-trafficking appearing to be a source of income for them that it wasn’t a couple years ago.”⁶³ Targeting young girls in crisis and nowhere to turn, MS-13 gang members promise a “family” and shelter, and

⁵⁶ *Id.*

⁵⁷ *The MS-13 Threat*, *supra* note 52.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Samuel Chamberlain, *Two More Arrested in Brutal MS-13 Murder Where Victim Was Maimed, Decapitated*, FOX NEWS (Dec. 1, 2017), <https://www.foxnews.com/us/two-more-arrested-in-brutal-ms-13-murder-where-victim-was-maimed-decapitated>.

⁶¹ *Id.*

⁶² Del Quentin Wilber, *MS-13 Gang is Branching into Prostitution, Authorities Say*, WASH. POST (Nov. 13, 2011), https://www.washingtonpost.com/local/ms-13-gang-is-branching-into-prostitution-authorities-say/2011/11/04/gIQAAtOyIN_story.html.

⁶³ *Id.*

then force the girls to have sex on a daily basis for money.⁶⁴

MS-13 successfully recruits young people to their ranks by maintaining a “join or die” culture.⁶⁵ Appealing to other immigrants, they focus on those who are without relatives in the United States, living in poverty, and are already accustomed to gang violence.⁶⁶ It gives youth the ability to fit into a country that does not speak their language, or share their culture.⁶⁷

All this violence highlights the problems that the United States immigration system faces with such an influx of asylum seekers from the Northern Triangle.⁶⁸ The United States, however, has rules that those fleeing the Triangle must follow in order to successfully seek Asylum.⁶⁹

II. ASYLUM RULES

Generally, the United States asylum application process was made available for people who have been seen as persecuted or fearful of persecution in their countries of origin.⁷⁰ Asylum as we know it today was created by section 208 of the Immigration and Nationality Act.⁷¹ The rules promulgated to implement the Act were then codified into the Code of Federal Regulations, 8 C.F.R. 208 et seq.⁷²

The Code states that:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a

⁶⁴ *Id.*

⁶⁵ Justin Jouvenal, Dan Morse, & Michael E. Miller, *MS-13 Gains Recruits and Power in U.S. as Teens Surge Across Border*, WASH. POST (June 17, 2017), https://www.washingtonpost.com/local/public-safety/ms-13-gains-recruits-and-power-in-us-as-teens-surge-across-border/2017/06/16/aacea62a-3989-11e7-a058-ddbb23c75d82_story.html.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Cheatham, *supra* note 1.

⁶⁹ *Asylum in the United States*, AM. IMMIGRATION COUNSEL (May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

⁷⁰ *Matter of A-B-*, 27 I&N Dec. 316, 317-18 (A.G. 2018).

⁷¹ *See* 8 U.S.C. § 1158 (1952).

⁷² 8 C.F.R. 208 (1997).

land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien must be granted asylum *in the discretion of the Attorney General* if the *Attorney General determines* that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.⁷³

Note that the Attorney General has discretion when it comes to who can be admitted to the United States through asylum. The discretion of the Attorney General involves taking into account the positive and negative factors in that particular asylum case in a balancing test.⁷⁴ This will be important later in this article, because this has allowed the requirements of asylum to change over time depending on the philosophy of the administration that currently holds the Executive Branch. This is because the Attorney General is appointed by the President, with the advice and consent of the Senate.⁷⁵

The term "refugee" is defined in the Code as "any person...who was unable or unwilling to avail themselves to the protection of their origin country...because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁷⁶ The Code also allows for the President to allow for admission under "special circumstances."⁷⁷ An interesting exception to this definition is that a person cannot be a refugee, which means claiming a fear of persecution, if this same person also "ordered, incited, assisted, or otherwise participated in" the events that created the reason for refugee status.⁷⁸ In other words, (s)he could not be one of the people persecuting, and then turn around and claim that they were being persecuted.

The Supreme Court laid out the fundamental rules for

⁷³ 8 U.S.C. § 1158.

⁷⁴ *Godoy v. Holder*, 434 Fed. Appx. 634, 636 (2011).

⁷⁵ U.S. CONST. art. II, § 2, cl. 2.

⁷⁶ 8 U.S.C.S. § 1101(a)(42) (LEXIS through Pub. L. No. 116-91).

⁷⁷ *Id.*

⁷⁸ *Id.*

Asylum in *INS v. Cardona-Fonseca*.⁷⁹ There, the Court stated that “asylum depends entirely on the Attorney General’s determination that an alien is a ‘refugee.’”⁸⁰ The Attorney General must use the underlying rule of asylum, the “well-founded fear of persecution,” when determining eligibility for asylum.⁸¹ However, even if the asylum seeker meets the definition of a “refugee,” the Attorney General may still deny the application because it is at the *discretion* of the Attorney General.⁸² The reasons for such a denial are case by case, but reasons could include safety or other national security reasons not encompassed by the code.⁸³

The case goes on to state the underlying standard that the asylum seeker must meet in order to reach the level of being granted asylum. The court lays out two possible rules to consider: a subjective and objective rule. For the objective rule, the applicant must “establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation.”⁸⁴ For the subjective rule, the applicant must prove that they had the subjective mental state of “fear.”⁸⁵ The court ultimately decided that to show a “well-founded fear of persecution,” the applicant must not satisfy the objective rule, but the subjective one.⁸⁶ This was to allow for the United States to have the “flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.”⁸⁷

INS v. Cardoza-Fonseca concludes by reiterating the flexibility that is given to the Attorney General.⁸⁸ The refugee

⁷⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449–50 (1987).

⁸⁰ *Id.* at 427–28.

⁸¹ *Id.* at 428; see also *Dwomoh v. Sava*, 696 F. Supp. 970, 980 n.2 (S.D.N.Y. 1988).

⁸² See *Cardoza-Fonseca*, 480 U.S. at 469 n.5.

⁸³ See *id.* at 448.

⁸⁴ *Id.* at 430; see *Bajwa v. Cobb*, 727 F. Supp. 53, 58 (D. Mass. 1989).

⁸⁵ See *Cardoza-Fonseca*, 480 U.S. at 430–31.

⁸⁶ *Id.* at 449.

⁸⁷ *Id.*; see also *Neng Long Wang v. Gonzales*, 405 F.3d 134, 141 (3d Cir. 2005) (holding that past persecution or well-founded fear of future persecution must be directed at the applicant, and not someone the applicant is related or associated with. An applicant may not step in the shoes of those facing direct persecution).

⁸⁸ See *Cardoza-Fonseca*, 480 U.S. at 449–50.

definition does not create a “strict” rule, but a more flexible one that gives the Attorney General the ability to prevent the “harsh measure” of a deportation.⁸⁹ Thus, asylum can be granted to those who can prove that it is more likely than not that they will be persecuted if deported, but asylum can also be granted in cases where the applicant proves a subjective “well-founded fear of persecution.”⁹⁰

After fulfilling the definition of a refugee, the first requirement for asylum is that the applicant must be physically present in the United States.⁹¹ It also does not matter what their immigration status is, meaning that they can be undocumented or illegal, and seek asylum in the country.⁹² The law also provides that the asylum seeker may apply for asylum at a port or point of entry even if the individual is a crewman or stowaway.⁹³ Although 8 U.S.C.S. § 1182 lists stowaways as “excludable aliens,” 8 U.S.C.S. § 1323 provides that “aliens applying for asylum may do so ‘irrespective of status’” within the United States.⁹⁴ To reconcile these two provisions, the court in *Chun v. Sava* concluded that stowaways are permitted a hearing limited to their asylum claim, because their status as a stowaway should not limit their asylum following the spirit of § 1323.⁹⁵ Individuals who are physically present may be excluded altogether from the asylum process, however, if they are noncitizens who are deemed to endanger the welfare, safety, or provide a security risk.⁹⁶ This rule is trying to exclude those who are “affiliated with ‘subversive’ organizations and aliens

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ 8 U.S.C.S. § 1158(a)(1) (LEXIS through Pub. L. No. 116-91).

⁹² *Id.*; 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.05, LexisNexis (database updated 2019).

⁹³ *See Chun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983).

⁹⁴ *Id.* at 874; *See* 8 U.S.C.S. § 1182(a)(6)(D) (LEXIS through Pub. L. No. 116-108); *See also* 8 U.S.C.S. § 1158(a)(1) (LEXIS through Pub. L. No. 116-108).

⁹⁵ *Chun*, 708 F.2d at 876; 8 U.S.C.S. § 1323(d) (LEXIS through Pub. L. No. 116-108) (repealed 1996).

⁹⁶ *Azzouka v. Sava*, 777 F.2d 68, 72 (2d Cir. 1985) (quoting 8 U.S.C. § 1182(a)(3)(F) (2012)).

who are involved in espionage.”⁹⁷

Because an illegal immigrant may be considered for asylum, there is a great possibility that the individual will be put into the process of removal from the country. Normally, if an immigration officer determines that an individual does not possess a valid visa or travel documents, or that the documents they possess are false, then the individual may be removed from the United States.⁹⁸ However, if the noncitizen, who is subject to removal based on lack of or false documentation, indicates that they want to apply for asylum, the removal process will be paused.⁹⁹ The individual requesting asylum will then be interviewed by an asylum officer in order to find out if they have a “credible fear of persecution.”¹⁰⁰ If it is the officer’s determination that there exists no fear of persecution, the individual will then be deported.¹⁰¹ The decision of the asylum officer will not be reviewed by the courts, there will only be a very limited administrative review upon request.¹⁰² However, if the officer determines that there is a credible fear of persecution if returned to the applicant’s origin country, then the asylum seeker will then be detained and be able to start the asylum application process.¹⁰³

A. Exceptions and Disqualifications of Asylum

There are some exceptions that prevent individuals from seeking asylum under certain circumstances, even if there is a fear of persecution.¹⁰⁴ The first exception is when the individual seeking asylum can be safely removed to a country that the United States has an agreement with

⁹⁷ *Id.*

⁹⁸ 8 U.S.C. § 1182(a)(7)(A)–(B) (2012).

⁹⁹ *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

¹⁰⁰ *Id.* § 1225(b)(1)(B)(i)–(ii).

¹⁰¹ *Id.* § 1225(b)(1)(B)(iii)(I).

¹⁰² *Id.* § 1225(b)(1)(B)(iii)(III); *see* Inspection of Persons Applying for Admission, 8 C.F.R. § 235.3(b)(7) (2019).

¹⁰³ 8 U.S.C. § 1225(b)(1)(B)(ii).

¹⁰⁴ 8 U.S.C. § 1158(a)(2)(A)–(E) (2012).

regarding asylum seekers.¹⁰⁵ However, the government must first prove that there would be fair procedures for determining asylum within that country.¹⁰⁶

The second exception is a time limit set on the asylum application.¹⁰⁷ To fulfill this, the asylum seeker must prove, with clear and convincing evidence, that the application was completed within one year of their arrival into the United States.¹⁰⁸ The time starts when the individual enters the United States for his or her current stay.¹⁰⁹ If they had previously been in the United States and had left, that time does not count towards it.¹¹⁰ There is an exception to the time limit if there exists “changed” or “extraordinary circumstances.”¹¹¹

Changed circumstances are defined as “circumstances . . . materially affect[ing] the applicant’s eligibility for asylum.”¹¹² Some examples include the conditions of the applicant’s origin country,¹¹³ changes to United States laws regarding asylum, activities the individual has now become involved in that puts the applicant at risk, and “the loss of a spousal or parent-child relationship to the principal applicant” when the alien was “included as a dependent in another alien’s pending asylum application.”¹¹⁴ The applicant must still apply “within a reasonable period given those

¹⁰⁵ *Id.* § 1158(a)(2)(A).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 1158(a)(2)(B).

¹⁰⁸ *Id.*

¹⁰⁹ Matter of F-P-R-, 24 I.&N. Dec. 681, 683–84 (U.S. Dep’t of Justice Exec. Office for Immigr. Review Bd. of Immigr. App. 2008).

¹¹⁰ *Id.*

¹¹¹ See Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 1208.4(a)(4)–(5) (2019) (defining “changed circumstances” and “extraordinary circumstances”).

¹¹² 8 U.S.C. § 1158(a)(2)(D).

¹¹³ For example, if changes in their origin country make their asylum application ineligible because his or her application relies on facts which have since changed. See 8 C.F.R. § 1208.4(a)(4)(i)(A)–(C).

¹¹⁴ 8 C.F.R. § 1208.4(a)(4)(i)(C); see *Vahora v. Holder*, 641 F.3d 1038, 1047 (9th Cir. 2011) (holding that alien demonstrated changed circumstances by presenting evidence regarding the disappearance of his brothers, destruction of his home, and unrest following the destruction of a temple).

‘changed circumstances.’”¹¹⁵ The time period seen as reasonable can also be affected if the applicant did not become aware of the changed circumstances until after they had already occurred.¹¹⁶

Extraordinary circumstances are “events or factors directly related to the failure to meet the 1-year deadline.”¹¹⁷ The application must also be within a reasonable period after the event.¹¹⁸ Events that would be considered “extraordinary” include “serious illness or mental or physical disability,” being considered “legal[ly] [disabled]” because of being an unaccompanied minor, ineffective counsel, or “the death or serious illness or incapacity of the applicant’s legal representative or a member of the applicant’s immediate family.”¹¹⁹

The third exception is when the asylum seeker has previously sought asylum and has been denied.¹²⁰ A previous denial will not prevent a second application “if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the [time limit].”¹²¹

Fourth, an applicant is disqualified if the Attorney General determines that they had “firmly resettled” in another country before they entered the United States.¹²² The statute does not provide what exactly an applicant must do to in order to be considered “firmly resettled” in another country. Separately, in the Code of Federal Regulations, there is a definition provided for the term that may be applicable in

¹¹⁵ 8 C.F.R. § 1208.4(a)(4)(ii).

¹¹⁶ *Id.*; see *Yuen Jin v. Mukasey*, 538 F.3d 143, 160 (2nd Cir. 2008) (holding that the birth of a child did not constitute sufficient changed circumstances because they were changed personal circumstances and not changed country conditions).

¹¹⁷ 8 C.F.R. § 1208.4(a)(5).

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 1208.4(a)(5)(i)–(vi).

¹²⁰ 8 U.S.C. § 1158(a)(2)(C).

¹²¹ *Id.* § 1158(a)(2)(D).

¹²² *Id.* at § 1158 (b)(2)(A)(vi).

asylum cases. There, “firmly resettled” is when the applicant “has been offered resident status, citizenship, or some other type of permanent resettlement by a country other than the United States.”¹²³ To achieve this, they must have traveled into that country due to their flight from persecution.¹²⁴ If they claim they did not firmly resettle in that country, the applicant must show that their residence was “so restrictive as to deny resettlement.”¹²⁵ There are three factors that should be considered in determining resettlement.¹²⁶ First, taking into account how others in the country live, was the applicant provided permanent or temporary housing?¹²⁷ Second, was employment readily available?¹²⁸ Lastly, were other benefits available to the applicant such as “property ownership, travel documentation, education, public welfare, and citizenship?”¹²⁹

The last disqualification for asylum triggers when there is a security issue with the applicant.¹³⁰ Examples include when the applicant has been convicted of a “particularly serious crime” and would be a danger to the community, when there are “serious reasons for believing” that the applicant “has committed a serious nonpolitical crime outside the United States,” and lastly, a catch all for when “there are reasonable grounds” for believing that the applicant would be “a danger to the security of the United States.”¹³¹ There is a final limitation that allows the Attorney

¹²³ Admission of Refugees, 8 C.F.R. § 207.1(b) (2019).

¹²⁴ *Id.*; see *Hanna v. Holder*, 740 F.3d 379, 397 (6th Cir. 2014) (holding that alien was not eligible for asylum because he was firmly resettled in Canada prior to entering the United States).

¹²⁵ 8 C.F.R. § 207.1(b).

¹²⁶ *Id.* § 207.1(b)(1)-(3).

¹²⁷ *Id.* § 207.1(b)(1); see *Andriasian v. INS*, 180 F.3d 1033, 1046-47 (9th Cir. 1999) (holding that alien was not firmly resettled because he was threatened and harassed in a third country, despite obtaining temporary residence there).

¹²⁸ 8 C.F.R. § 207.1(b)(2).

¹²⁹ *Id.* § 207.1(b)(3); see *Diallo v. Ashcroft*, 381 F.3d 687, 693 (7th Cir. 2004). One of the important factors is whether the country that the alien resettled in made an offer of resettlement, *Diallo*, 381 F.3d at 693.

¹³⁰ 8 U.S.C. § 1158(b)(2)(A)(i)-(v) (2012).

¹³¹ *Id.*

General to create regulations that establish additional disqualifications that would prevent an applicant from being granted asylum.¹³²

III. CHANGING ASYLUM APPROACHES

Any casual observer of the previous and current presidential administrations would surely conclude that the Trump and Obama Administrations have vastly different views on immigration issues. While some policies may not be too far apart, the two administrations have very different philosophies. Consequently, the exercise of discretion that the Executive Branch has on asylum policy directly affects, and causes much fluctuation in, the asylum process

A. *The Obama Administration*

The outcome of an asylum application in the United States may have a lot to do with what the policy of the executive branch is at the time. While there were some mixed messages under the Obama Administration, the policy of the branch was seemingly friendlier to asylum applications, and immigration in general.

According to the most recent data available, the Obama Administration resettled 84,989 refugees in 2016, most of whom originated from the Democratic Republic of the Congo, Syria, and Burma.¹³³ During the same time, 20,455 individuals¹³⁴ were granted asylum into the United States from mainly China, El Salvador, and Guatemala.¹³⁵ It is important to note that two of the three countries that most asylum seekers are coming from are in the “northern triangle.” The previous year, 2015, the United States took in

¹³² *Id.* § 1158(b)(2)(C).

¹³³ Nadwa Mossad & Ryan Baugh, *Refugees and Asylees 2016*, U.S. DEP’T OF HOMELAND SEC., (2018), https://www.dhs.gov/sites/default/files/publications/Refugees_Asytees_2016.pdf [hereinafter MOSSAAD & BAUGH, REFUGEES AND ASYLEES: 2016].

¹³⁴ This number includes individuals who were granted asylum by the Department of Homeland Security and Department of Justice, *id.*

¹³⁵ *Id.*

a total of 29,920 refugees from mainly Burma, Iraq, and Somalia.¹³⁶ Then for Asylees, a total of 26,124 were successfully granted entrance from, once again, the northern triangle.¹³⁷

Looking at these two years, there was a sharp increase of both refugee and asylum applications. Asylum applications have increased dramatically over the past decade, with 5,100 screenings for “credible fear” in 2008, to almost 92,000 in 2016.¹³⁸ Specifically, for 2016, “Northern Triangle countries of El Salvador, Guatemala, and Honduras led in [credible fear] case screenings” at 73 percent.¹³⁹ The statistics for who and how many people were granted asylum, however, is much different. From the northern triangle, a total of 5,611 individuals were granted asylum, constituting 27.4% of total asylum grants.¹⁴⁰ (See Table 1 below)

Country	2016		2015		2014	
	Number	Percent	Number	Percent	Number	Percent
El Salvador	1,404	12	1,860	10.5	183	1.3
China	1,381	11.8	2,573	14.5	3,912	26.8
Guatemala	1,317	11.2	1,700	9.6	311	2.1
Honduras	885	7.5	1,099	6.2	89	.6
Egypt	690	5.9	1,513	8.5	2,580	17.6
Syria	660	5.6	865	4.9	849	5.8
Iraq	611	5.2	697	3.9	533	3.6
Mexico	455	3.9	662	3.7	469	3.2
Iran	381	3.2	639	3.6	572	3.9

¹³⁶ Nadwa Mossaad, *Refugees and Asylees 2015*, U.S. DEP'T OF HOMELAND SEC. (2016), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2015.pdf.

¹³⁷ *Id.*

¹³⁸ MOSSAAD & BAUGH, REFUGEES AND ASYLEES: 2016, *supra* note 133, at 6.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 8 fig.6.

Venezuela	328	2.8	466	2.6	318	2.2
All other countries	3,617	30.8	5,713	32.1	4,808	32.9
Total	11,729	100	17,787	100	14,624	100

Table 1

Country	2016		2015		2014	
	Number	Percent	Number	Percent	Number	Percent
El Salvador	1,404	12	1,860	10.5	183	1.3
China	1,381	11.8	2,573	14.5	3,912	26.8
Guatemala	1,317	11.2	1,700	9.6	311	2.1
Honduras	885	7.5	1,099	6.2	89	.6
Egypt	690	5.9	1,513	8.5	2,580	17.6
Syria	660	5.6	865	4.9	849	5.8
Iraq	611	5.2	697	3.9	533	3.6
Mexico	455	3.9	662	3.7	469	3.2
Iran	381	3.2	639	3.6	572	3.9
Venezuela	328	2.8	466	2.6	318	2.2
All other countries	3,617	30.8	5,713	32.1	4,808	32.9
Total	11,729	100	17,787	100	14,624	100

Individuals Granted Asylum Affirmatively¹⁴¹¹⁴¹ *Id.* at 7 tbl.4.

This differential between asylum applications and grants is dramatic. Not only is there a big deficit between the number of raw applications and grants, but the make-up of the grants is also dramatically different. This may show lack of focus on the northern triangle countries, and more focus on refugees which account for the vast majority of resettled peoples. While this is likely the result of a variety of geopolitical factors, the exact reasons should be further explored.

One way the Executive Branch directly affects the flow of refugees and asylum seekers is the refugee admission ceiling.¹⁴² The President establishes, with the consent of Congress, the overall refugee limit for each year.¹⁴³ Over the course of Obama's presidency, the limit was increased over time, with a 21% increase from the previous three years up to 2016.¹⁴⁴ The Obama administration's increase in the ceiling may be its response to the growing number of crises across the globe. For example, in 2008, the ceiling was increased because of the heightened turmoil in Iraq, Iran, and Bhutan.¹⁴⁵ Then, in 2017, the Obama administration established the largest yearly increase in refugee admissions since 1990 by increasing the limit (that had already raised) from 85,000 to 110,000.¹⁴⁶

Interestingly, even with this increase, the Obama administration still did not focus on the northern triangle. Only 5,000 slots were allocated specifically for Latin America.¹⁴⁷ The majority of resettlement slots were made

¹⁴² See MOSSAAD, *supra* note 136, at 2.

¹⁴³ *Id.*

¹⁴⁴ Mossaad & Baugh, *Refugees and Asylees: 2016*, *supra* note 133, at 2.

¹⁴⁵ Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POLY INST. (June 7, 2017), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-6>.

¹⁴⁶ *Id.*; See Phillip Connor and Jens Manuel Krogstad, *U.S. on Track to Reach Obama Administration's Goal of Resettling 110,000 Refugees this Year*, PEW RES. CTR. (Jan. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/01/20/u-s-on-track-to-reach-obama-administrations-goal-of-resettling-110000-refugees-this-year/>.

¹⁴⁷ Zong & Batalova, *supra* note 145.

available for Near East and South Asia applicants, reflecting the focus on the conflicts in the middle east--specifically, Syria and the increasing refugee crisis involved with the Syrian civil war.¹⁴⁸ The unallocated reserve, however, did more than double, from 6,000 to 14,000. The unallocated reserve can be used by any applicant regardless of origin country.¹⁴⁹

Concurrently, the Obama administration also deported more people than any other President.¹⁵⁰ Sometimes referred to as the “Deporter-in-Chief,” Obama deported more than 2.5 million people.¹⁵¹ This amount is more than “the sum of all the presidents of the 20th century.”¹⁵² However, the Obama administration was selective as to who was deported. For example, in 2015, 91% of people who were removed from the United States were previously convicted of crimes.¹⁵³ This reflects the goals that Obama set for ICE, which was “identifying, arresting, and removing convicted criminals in prisons and jails, and also at-large arrests in the interior.”¹⁵⁴

Obama’s administration did make the door a bit wider for asylum seekers by changing the guidelines for women seeking asylum based on domestic abuse.¹⁵⁵ For years, the Executive Branch has not been allowing domestic abuse as a

¹⁴⁸ *Id.*; See Gardiner Harris, David E. Sanger, & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. TIMES (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html>.

¹⁴⁹ Zong & Batalova, *supra* note 145.

¹⁵⁰ Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661>.

¹⁵¹ *Id.*; see also Muzaffar Chishti, Sarah Pierce, & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POLICY INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

¹⁵² Marshall, *supra* note 148.

¹⁵³ *Id.*; see Ginger Thompson and Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, NYT (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

¹⁵⁴ Marshall, *supra* note 148.

¹⁵⁵ Julia Preston, *In First for Court, Woman is Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES (Aug. 29, 2014), <https://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html>. See *Matter of A-R-C-G-*, Respondents, 26 I&N Dec. 388 (BIA 2014).

reason for asylum, using the discretion that the Attorney General has with granting asylum.¹⁵⁶ These cases have been disputed since 1995 at least.¹⁵⁷ In the case that changed the legal precedent, the court expanded what it means to be a “member of a particular social group” by including Ms. Cifuentes, a woman who was severely beaten by her husband.¹⁵⁸ In 2005, she fled from Guatemala after being beaten by her husband on a weekly basis. At one point, she claimed her husband “threw burning paint thinner on her and raped her.”¹⁵⁹ She tried to call the police and have the government protect her, but they refused, leaving her with her abusive husband.¹⁶⁰ What was key to the judges allowing asylum in this case was that “Guatemala ‘has a culture of machismo and family violence’ and that the police routinely failed to respond.”¹⁶¹

In another case under the Obama Administration, *Cece v. Holder*, an Albanian woman, was able to establish her membership in a social group.¹⁶² The court stated that to determine if an individual is a member of a social group that is being targeted for persecution, “[the court] must look to see whether the group shares common characteristics that members of the group either cannot change, or should not be required to change, because such characteristics are fundamental to their individual identities.”¹⁶³ This broad reading reversed precedent followed by the lower court, allowing many individuals to be included in a social group under the law.¹⁶⁴ The court understood that it may permit a

¹⁵⁶ *Matter of A-R-C-G*, Respondents, 26 I&N Dec. 388 (BIA 2014).

¹⁵⁷ RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 4 (2005).

¹⁵⁸ *Matter of A-R-C-G*, Respondents, 26 I&N Dec. 388 (BIA 2014).

¹⁵⁹ *Id.* at 389.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 393.

¹⁶² *Cece v. Holder*, 733 F.3d 662, 671-73 (7th Cir. 2013).

¹⁶³ *Id.* at 672.

¹⁶⁴ See *id.* at 513 (an alien’s persecuted group cannot be solely formed and defined by a fear of persecution--they must have immutable characteristics to form a particular social group).

wide array of claims: “It would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.”¹⁶⁵ The court held that the asylum seeker was a part of a particular social group that was being persecuted because she was a young Albanian woman who was living alone.¹⁶⁶

In Cifuentes and Cece’s cases the test become more subjective. The courts under the Obama Administration made the test less clear and straight forward--including more people than originally intended. The administration further expanded the rules to ease restrictions on individuals with some security concerns.¹⁶⁷ Announced in the Federal Register, the move allows those with “limited material support” to organizations that are associated with terrorism to be considered for asylum in the United States.¹⁶⁸ Supporters of the change argued that the restrictions based on terror ties were too broad, and “resulted in deserving refugees and asylees being barred from the United States for actions so tangential and minimal that no rational person would consider them supports of terrorist activities.”¹⁶⁹

B. The Trump Administration

The Executive Branch changed administrations after the 2016 Presidential Election which turned over the White House to Donald Trump, and Congress to his allies in the Republican Party. Elections have consequences, and candidate Trump had very strong words when it came to

¹⁶⁵ *Id.* at 675.

¹⁶⁶ *Id.* at 677.

¹⁶⁷ Judson Berger, *Administration Eases Restrictions on Asylum Seekers with Loose Terror Ties*, FOX NEWS (Feb. 6, 2014), <https://www.foxnews.com/politics/administration-eases-restrictions-on-asylum-seekers-with-loose-terror-ties>.

¹⁶⁸ Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 79 Fed. Reg. 24, 6914 (Feb. 5, 2014).

¹⁶⁹ Judson Berger, *Administration eases restrictions on asylum seekers with loose terror ties*, FOX NEWS (Feb. 6, 2014), <https://www.foxnews.com/politics/administration-eases-restrictions-on-asylum-seekers-with-loose-terror-ties>.

immigration.¹⁷⁰ Trump proclaimed to have a very tough stance on immigration, and while his presidency is just beginning, the administration has begun to make its mark on the process of asylum by issuing numerous executive orders on the issue.

From the beginning of his Presidency in 2017, Trump used his power to eliminate some of the regulations that were expanding the rules of asylum. For example, Trump sought to lower the asylum admission ceiling from Obama's increase of 110,000, to a total of 50,000.¹⁷¹ On top of that, he suspended the refugee resettlement program for a period of time.¹⁷² These actions by Trump have been challenged in the courts and have been enjoined from implementation.¹⁷³

Facing the defeat in the courts, the Trump Administration sought to change the Executive Orders in order to make them sustainable through the court system and be held constitutional by ordering a new Executive Order which sought to limit admittance into the country.¹⁷⁴ While

¹⁷⁰ "When Mexico sends its people, they're not sending the best. They're not sending you, they're sending people that have lots of problems and they're bringing those problems. They're bringing drugs, they're bringing crime. They're rapists and some, I assume, are good people, but I speak to border guards and they're telling us what we're getting." Trump stands by statements on Mexican illegal immigrants, surprised by backlash, Fox News (July 4, 2015) (quoting remarks made by President Trump at his presidential announcement speech), <https://www.foxnews.com/politics/trump-stands-by-statements-on-mexican-illegal-immigrants-surprised-by-backlash>.; "The crime is raging and it's violent. And if you talk about it, it's racist." *Id.* (quoting comments made by President Trump to Fox News); "What do you say to the family of Kathryn Steinle in [California] who was viciously killed [because] we can't secure our border? Stand up for us." *Id.* (quoting a Tweet made by President Trump).

¹⁷¹ Zong and Batalova, *supra* note 143; Protecting the Nation From Foreign Terrorist Entry Into the United States, E.O. 13780 (Mar. 6, 2017).

¹⁷² Zong and Batalova, *supra* note 143.

¹⁷³ See Adam Liptak, *Supreme Court Won't Revive Trump Policy Limiting Asylum*, N.Y. TIMES (Dec. 21, 2018) <https://www.nytimes.com/2018/12/21/us/politics/supreme-court-asylum-trump.html>; see also Ariane de Vogue, Judge Extends Order Blocking Trump Administration Asylum Restrictions, CNN (Dec. 19, 2018) <https://www.cnn.com/2018/12/19/politics/judge-trump-asylum-restrictions/index.html> (Temporary ban on migrants receiving asylum outside of official ports of entry is blocked from implementation).

¹⁷⁴ *Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States*, THE WHITE HOUSE (Mar. 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> (Executive Order 13769).

these actions show the hard line that the Trump Administration is taking on all forms of immigration, these particular actions are not targeted at the Northern Triangle, with the closest country effected by the orders being Venezuela, whom the United States has been at political odds with for years.¹⁷⁵

The rules of asylum have been increasingly in the headlines as Trump's policies run into the realities of the various caravans coming from the Northern Triangle.¹⁷⁶ Trump has taken a hard stance on the influx of asylum seekers at the border, stating that we must put "America First" before those from the Northern Triangle.¹⁷⁷ The Trump administration must now deal with the fact that, as of 2017, asylum applications have been increasing to record numbers.¹⁷⁸ The increase in asylum seekers has caused a backlog of applicants, causing the whole process to take years to complete.¹⁷⁹ For example, Juan Fuentes, an asylum seeker from El Salvador, had to wait years to become a legal citizen.¹⁸⁰ Juan stated that "[I]f I was still in El Salvador, I wouldn't be alive."¹⁸¹

Recalling the asylum rules, the Attorney General has a lot of discretion regarding asylum.¹⁸² Jeff Sessions, who was

¹⁷⁵ *Id.*; see *U.S. Government Support for the Democratic Aspirations of the Venezuelan People*, U.S. DEP'T OF STATE, <https://www.state.gov/u-s-government-support-for-the-democratic-aspirations-of-the-venezuelan-people/> (last visited Feb. 9, 2020).

¹⁷⁶ Jessica Villagomez, *Seeking Asylum in the U.S. Under Trump*, PBS (May 1, 2018), <https://www.pbs.org/newshour/politics/seeking-asylum-in-the-u-s-under-trump>.

¹⁷⁷ "The migrant 'caravan' that is openly defying our border shows how weak & ineffective U.S. immigration laws are. Yet Democrats like Job Tester continue to support the open borders agenda – Tester even voted to protect Sanctuary Cities. We need lawmakers who will put America First." Donald J. Trump (@realDonaldTrump), Twitter (Apr. 30, 2018), <https://twitter.com/realDonaldTrump/status/991084424992296962>.

¹⁷⁸ Villagomez, *supra* note 174.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Katie Benner and Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. Times (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html>.

Trump's Attorney General until November 2018¹⁸³, overturned the Obama administration's precedent by reversing an immigration appeals court which granted asylum to a woman from El Salvador who "had been sexually, emotionally and physically abused by her husband."¹⁸⁴ With this decision, Mr. Sessions made it tough for asylum seekers to be granted asylum based on a fear of domestic or gang violence.¹⁸⁵ Mr. Sessions stated in the ruling that "the prototypical refugee flees her home country because the government has persecuted her."¹⁸⁶ He went on to say that "an alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family or other personal circumstances."¹⁸⁷ However, "the asylum statute does not provide redress for all misfortune."¹⁸⁸

IV. POLICY RECOMMENDATIONS

The United States should provide a model to show the world how to handle the asylum crisis. With a very divided country, the issue of offering asylum to Northern Triangle countries is a tricky one. Democrats, under Obama, expanded the ability of individuals fleeing their countries to be able to seek asylum by increasing the admission ceiling, and expanding the rules to grant asylum to people with a wider range of issues. On the other hand, the Republicans under Trump want to reign in the rules to make them stricter, lower the admission ceiling, and increase the discretion of organizations like I.C.E. to regulate the immigration system. These polar opposite approaches, swinging back and forth every couple of years, are not a way to run an effective system.

¹⁸³ Jeff Sessions is no longer the Attorney General because he was asked to resign by President Trump. The policies laid out by Mr. Sessions are presumed to continue to be the Trump Administration's policy until his replacement states otherwise. Letter from Jeff Sessions to Donald Trump, November 7 2018, Office of the Attorney General.

¹⁸⁴ Benner and Dickerson, *supra* note 182.

¹⁸⁵ *Id.*

¹⁸⁶ Matter of A-B, 27 I&N Dec. 316, 317-18 (A.G. 2018)

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

The answer should be a balance between internal security and sovereignty, while also addressing the international security concerns of the human rights crisis of those fleeing the Northern Triangle. We are all humans, and the United States can uphold international security by helping the Northern Triangle countries to provide for themselves. First, the constant changes to the immigration rules are harmful and confusing not only to the American people, but those seeking to enter the country. Second, the United States must assist the Northern Triangle countries to get to the root of the problem, which is their inability to provide a politically and economically stable country for their people. Third, these countries must be held accountable for any government assistance provided to them.¹⁸⁹ Lastly, the United States must provide a graduated solution to asylum which does not grant permanent citizenship, but temporary residency for periods of time to see if the problems in the origin country have improved, only approving permanent asylum when conditions do not improve.

A. Consistent and Objective Standard

The constant ebb and flow of the asylum system in the United States is confusing and unfair not only to the migrants but the American people as well. While the laws on the books are not necessarily clear, the Obama administration made them even more imprecise. Rulings by the Attorney General, Eric Holder, expanded the rules to encompass asylum seekers. While well meaning, just trying to help those in need and fleeing from the violence of the Northern Triangle, these rulings made the asylum standards increasingly unclear, sending signals to those seeking to enter the United States that they could use reasons that were previously denied. This provides a false hope to migrants who travel thousands of

¹⁸⁹ See Bryan Avelar, *A Former El Salvador President Tells How He Robbed the State*, INSIGHT CRIME (Aug. 14, 2018), <https://www.insightcrime.org/news/analysis/former-el-salvador-president-story-how-he-stole/> (Former El Salvador president Antonio Saca admitting to embezzling more than \$300 million in public funds).

miles to enter the United States, only to realize that the rules are not as expansive as they thought.

To make matters worse, the Trump administration swung the pendulum the other way, bringing the rules back to a stricter rule. This further confuses applicants who may not fully understand the asylum process, making the trek based on what has happened in the past only to find out that the rules have yet again changed and preventing them from being granted asylum. This is unfair to those who have legitimate reasons for seeking asylum.

To remedy this confusion, the asylum rule must be a consistent and objective test which is clear to those applying whether they are admitted or not. This will bring the expectations of applicants to a reasonable level, and hopefully lessen the incoming applicants by discouraging individuals to apply who think they be granted asylum based on a subjective and “squishy” standard.

B. Address the Root of the Problem

Making the rules clear will only go so far, to fully address the asylum problem the United States must lead by example and help the Northern Triangle countries get a hold of their crime problem. Stories like Lorena’s from El Salvador are too common, driving families to flee the country to the shining country on a hill: The United States. The asylum seeker’s origin country is the one that they most identify with, housing the culture they know and love. The most comfortable place for them would be their origin country with a stable and strong government that is able to protect its citizens from domestic and gang violence, as well as address the cyclical poverty that ravages their countries.

The Obama administration attempted to address this problem with a large \$750 million package that was supposed to help them with economic support, military financing,

health, and police training.¹⁹⁰ A more hands on approach may be necessary, however, with officials being trained in basic governance, or even having United States advisors play a limited role in helping Northern Triangle countries govern through a temporary assistance agreement.

C. Hold Northern Triangle Countries Accountable

Northern Triangle countries need to be held accountable for the aid they receive from the United States and others, while also taking responsibility for the instability in their countries. In the aid package provided by the US under Obama, the conditions which were placed on the money were that 75% of the money was conditioned on the countries' "taking effective steps" to address the problems causing the migration problems in their country.¹⁹¹ This is incredible broad language, and can be used by polarized parties to either allow aid when the countries are taking very minimal steps, but also take the aid away for little or no reason. Something that is considered "effective" may vary from one observer to the next.

Instead of broad conditions or aid without strings attached, help should only be provided with conditions that are a clear and achievable goal. For example, the conditions should be a specific increase in police officers in certain areas, or a decrease in crime rates. The countries should not only be made to meet these goals to show the effective use and results from the money provided, but also to decrease the flow and necessity of asylum from the Northern Triangle countries. Going forward, there should be measurable results that can verify that the aid provided to the countries in need is making a difference.

¹⁹⁰ Steven Dudley & Mimi Yagoub, *5 Takeaways from US Congress Northern Triangle Aid Package*, INSIGHT CRIME (Dec. 18, 2015) <https://www.insightcrime.org/news/analysis/5-takeaways-from-us-congress-proposed-northern-triangle-aid-package/>.

¹⁹¹ *Id.*

D. Graduated Asylum System

Lastly, the asylum system in the United States should not have “single outcome rule,” where an applicant is either granted full asylum or not. It should, instead, have a progressive rule that would provide the ability of asylum seekers to return to their origin countries when conditions have improved. The benefit of this will be two-fold. First, it will cut against individuals who are seeking asylum purely as a regular immigration system instead of being based on an actual fear of persecution. Second, it will give individuals who did flee the country the ability to stay in the United States until conditions in their origin country improve. Their origin country is the home of their culture and people, and returning once the persecution has ceased will allow the country to become stronger by rebuilding the population of individuals who want a safe and stable life. If conditions do not improve at the end of this time period, then the applicants may be given full asylum.

With the graduated asylum system, along with targeted aid to develop the Northern Triangle countries, when the countries improve after showing verifiable results, the asylum seekers will then return and build on these results. This is not meant to be a harsh system, because if the conditions do not improve, they could continue to live in the United States free from persecution.

CONCLUSION

The United States needs to provide an example to the world on decisive, objective, and realistic asylum procedures, not indecisively swing between vague and inconsistent rules. Countries look to the United States on how to deal with humanitarian crises around the globe. The United States should be a model of balance. While there are no perfect solutions, we must try to address this humanitarian crisis in the Northern Triangle with both our head and heart. By reaching a compromise, and not escalating rhetoric, the

United States can balance internal security and sovereignty,
with human rights and international security.