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## El Salvador: Root Causes and Just Asylum Policy Responses

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**Abstract:** *Throughout the course of United States history, there has often been a chasm between our ideals as a country, and our actions. Our foreign policy and immigration policy have been no exception – frequently betraying our stated commitment to democracy, respect for human rights, and protection of the persecuted. This article takes a close look at El Salvador, whose nationals make up a significant number of asylum seekers at our border. Our foreign and immigration policies towards El Salvador are illustrative of that gap between ideals and reality. We supported a brutal military during that country’s civil war, and adopted an unjust and biased policy towards Salvadoran asylum seekers. In recent years, as conditions worsened in El Salvador, the U.S. did too little to address root causes, and instead doubled-down on policies of deterrence and exclusion. In this article*

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*I argue that we, as a nation, can do better. We can welcome those fleeing persecution, while implementing policies that address the root causes of their flight. The article begins with a discussion of the conditions in El Salvador which lead to forced migration – from violence and corruption to climate change and natural disasters. The article next describes and critiques U.S. asylum policy from the passage of the 1980 Refugee Act to the beginning of the Biden administration; it details the substantive and procedural measures that have resulted in the denial of protection, and provides modest reform proposals. The article ends with an overview of recommendations for addressing the root causes of migration, with an appeal for the U.S. to live up to its ideals.*

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## INTRODUCTION

In 2018 I published an article, *El Salvador – A Peace Worse than War: Violence, Gender and a Failed Legal Response*.<sup>1</sup> Since the end of its twelve year civil war in 1992, El Salvador has experienced some of the highest levels of violence, including violence against women, of any country in the world.<sup>2</sup> *A Peace Worse than War* examined the complex interplay of historical and contemporary factors that have contributed to these persistently high levels of violence, and have caused many Salvadorans to flee their homeland.

Since the publication of *A Peace Worse than War*, conditions in El Salvador have worsened in many respects. At the same time, throughout its four years, the Trump administration did everything within its power to end the possibility of refugee protection for Salvadorans (as well as those from other countries), fleeing violence and persecution. The Trump administration's most draconian measure was to indefinitely close the border to all asylum seekers – using public health concerns around COVID-19 as a justification.<sup>3</sup> A restrictive immigration policy towards Salvadorans is nothing new.<sup>4</sup> Since the passage of the 1980 Refugee Act, restrictive policies have greatly limited protection for asylum seekers – of which a large

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<sup>1</sup> Karen Musalo, *El Salvador - A Peace Worse than War: Violence, Gender and a Failed Legal Response*, 30 YALE J.L. & FEMINISM 3 (2018).

<sup>2</sup> E.g., CONG. RSCH. SERV., R43616, EL SALVADOR: BACKGROUND AND U.S. RELATIONS 5 (Jul. 2020), <https://fas.org/sgp/crs/row/R43616.pdf> [<https://perma.cc/KQD9-LMFV>] [hereinafter CONG. RSCH. SERV.]; U.K. HOME OFFICE, COUNTRY POLICY AND INFORMATION NOTE, EL SALVADOR: GANGS 47-48 (Feb. 2020), [https://www.ecoi.net/en/file/local/2026251/El\\_Salvador\\_-\\_CPIN\\_-\\_Gangs\\_-\\_v1.EXT.cleared.pdf](https://www.ecoi.net/en/file/local/2026251/El_Salvador_-_CPIN_-_Gangs_-_v1.EXT.cleared.pdf) [<https://perma.cc/A896-GBZP>] [hereinafter U.K. COUNTRY NOTE, 2020].

<sup>3</sup> An order issued by the Centers for Disease Control and Prevention (CDC) on March 20, 2020 allowed for the closure of the border, and the expulsion without process of all individuals without valid documents, arriving by land. Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/> [<https://perma.cc/YNB4-DQ3L>]. There was no exception for asylum seekers or those fleeing torture. The CDC order was issued pursuant to an interim final rule promulgated by the Department of Health and Human Services (HHS). *Id.* It was based on the purported authority of section 362 of the 1944 Public Health Service Act which permits the suspension of the "introduction of persons or goods" into the U.S. on public health grounds. *Id.* This statutory provision had never before been used to expel people at the border, but only to quarantine people and goods. *Id.* Although the closure was justified as being a necessary public health measure, it was later revealed that it was adopted as a result of pressure from the White House, over the objections of top health officials. Associated Press, *Pence Ordered Borders Closed in March over Objection of CDC Experts*, L.A. TIMES (Oct. 5, 2020), <https://www.latimes.com/world-nation/story/2020-10-05/mike-pence-close-borders-cdc-experts-refused> [<https://perma.cc/83A7-T74U>].

<sup>4</sup> See *infra* Section II.

percentage have been Salvadoran. However, with the Trump administration, these restrictive policies reached new heights. President Biden has signaled a very different approach, ending some of the Trump era policies within his first two weeks in office, and promising to review others to determine whether they should be terminated.<sup>5</sup>

The economic cost of deterrence is high; the amount expended for immigration enforcement in the U.S. has increased over the years. Between 2003, when the Department of Homeland Security was created, and July 2020, it is estimated that the federal government spent \$333 billion on immigration enforcement.<sup>6</sup> But it is not economic cost alone that should concern us; there is the incalculable human cost of suffering and death which is the consequence of turning away asylum seekers. Beyond the individual loss of life and potential is the damage done to a global system, when the nations of the world – especially those with greater resources – shrink back from their international commitments. The entire protection system is weakened, leaving it to a smaller number of countries to step up and fill the gap.

The exclusion and deterrence of asylum seekers is a violation of protection obligations,<sup>7</sup> and is troubling on the moral and ethical realm.<sup>8</sup> In situations where the numbers of asylum seekers far exceed U.S. capacity – a situation which has not existed in recent history – the U.S. could engage in “burden-sharing” with other countries.<sup>9</sup> But ultimately, the solution to large-

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<sup>5</sup> See *infra*, text accompanying notes 391-399.

<sup>6</sup> *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL 1 (Jan. 21, 2021), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> [<https://perma.cc/PMA3-9X5C>].

<sup>7</sup> The U.S. is a party to the Protocol Relating to the Status of Refugees, *opened for signature Jan. 31, 1967*, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. Congress enacted the 1980 Refugee Act to bring U.S. refugee law “into conformance” with the Protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

<sup>8</sup> Philosophers have examined the moral or ethical dimensions of refugee protection. For example, Peter Singer has written, “[I]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.” Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972).

<sup>9</sup> The concept and importance of burden-sharing is set forth in many Executive Committee Conclusions of the United Nations High Commissioner for Refugees (UNHCR). See, e.g., Rebecca Dowd & Jane McAdam, *International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why And How?*, 66 THE INT’L & COMP. L. Q. 863 (2017), <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/international-cooperation-and-responsibility-sharing-to-protect-refugees-what-why-and-how/83C23155258B2F45634F38D493301D5C> [<https://perma.cc/5R92-FHDM>]; G.A. Res. 71/1, ¶ 7 (Sept. 19, 2016) (recognizing the need for international cooperation and burden-sharing when there are mass influxes of refugees).

scale refugee flows lies in addressing root causes for forced migration, a commitment which President Joe Biden has made.<sup>10</sup>

The argument to address root causes becomes even more compelling when a receiving country has played a role in creating the conditions of violence and inequality that force people to flee their homes.<sup>11</sup> The U.S. funded the brutal military regime over the course of El Salvador's twelve year civil war; the conflict resulted in 75,000 killed, 7,000 disappeared, and 500,000 displaced.<sup>12</sup> Despite "ever-growing evidence" of the commission of atrocities, the Carter administration, followed at a higher level by the Reagan administration, continued financial assistance to the Salvadoran military.<sup>13</sup> It only ended its support due to intense pressure to do so given the high level of human rights abuses.<sup>14</sup> And in its post-war period, when El Salvador was struggling to develop strong democratic institutions and a functioning legal system, the U.S. deported thousands of Salvadoran gang members – something with which the country was not equipped to deal.<sup>15</sup>

In this article, I focus on two distinct but related themes – the conditions in El Salvador that cause people to flee, and the evolution of U.S. asylum standards that increasingly resulted in the exclusion from protection of Salvadorans (and other Central Americas). Part I looks at the push factors of violence, deeply entrenched economic inequality, and climate change and environmental degradation. It also provides an overview of developments since the 2019 election of Nayib Bukele, a leader with alarmingly authoritarian tendencies. Part II examines the United States' policy towards Salvadoran migrants from the civil war era to the present, critiquing select developments in asylum law that have excluded those worthy of protection from receiving it. It makes the case that it is not only the restrictive policies

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<sup>10</sup> "We cannot solve the humanitarian crisis at our border without addressing the violence, instability, and lack of opportunity that compel so many people to flee their homes." Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf> [hereinafter E.O., Creating a Comprehensive Regional Framework]. This Executive Order commits to working "closely with civil society, international organizations, and the governments in the region to: establish a comprehensive strategy for addressing the causes of migration[.]" *Id.* at § 1.

<sup>11</sup> Musalo, *supra* note 1, at 11-12.

<sup>12</sup> Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 "Surge" of Central American Women and Children at the U.S.-Mexico Border*, 5 J. MIGRATION & HUM. SECURITY 137, 154 (2017).

<sup>13</sup> Musalo, *supra* note 1, at 11.

<sup>14</sup> *Id.*

<sup>15</sup> See José Miguel Cruz, *Global Gangs in El Salvador: Maras and the Politics of Violence*, presented at Centre on Conflict, Development, and Peacebuilding, 2009 Global Gangs Workshop (May 14-15, 2009), [http://www.academia.edu/1451010/Global\\_Gangs\\_in\\_El\\_Salvador\\_Maras\\_and\\_the\\_Politics\\_of\\_Violence](http://www.academia.edu/1451010/Global_Gangs_in_El_Salvador_Maras_and_the_Politics_of_Violence) [<https://perma.cc/T3L7-X4BY>].

implemented by the Trump administration that need to be rolled back, but other substantive and procedural developments that diverge from international norms. Part III provides a brief overview of measures to constructively address the root cause of forced migration in El Salvador.

## I. ROOT CAUSES OF FORCED MIGRATION

### A. Historical Context

Current conditions in El Salvador can be best understood in historical context. Starting in the colonial period, powerful, monied interests dispossessed indigenous communities of their land and forced them to become a low-wage source of labor. These deep inequalities and exploitations were maintained by brutal repression over decades. Attempts to bring about societal change – specifically greater economic equality through popular organizing were met with state violence. Ultimately, this led to the taking up of arms, and the ensuing twelve-year civil war between the *Frente Farabundo Martí para La Liberación Nacional* (FMLN) [Farabundo Martí National Liberation Front] and the Salvadoran state.<sup>16</sup> The conflict was characterized by massive human rights violations committed by Salvadoran security forces, which received substantial support from the United States government.<sup>17</sup>

The civil war came to an end in 1992 with a negotiated agreement and the signing of Peace Accords. Although the conflict had been fought with the objective of obtaining greater economic justice, the Peace Accords did not result in measures which addressed the profound economic inequalities which had led to the conflict.<sup>18</sup> The U.S. was not a constructive force; it used its influence to pressure El Salvador to adopt neoliberal economic policies,<sup>19</sup>

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<sup>16</sup> See Musalo, *supra* note 1, at 8-14 (discussing the history leading up to the twelve-year civil war).

<sup>17</sup> During the conflict the U.S. provided \$4.5 billion in economic and military aid. PAT PATERSON, TRAINING SURROGATE FORCES IN INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM PERU, COLOMBIA, EL SALVADOR, AND IRAQ 75 (2016).

<sup>18</sup> Musalo, *supra* note 1, at 14.

<sup>19</sup> *Id.* at 24-25. For example, the United States Agency for International Development (USAID) funded a Salvadoran think tank that developed an economic liberalization plan which included “eliminating price controls, deregulating interest rates, and cutting public spending, especially to public services such as education and health care.” ELLEN MOODIE, EL SALVADOR IN THE AFTERMATH OF PEACE: CRIME, UNCERTAINTY, AND THE TRANSITION TO DEMOCRACY 42 (2010). The Alianza Republicana Nacionalista (ARENA) [Nationalist Republican Alliance], which held power from 1994-2009, is firmly associated with neoliberal policies:

[T]he rise of neoliberal policies under ARENA still haunts Salvadorans today. The dollarization and privatization of telecommunications, electric



whose impact were adverse to the interests of the poor. There was also little appetite to address the human rights violations committed during the conflict, which largely remained in impunity.<sup>20</sup>

The first post-war elections were held in March 1994.<sup>21</sup> The candidate of the right-wing *Alianza Republicana Nacionalista* (ARENA) [Nationalist Republican Alliance], the party representing the interests of the monied elite, was elected president.<sup>22</sup> ARENA held the power of the presidency in successive elections until 2009 when defeated by the FMLN candidate.<sup>23</sup> Disillusionment with both parties, resulting from corruption and the inability to address violence committed with impunity, economic inequality, and other pressing societal problems,<sup>24</sup> led to the 2019 election of Nayib Bukele, the

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energy, public banks, the pension system, sugar mills, and coffee exports, along with the passage of the Central American Free Trade Agreement (CAFTA), a free market strategy that largely benefits U.S. corporate interests, heightened poverty levels and widened inequality.

Karla Cativo, *Abstention Wins in El Salvador: Though Salvadoran president Nayib Bukele claimed a narrow first-round victory, low voter turnout reveals deep problems in the country's political landscape*, 51 *NACLA REPORT ON THE AMERICAS*, 127, 128 (2019).

<sup>20</sup> The Salvadoran Legislative Assembly passed a broad amnesty law after the end of the civil war. Musalo, *supra* note 1, at 21. On July 13, 2016, the Constitutional Chamber of El Salvador's Supreme Court ruled the Amnesty Law unconstitutional allowing prosecutions for crimes committed during the armed conflict. *Id.* at 23-24. For an extensive discussion of the repeal of the Amnesty Law, see Nadia Hajji, *After Repeal of El Salvador's Amnesty Law: Next Steps in Justice and Accountability*, 53 *TEX. INT'L L. J.* 77 (2018). One of the most significant cases underway is the trial for the El Mozote massacre, during which the military killed more than 1,000 civilians. *CONG. RSCH. SERV.*, *supra* note 2, at 16. There have been attempts by the Legislative Assembly to enact a law which would essentially restore a broad amnesty, but to date they have been unsuccessful. *In El Salvador, Justice Delayed—Again?*, *AMERICA*, Mar. 16, 2020, at 8, [https://www.americamagazine.org/sites/default/files/issue\\_pdf/ARI\\_03.16.20.pdf](https://www.americamagazine.org/sites/default/files/issue_pdf/ARI_03.16.20.pdf) [<https://perma.cc/2ZDX-CGY6>].

<sup>21</sup> See Dinorah Azpuru, *The Saliency of Ideology: Fifteen Years of Presidential Elections in El Salvador*, 52 *LATIN AM. POL. & SOC'Y* 103, 109 (2010); Howard W. French, *Rightist Party Retains Power in Salvadoran Election*, *N.Y. TIMES* (Mar. 22, 1994), <https://www.nytimes.com/1994/03/22/world/rightist-party-retains-power-in-salvadoran-election.html> [<https://perma.cc/ZKU3-T3VE>].

<sup>22</sup> Azpuru, *supra* note 21, at 109; MOODIE, *supra* note 19, at 39; Chris van Der Borgh, *The Politics of Neoliberalism in Postwar El Salvador*, 30 *INT'L J. OF POL. ECON.* 36, 47 (2000).

<sup>23</sup> Azpuru, *supra* note 21, at 109; Blake Schmidt & Elisabeth Malkin, *Leftist Party Wins Salvadoran Vote*, *N.Y. TIMES* (Mar. 16, 2009), <https://www.nytimes.com/2009/03/17/world/americas/17salvador.html> [<https://perma.cc/93NJ-LHPZ>].

<sup>24</sup> "After continuous disappointments with previous governments, including former presidents who face serious corruption charges, voters are counting on Bukele to deliver on his promises to tackle the countries' [sic] three crushing problems: corruption, violence and poverty." Frida Ghitis, *Is El Salvador's New Social-Media Savvy President Promising Too Much?*, *WORLD POLITICS REVIEW* (Sept. 12, 2019),

first president who did not belong to either ARENA or the FMLN.<sup>25</sup> Bukele ran as a candidate of the *Gran Alianza por la Unidad Nacional* (GANA) [Grand Alliance for National Unity], which is considered a right of center party.<sup>26</sup> It is worth noting that Bukele prevailed in an election with a high level of abstention – more than half of the registered voters (53%) failed to vote.<sup>27</sup>

Since elected, Bukele has raised alarms internationally as a result of his anti-democratic, authoritarian tendencies which have included using the military in an attempt to coerce members of the Legislative Assembly to approve funding for his public security plan,<sup>28</sup> and publicly disparaging Supreme Court rulings regarding the legality of his COVID-19 quarantine regulations.<sup>29</sup> Similarly concerning have been credible allegations of

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<https://www.worldpoliticsreview.com/articles/28184/is-el-salvador-s-new-social-media-savvy-president-promising-too-much> [<https://perma.cc/4BU8-GSSW>].

<sup>25</sup> For more background on Nayib Bukele, *see generally*, Noelia Ruiz-Alba & Rosalba Mancinas-Chávez, *The Communications Strategy via Twitter of Nayib Bukele: The Millennial President of El Salvador*, 33 COMM. & SOC'Y 259 (Apr. 20, 2020), <https://revistas.unav.edu/index.php/communication-and-society/article/view/39038> [<https://perma.cc/Q5N3-8STE>]. Bukele's father was a successful entrepreneur, and he was involved in the family business, as well as starting his own business, Obermet, before running for political office. *Id.* at 260-61. In 2012 he successfully ran as a FMLN candidate for mayor of Nuevo Cuscatlán; in 2015 he was elected mayor of San Salvador. *Id.* at 261. In October 2017 he was expelled from the FMLN after being accused of violence against a city councilwoman. Cativo, *supra* note 19. After his expulsion, Bukele founded a new party, Nuevas Ideas (New Ideas), planning to run for president as its candidate, but was unable to do so due to electoral requirements. Ruiz-Alba et al., *supra* note 25, at 261. He then joined and ran as candidate of the Gran Alianza por la Unidad Nacional (GANA) [Grand Alliance for National Unity]. *Id.*

<sup>26</sup> Ruiz-Alba et al., *supra* note 25, at 261.

<sup>27</sup> Cativo, *supra* note 19, at 127.

<sup>28</sup> Maria Luz Nóchez, *Bukele Bypasses Legislative Assembly and Extends the State of Emergency by Decree*, EL FARO (May 18, 2020), [https://elfaro.net/en/202005/el\\_salvador/24434/Bukele-Bypasses-Legislative-Assembly-and-Extends-the-State-of-Emergency-by-Decree.htm](https://elfaro.net/en/202005/el_salvador/24434/Bukele-Bypasses-Legislative-Assembly-and-Extends-the-State-of-Emergency-by-Decree.htm) [<https://perma.cc/KW3R-HBHT>]; Valeria Guzmán, Nelson Rauda & Jimmy Alvarado, *Bukele Mete al Ejército en la Asamblea y Amenaza con Disolverla dentro de una Semana [Bukele Brings the Army into the Assembly and Threatens to Dissolve the Assembly within a Week]*, EL FARO (Feb. 10, 2020), [https://elfaro.net/es/202002/el\\_salvador/24008/Bukele-mete-al-Ejército-en-la-Asamblea-y-amenaza-con-disolverla-dentro-de-una-semana.htm](https://elfaro.net/es/202002/el_salvador/24008/Bukele-mete-al-Ejército-en-la-Asamblea-y-amenaza-con-disolverla-dentro-de-una-semana.htm) [<https://perma.cc/5F72-CE7H>]; Frida Ghitis, *El Salvador Knew Bukele Was Brash. But His Military Show of Force Was Ominous*, WORLD POLITICS REVIEW (Feb. 13, 2020), <https://www.worldpoliticsreview.com/articles/28535/in-el-salvador-bukele-sends-an-ominous-signal-with-his-military-show-of-force> [<https://perma.cc/Y3BV-6FSM>] [hereinafter Ghitis, *El Salvador Knew Bukele Was Brash*].

<sup>29</sup> *El Salvador: President Defies Supreme Court*, HUMAN RIGHTS WATCH, (Apr. 17, 2020), <https://www.hrw.org/news/2020/04/17/el-salvador-president-defies-supreme-court> [<https://perma.cc/XY4T-6G6R>].

widespread corruption in his government<sup>30</sup> and his crackdown on the media,<sup>31</sup> while reports of secret negotiations with the leaders of the Mara Salvatrucha 13 gang (MS-13) have demonstrated his willingness to use them to further his political aspirations.<sup>32</sup>

## B. Violence and its Broad Societal Impact

For the past two decades, El Salvador has been one of the most violent countries in the world, with the highest rates of homicides and femicides.<sup>33</sup> Much of the killing has been blamed on the two dominant gangs,<sup>34</sup> MS-13 and Barrio 18, which has two factions, the Revolutionaries and the Southerners.<sup>35</sup> MS-13 and Barrio 18 have their origin in the deportation of

<sup>30</sup> See text accompanying notes 165-183.

<sup>31</sup> See text accompanying notes 194-197.

<sup>32</sup> Steven Dudley, *The El Salvador President's Informal Pact with Gangs*, INSIGHT CRIME (Oct. 2, 2020), <https://www.insightcrime.org/news/analysis/el-salvador-nayib-bukele-gangs/> [<https://perma.cc/E6EH-ADXH>]. Under certain circumstances, negotiations with gangs can have positive societal consequences, especially in bringing down levels of violence. See José Miguel Cruz, *The Politics of Negotiating with Gangs. The Case of El Salvador*, 38 BULL. OF LATIN AM. RES. 547 (2019). See also Eric Rahman & Siniša Vuković, *Sympathy for the Devil: When and How to Negotiate With Criminal Gangs-Case of El Salvador*, 42 STUD. IN CONFLICT & TERRORISM 935 (2019). However, in Bukele's case, it was reported that his objective in negotiating with MS-13 was focused on bringing him political advantage, including the support of MS-13 for his party in legislative elections scheduled for Feb. 2021. See Carlos Martínez et al., *Bukele Has Been Negotiating with MS-13 for a Reduction in Homicides and Electoral Support*, EL FARO (Sept. 6, 2020), [https://elfaro.net/en/202009/el\\_salvador/24785/Bukele-Spent-A-Year-Negotiating-with-MS-13-for-a-Reduction-in-Homicides-and-Electoral-Support.htm](https://elfaro.net/en/202009/el_salvador/24785/Bukele-Spent-A-Year-Negotiating-with-MS-13-for-a-Reduction-in-Homicides-and-Electoral-Support.htm) [<https://perma.cc/6VS7-EPEY>].

<sup>33</sup> The term "femicide" is generally understood to denote the gender-motivated killing of a woman. The term "femicide" adds an additional element of state complicity, demonstrated by the fact that the killings are carried out in a context of virtually total impunity. See Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 172-73 (2010).

<sup>34</sup> Some sources attribute two thirds of the country's homicides to the gangs, while others place the number even higher. U.K. COUNTRY NOTE, 2020, *supra* note 2, at 37. Attributing high levels of violence to gang activity paints an incomplete picture; it does not take into account the historic and social factors which made El Salvador "such fertile ground for [gang] emergence." Musalo, *supra* note 1, at 15-16. Structural violence dating back to 1800s, the brutality of the civil war, and economic inequalities and social exclusion created the conditions under which gang and organized crime activity could thrive. *Id.* at 16. Added to these factors, and especially pertinent to gender violence, and violence against the LGBTQ community, are the patriarchal norms which first took root during the Spanish Conquest. *Id.* at 32-36.

<sup>35</sup> *Mirage or Miracle? Gangs and Plunging Violence in El Salvador*, No. 81 INT'L CRISIS GROUP 1, 2 (July 8, 2020), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/81-mirage-or-mirage-gangs-and-plunging-violence-el-salvador> [<https://perma.cc/FJH6-U2UT>] [hereinafter INT'L CRISIS GROUP, *Mirage or Miracle?*].

thousands of Salvadoran youth from the U.S. in the 1990s.<sup>36</sup> There are currently an estimated 60,000 gang members,<sup>37</sup> which makes El Salvador the country with the highest per capital gang concentration in Central America.<sup>38</sup> Gangs are present in more than ninety percent of the country's municipalities, and in many of them, they "exercise full control of the daily life of its inhabitants."<sup>39</sup> They determine who can enter or leave the territory, using murder as "an integral part of their exercise of control and power."<sup>40</sup> The level of their sophistication and organization has continued to increase, with one source observing that they "are better organized than the State [of El Salvador] is."<sup>41</sup> In addition to homicides, MS-13 and Barrio 18 engage in a wide range of criminal activity, including extortion, which is believed to constitute eighty percent of gang income.<sup>42</sup>

<sup>36</sup> INT'L CRISIS GROUP, *Mirage or Miracle?*, *supra* note 35, at 6. "A country in a post-conflict transition, with weak state institutions, deep social divides and high poverty levels provided perfect conditions for gangs to take root among marginalized young people." *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> CONG. RSCH. SERV., *supra* note 2, at 6.

<sup>39</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 11 & 22. *See also* Ivan Briscoe & David Keseberg, *Only Connect: The Survival and Spread of Organized Crime in Latin America*, 8 PRISM 114 (2019), [www.jstor.org/stable/26597314](http://www.jstor.org/stable/26597314) [<https://perma.cc/7GUQ-NVEP>] (on growing sophistication and control of the gangs). One in-country source noted that the gangs are an "organized power," they have "their own rules, their own weapons, and they have money." CGRS/RHRC Interview with Carmen Elena Molina, Juez [Judge], Juzgado Tercero de Familia [Third Family Court] at 9, in San Sal., El Sal. (Oct. 15, 2019) (on file with author). Judge Molina ended by saying: "In El Salvador, we have three military branches: the national army, the gangs, and the private security companies." *Id.*

<sup>40</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 29 (quoting UNHCR, S.R. Extrajudicial Execution Report 2018, ¶ 65e-f (Dec. 7, 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/359/05/PDF/G1835905.pdf?OpenElement>). Our in-country sources told us of many incidents regarding the strict control the gang exert over the communities they command. Roberto Rodriguez Meléndez, Child Protection Specialist at UNICEF addressed the ability to practice one's religion: "If you are a boy, you have to have the consent of the gang to go to church. If a youth goes to church without the gang's permission, the gang will kill him." CGRS/RHRC Interview, with Roberto Rodriguez Meléndez, Especialista en Protección Infantil [Child Protection Specialist], UNICEF, in San Sal., El Sal. (Oct. 16, 2019) (on file with author).

<sup>41</sup> "Gangs are so organized. They have members within the police, the military, the academia, the banks. They have the technical ability to locate you just by checking your credit card online and looking where you spent your money." CGRS/RHRC Interview, with Rosy Quintanilla, Gerente de Proyectos de Apoyo a la Sociedad Civil [Manager of Civil Society Support Projects], Save the Children, in San Sal., El Sal. (Oct. 15, 2019) (on file with author).

<sup>42</sup> INT'L CRISIS GROUP, *Mirage or Miracle?*, *supra* note 35, at 6. "Studies estimate that one in five micro- and small businesses fall prey to extortion, while the private sector as a whole pays the equivalent of 3 per cent of the country's GDP by way of extortion." *Id.* In-country sources have noted that even "[b]usinesses and companies of high prestige are extorted and they pay the extortion" citing the example of Pullmantur, an international cruise company that operates through Latin America, and pays extortion for its landline trips in Central America. CGRS/RHRC Interview, with Celia Medrano, Directora de Programación Regional

As a result of corruption and a weak justice system, levels of impunity for crimes committed by the gangs remain high, and only a fraction of the homicides,<sup>43</sup> femicides,<sup>44</sup> and crimes of sexual violence are investigated, prosecuted, and result in a conviction.<sup>45</sup> Widespread violence committed without an effective law enforcement response<sup>46</sup> has had a deleterious socio-economic impact – both on the individual and national level. Children going to school<sup>47</sup> or adults going to work cannot safely cross gang lines, resulting in worse educational and income levels than for similar individuals not living under gang control.<sup>48</sup> When surveyed, some individuals who have fled El

[Director of Regional Programming], Cristosal at 7, in San Sal., El Sal. (Oct. 16, 2019) (on file with author).

<sup>43</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 71. The inability to protect witnesses to crimes also contributes to impunity, where many prosecutions rely more on witness testimony than on scientific evidence such as “toxicology, pathology, and forensic studies.” CGRS/RHRC Interview, with Kenia Elizabeth Melgar de Palacios, Directora Ejecutiva de la Unidad Técnica [Executive Director of the Technical Unit] and Flor Parada, Jefa de la Unidad de Género [Head of the Gender Unit], Unidad Técnica Ejecutiva del Sector de Justicia (UTE) [Technical Executive Unit of the Judicial Sector] at 3, in San Sal., El Sal. (Oct. 2019) (on file with author). The budget for El Salvador’s witness protection program “is the same as it was in 2006,” even though with the rise in crime, there is increased demand. *Id.*

<sup>44</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 79.

<sup>45</sup> Instituto De Derechos Humanos de la Universidad Centroamericana (IDHUCA) University of Central America Human Rights Institute], *Informe De Derechos Humanos 2019 [Human Rights Report 2019]*, UNIVERSIDAD CENTROAMERICANA JOSÉ SIMEÓN CAÑAS [CENTRAL AMERICAN UNIVERSITY JOSÉ SIMEÓN CAÑAS], 7 (2019), <https://www.uca.edu.sv/idhuca/wp-content/uploads/INFORME-DE-DERECHOS-HUMANOS-2019-VF-Completo.pdf> [<https://perma.cc/X6AJ-US5K>] [hereinafter IDHUCA].

<sup>46</sup> For a more detailed discussion of factors leading to impunity, *see infra* text accompanying notes 421-425. There is inadequate performance and corruption by the main justice system actors – from the police to the prosecutors to the judges. CGRS/RHRC Interview with Sidney Blanco Reyes, Juez de Instrucción [Instruction Judge], Law Professor, Universidad Centroamericana José Simeón Cañas [José Simeón Cañas Central American University], in San. Sal., El Sal. (Oct. 17, 2019) (on file with author). The United Nations Development Program commissioned Judge Reyes and a colleague to carry out an investigation of causes for impunity in 2007. Their report concluded that the level of impunity for homicides was as high as 96.6%. In 2019 Judge Reyes was of the opinion that: “Impunity has not changed much since the study, and the conclusion of this research about impunity is still perfectly valid and relevant today.” *Id.* at 2.

<sup>47</sup> *See, e.g., Families on the Run, Why Families Flee From Northern Central America?*, UNHCR (2019), <https://familiesontherun.org/> [<https://perma.cc/838L-7H33>]; *A Young Life Deeply Saddened by Violence in El Salvador*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/charity-stories/children-impacted-violence-el-salvador> [<https://perma.cc/9T6S-KNA5>](last visited Mar. 15, 2021); CONG. RSCH. SERV., *supra* note 2, at 12.

<sup>48</sup> *See* Nikita Melnikov, Carlos Schmidt-Padilla & María Micaela Sviatschi, *Gangs, Labor, Mobility, and Development* 13 (NBER, Working Paper No. w27832, 2020), <http://dx.doi.org/10.2139/ssrn.3477097> [<https://perma.cc/YZ35-39B7>]; *The Wrong Side of the Tracks: A New Study Suggests That Street Gangs Inflict Broad Economic Harm*, 434 THE ECONOMIST 77 (Jan. 11, 2020), <https://www.economist.com/graphic-detail/2020/01/11/a->

Salvador have stated that they left because of economic reasons, in search of work. But upon further questioning, it is clear that extortion demands – often in increasing amounts – made their basic survival impossible,<sup>49</sup> contributing to the exodus.<sup>50</sup> On the national level, El Salvador’s “security challenges and ineffective justice system” are among the reasons for low levels of foreign investment.<sup>51</sup>

Violence and the threat of violence by the gangs have led to high levels of internal displacement, with recent studies showing that of the nearly 454,000 internally displaced Salvadorans, the majority were forced to move due to gang violence,<sup>52</sup> although significant displacement also results from actions by the armed forces and the police,<sup>53</sup> and climate change.<sup>54</sup> In-country sources have described the near impossibility of safe internal relocation for those fleeing gangs,<sup>55</sup> with some individuals feigning their own

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new-study-suggests-that-street-gangs-inflict-broad-economic-harm [https://perma.cc/5TCV-MJ7N].

<sup>49</sup> The human rights organization Cristosal has conducted in-depth interviews to determine the reasons individuals leave El Salvador. An initial reason given is often related to the need for work, but on further exploration, the connection to gang extortion and intimidation often emerges. CGRS/RHRC Interview with Celia Medrano, Cristosal, *supra* note 42, at 8 (describing a typical explanation for flight: “I lost my family’s mechanics workshop, where I had worked. I was extorted. I was threatened. I had to abandon it, and I could not find work after and for that reason I migrated.”). In another case recounted by Celia Medrano, a young man who was an employee of a government agency lived in an area controlled by one gang but worked in the area controlled by the opposing gang. *Id.* at 17. The gang members in the area where he lived told him they would only allow him to move between zones if he would transport drugs for them. *Id.* He did not want to do so, so he requested that his superiors reassign him so that he would not have to move between zones controlled by opposing gangs. *Id.* When his request was refused, he was forced to give up his job. *Id.*

<sup>50</sup> See *The Wrong Side of the Tracks*, *supra* 48.

<sup>51</sup> CONG. RSCH. SERV., *supra* note 2, at 10.

<sup>52</sup> *El Salvador*, INTERNAL DISPLACEMENT MONITORING CENTER, <https://www.internal-displacement.org/countries/el-salvador> [https://perma.cc/C8WA-R9LA] [hereinafter INTERNAL DISPLACEMENT MONITORING CENTER] (last visited Mar. 15, 2021).

<sup>53</sup> See, e.g., CGRS/RHRC Interview with Karen Sánchez Reyes, Coordinadora del Programa ACNUR y Desplazamiento Forzado [Coordinator of the Program with UNHCR and Forced Displacement], Instituto de Derechos Humanos de la Universidad Centroamericana José Simeón Cañas [Human Rights Institute, José Simeón Cañas Central American University], in San. Sal., El Sal. (Oct. 18, 2019) (on file with author). CGRS/RHRC Interview with Laura Regina Andrade Cruz, Coordinadora de Estudios de Opinión [Opinion Studies Coordinator], Instituto Universitario de Opinión Pública, Universidad Centroamericana José Simeón Cañas [University Institution of Public Opinion, José Simeón Cañas Central American University] at 3, in San. Sal., El Sal. (Oct. 18, 2019) (on file with author).

<sup>54</sup> See *infra* Section I.D.

<sup>55</sup> El Salvador is such a small country, and the gangs have “elaborate structures of surveillance” enabling them to find their victims “anywhere” they might go, making internal relocation impossible. CGRS/RHRC Interview with Karen Sánchez Reyes, *supra* note 53, at 3.

death, in order to throw the gang members off their trail.<sup>56</sup> Communities are often reluctant to accept individuals whose displacement is due to gang

The perception that internal relocation is not possible is widely shared; a source from the prosecutor's office recounted the following:

A short while ago there was a woman who came to our office. She had been a victim in San Salvador, and her case was being prosecuted in the courts. She relocated to the eastern part of the country and was killed. It is very complicated; the country is so small. It is just not feasible. Gangs have networks of local branches. They are more organized than the mere institutions. . . . Gangs are extremely well organized. Their modus operandi has improved. Their capacities have been underestimated. They manage a lot of money, have technology in their favor.

CGRS/RHRC Interview with Marina Haydee Martinez de Ortega, Directora Nacional de la Mujer, Ninez, Adolescencia, Población LGBTI y otros Grupos en Condición de Vulnerabilidad [National Director of the Office for Women, Children, Adolescents, the LGBTI Population, and Other Groups in Conditions of Vulnerability], Fiscalía General de la Republica [Office of the Prosecutor General of the Republic] and Erick Alvarez Cornejo, Jefe Departamento de Comunicación Interna [Head of the Internal Communications Department] at 7, in San. Sal., El Sal. (Oct. 16, 2019) (on file with author). Ms. Ortega went on to say that El Salvador's witness protection services was onerous and inadequate. Although witnesses receive protection during the trial, they live in circumstances similar to being in "jail," and protection is terminated immediately after a verdict is reached. *Id.*

The national identity card carried by Salvadorans includes their address; this also causes problems when an individual attempts to relocate:

[T]he first thing they [the gangs] do is ask for their DUI [Document Único de Identidad - identity document] and if the person comes from territory under the control of an opposing gang, they won't be permitted to enter, and if they came from a zone under the control of the same gang, the gang [would] communicate with its members in the other zone to see if the person had any issues with the gang. . . or if they are on good terms with the person. Only then can the person move into or enter the zone.

CGRS/RHRC Interview with Flor de Maria Belloso, Coordinadora Nacional [National Coordinator], American Friends Service Committee at 4-5, in San. Sal., El Sal. (Oct. 17, 2019) (on file with author).

<sup>56</sup> Ms. Sánchez Reyes described the case of a feigned death as follows:

There was a case where a person was driving, and the gangs shot him in the arm, and it went through his shoulder. The gang members thought he died, [and they left him there]. He did not die. He called his family and they took him in for medical treatment. The hospital told the gangs he died. His family took him in a car with polarized windows to a place to hide, where he couldn't even turn on the lights [because they didn't want anyone to know a person was inside]. They didn't even tell his young daughter that he was alive; his family told her he was dead. The gangs will think he is dead or left the country. Being confined has a psychological effect. Also, there has to be a management of information that is given [meaning that the few people that know about the person must be wary of revealing information to others].

CGRS/RHRC Interview with Karen Sánchez Reyes, *supra* note 53, at 8-9.

The strategy of attempting to evade the gangs by remaining hidden in one's home has become so normalized that the term "confinandos"— whose literal meaning is "confined" is used to

threats, fearing that the gangs will pursue them to the new location, causing problems for the relocation community.<sup>57</sup> In January 2020, as a result of civil society advocacy and a favorable ruling from El Salvador's Supreme Court,<sup>58</sup> the Legislative Assembly enacted a law<sup>59</sup> that recognizes the phenomenon of forcible displacement, and provides for a range of governmental responses and assistance.<sup>60</sup> The government has failed to issue regulations to implement and enforce the law, and there has been a decrease in available funds for the forcibly displaced since the law was enacted.<sup>61</sup>

With limited exception, since 1999, the government's response has been a *Mano Dura* (Iron Fist) policy of harsh laws, which has had the unintended consequences of strengthening the gangs.<sup>62</sup> The government has also

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describe these individuals. These persons "cannot leave their house; they cannot work or go to school." CGRS/RHRC Interview with Karen Sánchez Reyes, *supra* note 53, at 3. When NGOs attempt to assist these individuals, by transporting them out of their homes to a temporary shelter, they need to use cars with polarized windows, and use great care as to the timing for the evacuation. *Id.* at 4.

<sup>57</sup> CGRS/RHRC Interview with Celia Medrano, Cristosal, *supra* note 42, at 14.

<sup>58</sup> See Sala de lo Constitucional de la CSJ [Constitutional Chamber of the CSJ], 411-2017, July 13, 2018, (El Sal), [https://d2jhuj1whasmze.cloudfront.net/docs/Amp.%20411-2017%20Sentencia%20desplazamiento\\_7MZT.pdf](https://d2jhuj1whasmze.cloudfront.net/docs/Amp.%20411-2017%20Sentencia%20desplazamiento_7MZT.pdf) [<https://perma.cc/7V5W-MXFC>]. The Court ruled that the Salvadoran government was violating the constitutional rights of citizens by failing to protect and assist those who were forcibly displaced due to violence. It gave the government six months to prepare legislation aimed at protecting and assisting victims of internal displacement. *Id.* at 46-47.

<sup>59</sup> Ley Especial para la Atención y Protección Integral de Personas en Condición de Desplazamiento Forzado Interno [Special Law for the Comprehensive Care and Protection of Persons in Conditions of Forced Internal Displacement], Decree 539, D.O. No. 15, Vol. 426. Jan. 23, 2020, (El Sal.), <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/98F1C211-B62A-446B-89CB-948EC765E49D.pdf> [<https://perma.cc/KVV3-2QQN>].

<sup>60</sup> The law defines internally displaced persons (art. 3), requires the creation of a national registry, (art. 29.), states that humanitarian services including access to emergency health services, education and temporary shelters be provided (art. 10), and directs the Ministry of Justice and Security to budget for the law's implementation (art. 31). *Id.*

<sup>61</sup> EFE, *Piden a Gobierno de El Salvador Complementar Ley Para Atener a Desplazados*, DIARIO LIBRE (Jan. 21, 2021), <https://www.diariolibre.com/actualidad/internacional/piden-a-gobierno-de-el-salvador-complementar-ley-para-atener-a-desplazados-MK23929207> [<https://perma.cc/7TFT-6QJV>] (reporting on the lack of regulation to implement and enforce the law, and noting the decrease in available funds to address the situation of forced displacement since the law was enacted).

Melissa Pacheco, *CRISTOSAL Reprocha que Gobierno no Formule Reglamento de Ley Para Atender Víctimas De Desplazamiento Forzado*, LA PRENSA GRÁFICA (Jan. 22, 2021), <https://www.laprensagrafica.com/elsalvador/CRISTOSAL-reprocha-que-Gobierno-no-formule-reglamento-de-ley-20210121-0139.html> [<https://perma.cc/N2CE-7X8A>] (reporting the lack of regulation available to implement and enforce the law and the lack of public funds assigned to address the forced displacement situation).

<sup>62</sup> See Musalo, *supra* note 1, at 27-28; Briscoe & Keseberg, *supra* note 39, at 117.



increasingly involved the military in public security.<sup>63</sup> The use of the military, along with limited accountability for rights violations, has led to a rise in abuses by state security forces,<sup>64</sup> including the “formation of death squads, sometimes involving active officers, which have reportedly been responsible for a number of extrajudicial killings of gang members as well as civilians.”<sup>65</sup> The use of lethal force by security forces contributed to ten percent of the killings in 2017, which was fifteen times higher than in 2011.<sup>66</sup> The high level of homicides, therefore, is related to the security forces, as well as the gangs.

One notable departure from *Mano Dura* was in 2012 when the FMLN government of Mauricio Funes helped negotiate a truce between the leaders of the MS-13 and the two factions of Barrio 18.<sup>67</sup> The gangs committed to a ceasefire in exchange for the transfer of their leaders out of maximum security facilities, and for “creating economic opportunities and social projects in marginalized communities.”<sup>68</sup> The homicide rate appeared to plummet from 2012-2014; however, subsequently, clandestine graves were discovered leading some to infer that the gang members had not stopped their killing, but had simply hidden the evidence of their deeds.<sup>69</sup>

The following two charts illustrate the trajectory of homicides (2000-2020) and femicides (2003-2019) per 100,000 population in El Salvador. For homicides, the highest reported number is 103, and the lowest is an estimated 18-20 homicides per 100,000 for calendar year 2020. For femicides, the highest is 19.1 and the lowest is 6.48. To put these numbers in context, there is *one* homicide per 100,000 within the European Union, *two* in Canada, and *five* in the United States.<sup>70</sup> The decline in homicide and femicide rates between 2012-2014 shown on the following charts corresponds with the negotiated gang truce.

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<sup>63</sup> INT’L CRISIS GROUP, *Mirage or Miracle?*, *supra* note 35, at 7.

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

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

<sup>66</sup> *Id.* at 7-8.

<sup>67</sup> *Id.* at 8.

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

<sup>69</sup> See Carlos Carcach & Evelyne Artola, *Disappeared Persons and Homicide in El Salvador*, 5 CRIME SCI. 13 (2016), <https://link.springer.com/article/10.1186/s40163-016-0061-x> [<https://perma.cc/S5QZ-QMJA>] (noting that the number of disappeared rose by almost the same rate as the decline in homicides).

<sup>70</sup> U.N. Office of Drugs and Crime’s International Homicide Statistics Database, *Intentional Homicide (Per 100,000 People)*, WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5> [<https://perma.cc/8SXU-37PP>] [hereinafter *Intentional Homicide Statistics*] (showing homicides per 100,000 for the European Union in 2015, Canada in 2018, and the United States in 2018).

Figure 1. Homicide Rate per 100,000 from 2000 to 2020<sup>71</sup>

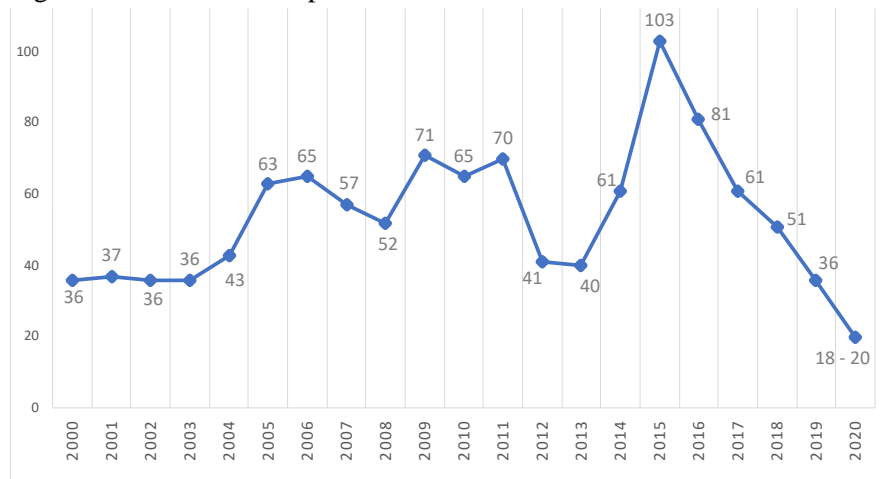
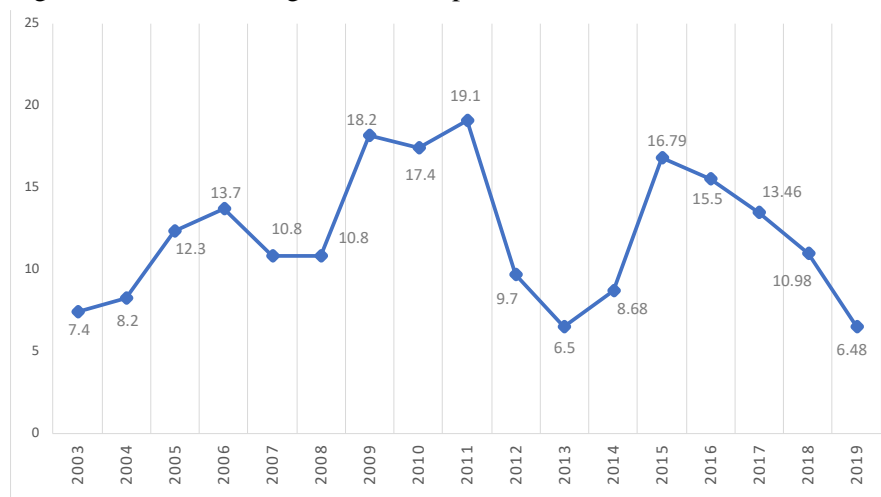


Figure 2. Violent Killings of Women per 100,000 from 2003 to 2019<sup>72</sup>



<sup>71</sup> The numbers for 2000-2019 are from IDHUCA, *supra* note 45, at 5. The estimated number for 2020 is from Roberto Valencia, *Opinion: El Año en el que El Salvador Se Volvió Menos Homicida que México* [*Opinion: The year El Salvador Became Less Homicidal than Mexico*], WASH. POST (Sept. 6, 2020, 10:26 PM), <https://www.washingtonpost.com/es/post-opinion/2020/09/06/el-ano-en-el-que-el-salvador-se-volvio-menos-homicida-que-mexico/> [<https://perma.cc/C842-KBQU>].

<sup>72</sup> The numbers for 2003-2015 are from Musalo, *supra* note 1, at 39. The number for 2016 is from the U.N. Office of Drugs and Crime's International Homicide Statistics Database, *Intentional Homicides, Female (per 100,000 female)—El Salvador*, WORLD BANK, <https://data.worldbank.org/indicator/VC.IHR.PSRC.FE.P5?locations=SV> [<https://perma.cc/J9L5-W7W9>] [hereinafter *Intentional Homicide Statistics, Female*]. The numbers for 2017-2019 are from IDHUCA, *supra* note 45, at 7-8.

As you can see from the charts, most recently, there has been an even more dramatic drop in killings under Nayib Bukele, with the lowest numbers recorded in the last two decades, at 18-20 homicides per 100,000 and 6.48 violent killings of women per 100,000. Bukele has claimed that the drop was due to the implementation of his new public security plan, *Plan de Control Territorial* (PCT) [Territorial Control Plan].<sup>73</sup> The Territorial Plan was launched in twenty-two priority municipalities with high levels of violence, but the drop in homicides does not correspond to the areas where the Plan was deployed,<sup>74</sup> bringing Bukele's assertion into doubt.<sup>75</sup>

Other factors better explain the drop. In November 2020, *El Faro*, "one of Latin America's most trusted news sites"<sup>76</sup> which has won numerous awards for its investigative journalism, reported that Bukele's administration began negotiating with MS-13 in June 2019, shortly after his inauguration.<sup>77</sup> Just as the 2012 FMLN-negotiated gang truce led to a steep decline in homicide numbers, it is assumed that the same is occurring now. During the current negotiations, MS-13 issued an order to all gang members "to ask permission to the leaders in order to commit a murder,"<sup>78</sup> a similar mandate that the gang had imposed during the 2012 gang truce, allowing it to control the level of homicides. The gang leaders have a "keen understanding that homicides, public opinion polls and foreign direct investment are intimately linked"<sup>79</sup> and having the ability to elevate or depress killings puts them in a powerful bargaining position.

There are some who believe that killings have not really gone down, but that MS-13 is simply hiding the bodies as gangs were believed to have done during the 2012-2014 truce, when homicide numbers dropped but disappearances rose.<sup>80</sup> Disappearances have been high in both 2018, with

<sup>73</sup> Discussed in more detail *infra* Section I.C.i.

<sup>74</sup> INT'L CRISIS GROUP, *Mirage or Miracle?*, *supra* note 35, at 20.

<sup>75</sup> "If the drop in homicides was the result of the implementation of the Territorial Control Plan, it would be natural to suppose that these 22 priority municipalities would display better results in security indicators than those not included in the Plan." *Id.*

<sup>76</sup> Sarah E. Maslin, *A Light in the Underworld*, COLUMBIA JOURNALISM REVIEW (Nov. 21, 2016), [https://www.cjr.org/special\\_report/el\\_faro\\_el\\_salvador.php](https://www.cjr.org/special_report/el_faro_el_salvador.php) [<https://perma.cc/Z9QN-KU9U>].

<sup>77</sup> Carlos Martínez, et al., *Bukele Has Been Negotiating with MS-13 for a Reduction in Homicides and Electoral Support*, EL FARO (Sept. 6, 2020), [https://elfaro.net/en/202009/el\\_salvador/24785/Bukele-Spent-A-Year-Negotiating-with-MS-13-for-a-Reduction-in-Homicides-and-Electoral-Support.htm](https://elfaro.net/en/202009/el_salvador/24785/Bukele-Spent-A-Year-Negotiating-with-MS-13-for-a-Reduction-in-Homicides-and-Electoral-Support.htm) [<https://perma.cc/6VS7-EPEY>].

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

<sup>79</sup> Steven Dudley, *3 Dirty Secrets Revealed by the El Salvador Gang 'Negotiations,'* INSIGHT CRIME (Sept. 4, 2020), <https://www.insightcrime.org/news/analysis/secrets-el-salvador-gang-negotiations/?eType=EmailBlastContent&eId=46929f5f-4fab-4067-8d8c-3905cc738901> [<https://perma.cc/8PEV-VM8E>].

<sup>80</sup> See Carcach & Artola, *supra* note 69.

3,514, which exceeded the number of homicides registered that year,<sup>81</sup> and 2019, with 3,202.<sup>82</sup> Israel Ticas, an internationally renowned Salvadoran forensic investigator,<sup>83</sup> is one person who shares the belief that bodies are being hidden.<sup>84</sup> Afraid that “there [would] no longer be investments in the country” because of the level of violence, the government and gangs made a “deal” and its solution was to “hide everything, zero cadavers, zero everything.”<sup>85</sup> The bodies are not left in plain sight, but are interred in clandestine graves, and the missing person is listed as a “disappearance” rather than a homicide.

Reinforcing Ticas’ cynical perspective that the government is manipulating data is the fact that shortly after taking office, the Bukele administration announced that it would no longer count as homicides those individuals found in clandestine graves.<sup>86</sup> It also adopted a policy of excluding from official homicide numbers deaths resulting from security force operations. These operations have become more deadly since 2018,<sup>87</sup> and killings by security forces have constituted an increasing percentage of

<sup>81</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 37.

<sup>82</sup> The 2019 number translates to a rate of 48 per 100,000. Anything over 10 disappearances per 100,000 is considered of “epidemic” proportion. IDHUCA, *supra* note 45, at 15. In the past couple of years there have been more disappearances than during the 12 years of El Salvador’s civil war. CGRS/RHRC Interview with Sidney Blanco Reyes, *supra* note 46, at 8.

<sup>83</sup> See Ali Rae & Elizabeth Melimopoulos, *Digging up the Dead in El Salvador to Find the Truth*, AL JAZEERA (Nov. 24, 2018), <https://www.aljazeera.com/news/2018/11/24/digging-up-the-dead-in-el-salvador-to-find-the-truth> [<https://perma.cc/U7EU-57WH>]. Israel Ticas and his work was the focus of a chapter in ÓSCAR MARTÍNEZ, *A HISTORY OF VIOLENCE: LIVING AND DYING IN CENTRAL AMERICA* 95-107 (2016).

<sup>84</sup> CGRS/RHRC Interview with Israel Ticas, Criminólogo [Criminologist], Fiscalía General de la Republica (FGR) [Office of the Prosecutor General of the Republic] at 8, in San Sa., El Sal. (Oct. 18, 2019) (on file with author).

<sup>85</sup> *Id.* at 3. See also CGRS/RHRC Interview with Karen Sánchez Reyes, *supra* note 53 (commenting that: “Actual levels of violence are currently not reflected in the official data. There has been a decrease in homicides, but an increase in disappeared which can explain [the decrease in homicides].”).

<sup>86</sup> Parker Asmann, *El Salvador to Omit Key Data From Official Homicide Tally*, INSIGHT CRIME (Jul. 18, 2019) <https://www.insightcrime.org/news/brief/el-salvador-omit-key-data-homicides/> [<https://perma.cc/8X2E-KTW2>] (reporting that the homicides registered in the country will no longer include victims of alleged confrontations between security forces and suspected gang members, nor those found dead and buried in graves). Redacción Nacional, *Gobierno Suma 262 Homicidios Entre Junio y Julio* [*Government Adds 262 Homicides between June and July*], DIARIO EL MUNDO (Jul. 15, 2019), <https://diario.elmundo.sv/gobierno-suma-262-homicidios-entre-junio-y-julio/> [<https://perma.cc/8AL6-MF9D>].

<sup>87</sup> IDHUCA, *supra* note 45, at 11-12.

the overall annual homicides.<sup>88</sup> These changes in calculating the homicide rate are a “clear attempt to paint a rosy picture.”<sup>89</sup> As human rights experts have pointed out, even if one were to accept the accuracy of the numbers showing an historic decrease in homicides, there is doubt they would persist at such a low level because there is no indication that they have been accompanied by the “structural changes” needed to effectuate real transformation.<sup>90</sup>

Although societal violence – much of it perpetrated by the gangs – affects all Salvadorans, certain populations are particularly vulnerable. Within that category are women and girls, and members of the LGBTQ community. A combination of machismo and extreme homophobia, respectively, puts them at a higher risk of violence committed with impunity.

### i. Violence against Women

El Salvador is a particularly dangerous country for women. In addition to the elevated levels of gender-motivated killings,<sup>91</sup> physical, sexual, and

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<sup>88</sup> IDHUCA, *supra* note 45, at 12-13. In 2011, they made up less than one percent of the total homicides (0.7%), but by 2016 the number had risen to 11.69%. *Id.* at 13. One human rights expert noted that security forces have planted weapons on victims in order to claim that they died in an armed confrontation when they were actually the victims of an extrajudicial killing. CGRS/RHRC Interview with Celia Medrano, Cristosal, *supra* note 42, at 2.

<sup>89</sup> Asmann, *supra* note 86. Many governmental and NGO sources shared the view that the Bukele administration was manipulating statistics to present a positive, but false perception of decreased violence. “[S]tatistics are being manipulated at all levels. This is because of our need to ask for donations and money [i.e. the assistance of the international community]. We want to say how good we are. . . . But how can these things change from one day to the other?” CGRS/RHRC Interview with Carmen Elena Molina, *supra* note 39, at 3.

<sup>90</sup> “La repression del delito sin cambios estructurales serios en nuestra sociedad desigual, injusta y con tasas elevadas de pobreza y vulnerabilidad social, aunque disminuyan coyunturalmente, siempre se pueden volver a crecer.” [The repression of crime without serious structural changes in our unequal and unjust society, with high levels of poverty and social vulnerability, can always increase again.] IDHUCA, *supra* note 45, at 10. The perspective that addressing root causes of crime is the only way to reduce it was repeated by many in-country sources: “There is now more repression, more police, and more prisons, but that is not changing the situation. As long as we do not change the situation of employment and education then it [the situation of violence] is not going to change. CGRS/RHRC Interview with Carmen Elena Molina, *supra* note 39, at 3.

<sup>91</sup> See *Femicide or Feminicide*, GENDER EQUAL. OBSERVATORY FOR LATIN AM. & THE CARIBBEAN, <https://oig.cepal.org/en/indicators/femicide-or-feminicide> [<https://perma.cc/6U3W-AFGT>] (last visited Mar. 15, 2021); Gobierno de El Salvador: Ministerio de Economía, *Hechos de Violencia Contra las Mujeres, El Salvador 2018*, DIRECCIÓN GENERAL DE ESTADÍSTICA Y CENSO (DIGESTYC), 22 (2018), [http://aplicaciones.digestyc.gob.sv/observatorio.genero/docs/Hechos\\_de\\_Violencia\\_contra\\_las\\_Mujeres\\_2018\\_VF.pdf](http://aplicaciones.digestyc.gob.sv/observatorio.genero/docs/Hechos_de_Violencia_contra_las_Mujeres_2018_VF.pdf) [<https://perma.cc/9VUL-7R89>]. See also CONG. RSCH. SERV., *supra* note 2, at 15. If you refer back to Figure 2, Violent Killings of Women, you will see that the highest rate of killing of women per 100,000 was 18.2 and the lowest was 6.48. For

other forms of gender violence are pervasive, and high levels of impunity for violence against women has been a constant.<sup>92</sup> The statistics on forms and levels of violence paint an incomplete picture in that eighty percent of incidents of violence against women go unreported.<sup>93</sup> A significant percentage of the incidents of sexual assault are committed against girls under the age of eighteen.<sup>94</sup> Although gang members are often the perpetrators,<sup>95</sup> violence against women and girls is common and normalized

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purposes of comparison, for the most recent year in which data was available, the rate for Canada was 0.9. *Intentional Homicide Statistics, Female, supra* note 72.

<sup>92</sup> “Due to ineffective governmental institutions, corruption, and social acceptance, impunity reigns in nearly all cases of violence against women.” Angelika Albaladejo, *How Violence Affects Women in El Salvador*, LATIN AMERICA WORKING GROUP, <https://www.lawg.org/how-violence-affects-women-in-el-salvador/> [<https://perma.cc/WM89-5RPG>] (last visited Mar. 15, 2021). The UN reported that “only a quarter of femicide cases make it to court and only 7% result in convictions.” U.K. COUNTRY NOTE, 2020, *supra* note 2, at 79. Ima Guirola, a women’s rights activist referred to impunity for violence against women as “social impunity,” or the “lack of reaction. . . cover-up, the normalization and justification that the very population carries out with respect to abuses of violence perpetrated against women of different ages, against children and adolescents, and the blaming and stigmatization of the victims.” CGRS/RHRC Interview with Ima Guirola, Instituto de Estudios de la Mujer “Norma Virginia Guirola de Herrera” (CEMUJER) [Norma Virginia Guirola de Herrera Institute for Women’s Studies] at 2, in San Sal., El Sal. (Oct. 13, 2019) (on file with author).

<sup>93</sup> *Informe de Monitoreo del Plan El Salvador Seguro 2016-2017* [Monitoring Report of the Safe El Salvador Plan 2016 - 2017], PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO [UNITED NATIONS DEVELOPMENT PROGRAM (UNDP)], 74 (Jul. 2018), <https://infosegura.org/2018/09/05/informe-de-monitoreo-del-plan-el-salvador-seguro-2016-2017/>. There are various reasons that a woman may choose not to report. As one source noted: “Women need to feel safe and protected to be able to report a crime or file a complaint. There are municipalities where the violence is so high that women do not report crimes.” CGRS/RHRC Interview with Elisa Garcia, Asesora Técnica [Technical Advisor], Comisión de la Mujer e Igualdad de Género (CMIG) [Commission of Women and Gender Equality], Asamblea Legislativa [Legislative Assembly] at 3, in San Sal., El Sal. (Oct. 2019) (on file with author). One source linked the lack of shelters and adequate protective services as reasons women do not report:

We don’t give women the security . . . to file a report. . . . If a woman arrives at the FGR [Fiscalia General de la Republic – Office of the Prosectuor General of the Republic] and does not receive an immediate response, such as access to a shelter, she will regret that she even came to report to the FGR because it made her situation even worse than if she had not reported.

CGRS/RHRC Interview with Maria Antonieta Josa De Parada, Presidente del Consejo Nacional de la Judicatura (2016-2021) [President of the National Council of the Judiciary (2016-2021)], Oficina del Presidente, Consejo Nacional de la Judicatura [President’s Office, National Council of the Judiciary] at 8, in San Sal., El Sal. (Oct. 2019) (on file with author).

<sup>94</sup> IDHUCA, *supra* note 45, at 7. “[E]n el primer semestre de 2019 hubo 3.138 hechos de violencia sexual contra mujeres, el 67% de las mismas contra menores de edad.” [In the first semester of 2019 there were 3,138 incidents of sexual violence against women, 67% of which were against minors]. *Id.*

<sup>95</sup> The gangs inflict sexual violence and economic harms upon women.

within the broader societal context.<sup>96</sup> Women who attempt to flee their persecutors find it near impossible to internally relocate.<sup>97</sup>

a. Specialized Laws and Institutions

Laws and institutions created to address gender violence and inequality, have not brought about appreciable change.<sup>98</sup> The first law, enacted in 1996,

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[I]n addition to this economic harm [extortions], women are also subject to violence of a sexual nature, both within the extortion framework and beyond, as gangs have come to exploit the threat and use of sexual violence as a tool in their struggle for territorial control.

‘Women’s bodies have become a battleground,’ said Miriam Bandes, responsible for UN Women’s program in El Salvador, who reminds that gangs target women related — either directly as members or more often as companions — to rival gangs.

Tristan Clavel, *Extortion and Sexual Violence: Women’s Unspoken Suffering*, INSIGHT CRIME (Apr. 26, 2019), <https://www.insightcrime.org/investigations/extortion-sexual-violence-womens-unspoken-suffering/> [<https://perma.cc/QDV3-GY4G>].

<sup>96</sup> Albaladejo, *supra* note 92.

<sup>97</sup> The relatively small size of the country, and the connection and dependency individuals have with their home communities makes internal relocation exceedingly difficult:

El Salvador is such a small country compared to the United States or Canada for example, that an identity reassignment program [i.e. changed name/identity] makes no sense. In the United States or in Canada, one can travel to another state, change his or her appearance, have a new place and make a new life. In El Salvador, this is not really possible because El Salvador is a place where people are connected to wherever they are from, where you can easily find a person anywhere if you are a bit persistent, if you investigate[.]

CGRS/RHRC Interview with Ima Guirola, CEMUJER, *supra* note 92, at 12.

<sup>98</sup> One in-country source stated that “[d]espite all of the laws in defense of women’s rights, we are going backwards.” CGRS/RHRC Interview with Benjamin Bonilla, Director Asociación Masculinidades para La Paz y La Igualdad de Género (MasPAZ) [Masculinity Association for Peace and Gender Equality], in San Sal., El Sal (Oct. 15, 2019) (on file with author). Bonilla singled out the justice system as “having the highest level of misogyny,” citing the criminalization of abortion as an example, *See infra* text accompanying notes 113-122 for a discussion of abortion in El Salvador. This opinion was expressed by other sources who commented on actions taken by the Bukele administration which were not favorable to women’s rights, including placing the holistic service provision centers, Ciudad Mujer (Women’s City) in limbo by transferring them from the office of the First Lady to the Ministry of Culture. CGRS/RHRC Interview with Elisa Margarita Garcia H., Asesora Técnica [Technical Advisor], Comisión de la Mujer e Igualdad de Género de la Asamblea Legislativa (CMIG) [Commission of Women and Gender Equality, Legislative Assembly]; Vicenta Mabel Reyes, Diputada Suplente [Alternate Deputy] for FMLN, San Miguel Department; Maria Imelda Rivas de Aucaeda, Diputada Suplente [Alternate Deputy] for FMLN, La Libertad Department; and Marielos Marquez, Asistente de Grupo Parlamentario de Mujeres (GPM) [Parliamentary Group of Women], in San Sal., El Sal. (Oct. 16, 2019) (on file with author) [hereinafter CGRS/RHRC Interview, Gender Unit Legislative Assembly]. *See generally*

was the *Ley contra la Violencia Intrafamiliar* (LVI) [Law against Intrafamilial Violence],<sup>99</sup> aimed at prevention, rather than punishment; it attempted to make it easier for a woman to obtain a protective order. It was followed by a 1998 reform to Penal Code Article 200<sup>100</sup> which has been the subject of controversy,<sup>101</sup> but was understood to recognize domestic violence as a crime. The LVI and Penal Code reform were followed by the 2010 *Ley Especial Integral para una Vida Libre de Violencia para las Mujeres* (LEIV or Integral Law) [Special Integral Law for a Life Free of Violence against Women],<sup>102</sup> and the 2011 *Ley de Igualdad, Equidad y Erradicación de la Discriminación contra las Mujeres* (LIE or Law of Equality) [Law of Equality, Equity, and Eradication of Discrimination against Women].<sup>103</sup>

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Ciudad Mujer, *Ciudad Mujer en El Salvador: Una Experiencia Transformadora* [Women's City in El Salvador: A Transformative Experience], COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE (CEPAL) [ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN],

[https://www.cepal.org/12conferenciamujer/noticias/paginas/1/49921/Folleto\\_Ciudad\\_Mujer\\_-\\_BID.pdf](https://www.cepal.org/12conferenciamujer/noticias/paginas/1/49921/Folleto_Ciudad_Mujer_-_BID.pdf) [<https://perma.cc/9GCL-THVZ>] (last visited Mar. 15, 2021) (for background on Ciudad Mujer). Other sources referred to actions taken by the Fiscalía General de la República [Office of the Prosecutor General of the Republic], which had dismantled the Unidades Especial de la Mujer [Women's Special Units], resulting in less attention to crimes of gender violence. CGRS/RHRC Interview with Laura Andrade, Directora, Instituto Universitario de Opinión Pública (IUDOP) Universidad Centroamericana José Simeón Cañas (UCA) [Director, University Institute of Public Opinion, José Simeón Cañas Central American University], in San Sal. El Sal., (Oct. 18, 2019) (on file with author).

<sup>99</sup> *Ley contra la Violencia Intrafamiliar* [Law against Intrafamilial Violence], Decree 902, D.O. No. 241, No. 333, Dec. 21, 1996 (El Sal.), <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/6AA65328-414D-4E67-B3DB-6D6D96009D46.pdf> [hereinafter LVI].

<sup>100</sup> Código Penal (C.P.) [Penal Code] art. 200, Decree 1030, D.O. 105, Vol. 335, June 10, 1997 (El Sal.). Article 3 of the LVI defined intrafamilial violence as acts causing physical, psychological, or sexual suffering. Article 200 of the Penal Code provides that “any family member. . . who commits violence in any of the forms mentioned in Art[icle] 3 of the [LVI] shall be punished with one to three years of imprisonment.” *Id.*

<sup>101</sup> The controversy centered on the question whether article 200 recognized physical, psychological or sexual violence as distinct crimes, or if they constituted crimes only if they were recognized as such under other provisions of the Penal Code. *See* Musalo, *supra* note 1, at 53-55, nn.334-42.

<sup>102</sup> *Ley Especial Integral para una Vida Libre de Violencia para las Mujeres* [Special Integral Law for a Life Free of Violence against Women], Decree 520, D.O. No. 2, Vol 390, Nov. 25, 2010 (El Sal.), <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/A5F14F60-2DC3-4FEB-AEE6-F9AEA7F498B3.pdf> [hereinafter LEIV].

<sup>103</sup> *Ley de Igualdad, Equidad y Erradicación de la Discriminación contra las Mujeres* [Law of Equality, Equity, and the Eradication of Discrimination against Women], Decree 645, D.O. No. 70, Vol. 391, Jan 4, 2011 (El Sal.), <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/0AC3B5EB-167D-4A11-A34A-8756FF3E6D01.pdf> [hereinafter LEI].



Among the LEIV's most relevant provisions are those criminalizing various forms of violence against women, including feminicides.<sup>104</sup> Notably, neither domestic violence nor rape are included as crimes in the LEIV.<sup>105</sup> To improve access to justice for women, who historically faced bias in the justice system, the LEIV's drafters had hoped to include provisions for specialized courts in the law, as has been done in other countries, such as Guatemala.<sup>106</sup> For budgetary reasons, they were not included in the LEIV, although limited specialized courts were created by decree in 2016.<sup>107</sup>

The LIE, rather than dealing with violence against women, focuses on what women rights' activists see as underlying violence against women – a lack of gender equality. The LIE's stated purpose is to provide “a legal instrument that develops the constitutional principles of equality.”<sup>108</sup> It addresses equality across societal spheres,<sup>109</sup> requiring governmental bodies to develop internal norms of non-discrimination.

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<sup>104</sup> The LEIV uses the term “feminicide” rather than “femicide.” In the international context, both terms denote a gender-motivated killing of a woman, but “feminicide” adds the additional element of government complicity. Whether the killing of a woman is a femicide/feminicide is a legal determination, and killings designated as femicides/feminicides constitute a subset of the larger category of “violent killings of women.” See Musalo *supra* note 1, at 6 n.13.

<sup>105</sup> *Id.* at 79-80. The explanation given for excluding these crimes is that their volume is so great that the specialized courts would “collapse” should they be within their jurisdiction. CGRS/RHRC Interview, Gender Unit Legislative Assembly, *supra* note 98 (stating that if the courts had jurisdiction over cases of domestic violence and rape, they would have collapsed). Even without having jurisdiction over these crimes, the specialized courts are “saturated,” there are only three courts “and the level of violence is so high” that the courts cannot hear all the cases. CGRS/RHRC Interview with Melida Guevara, Coordinadora del Programa de la Justicia del Género [Coordinator of the Gender Justice Program], OXFAM, at 3, in San Sal., El Sal. (October 18, 2019) (on file with author).

<sup>106</sup> Héctor Ruiz, *No Justice for Guatemalan Women: An Update Twenty Years After Guatemala's First Violence Against Women Law*, 29 HASTINGS WOMEN'S L.J. 101, 109-12 (2018) (discussing Guatemala's implementation of specialized courts).

<sup>107</sup> Decreto para la Creación de los Tribunales Especializados para una Vida Libre de Violencia y Discriminación para las Mujeres [Decree for the Creation of Specialized Courts for a Life Free of Violence and Discrimination against Women], Decree 286, D.O. No. 60, Vol. 411, Apr. 4, 2016 (El Sal.) [hereinafter Decree 286]. Ima Guirola, of the women's rights NGO CEMUJER noted that there are efforts to amend the legislative decree creating the specialized courts so that they would have jurisdiction over crimes such as domestic violence and sexual assault, which are not currently included. “[A]ll those crimes that are in the penal code and that have a clear definition of gender violence [should be included]. . . . Starting with rape, sexual assault, statutory rape, sexual harassment. . . and forced prostitution.” CGRS/RHRC Interview with Ima Guirola, CEMUJER, *supra* note 92, at 8.

<sup>108</sup> LIE, *supra* note 103, part VI.

<sup>109</sup> *Id.* at ch. III-VI.

Salvadoran sources report that the persistence of deeply entrenched attitudes regarding women's subordinate role in society persist,<sup>110</sup> and there has been little change in levels of violence<sup>111</sup> and impunity<sup>112</sup> for these crimes.

Paradoxically, the only crime which is zealously investigated and prosecuted is that of abortion. El Salvador is among a very small number of countries that prohibit all abortions.<sup>113</sup> Prior to 1997, although abortion was not legal, there were exceptions in cases of rape, abnormality of the fetus, or risk to the life of the mother.<sup>114</sup> In 1997 an amendment to El Salvador's Penal Code banned abortion in all circumstances,<sup>115</sup> and a 1999 amendment to El

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<sup>110</sup> Doris Rivas Galindo, a magistrate on El Salvador's Corte Suprema de Justicia (CSJ) [Supreme Court of Justice] commented on the force these societal attitudes still have:

The stereotypes, the patriarchy, the power dynamic, and the social inequalities persist. It is the power structure that has lasted. Women live it at every moment. . . . We need to confront and unlearn these stereotypes, but I do not know how much time it will take us to achieve it.

CGRS/RHRC Interview with Doris Rivas Galindo, Magistrada [Magistrate], Corte Suprema de Justicia (CSJ) [Supreme Court of Justice], at 3, in San. Sal., El Sal. (Oct. 18, 2019) (on file with author). Some sources characterized officials in Bukele's government as particularly hostile to women's rights, "I consider many of this government's officials to be openly sexist. . . . I am not saying that the previous ones have not been sexist . . . but at least they were a little ashamed of openly declaring themselves sexist." CGRS/RHRC Interview with América Joaquina Romauldo, Cárcomo, Directora Ejecutiva [Executive Director], Las Dignas, at 2, in San Sal., El Sal. (Oct. 15, 2019) (on file with author).

<sup>111</sup> Although the violent killings of women have decreased, as noted *supra*, these numbers are not considered reliable. Statistics indicate that other forms of violence are on the rise. See Gobierno de El Salvador: Ministerio de Economía, *Hechos de Violencia Contra las Mujeres, El Salvador 2019*, DIRECCIÓN GENERAL DE ESTADÍSTICA Y CENSO (DIGESTYC), 14-15 (2020), <http://aplicaciones.digestyc.gob.sv/observatorio.genero/docs/Hechos%20de%20Violencia%20Contra%20las%20Mujeres%202019.pdf> [<https://perma.cc/BV57-3AFT>] (showing a constant increase in gender-based violence from 2015 to 2019). Press Release, *IRC Data Shows an Increase in Reports of Gender-Based Violence Across Latin America*, INT'L RESCUE COMM. (June 9, 2020), <https://www.rescue.org/press-release/irc-data-shows-increase-reports-gender-based-violence-across-latin-america> [<https://perma.cc/HLD5-DYXG>] (stating that in El Salvador, the Organization of Salvadoran Women for Peace reported a 70% increase in violence against women from March to May 2020 compared to 2019 and that this is likely an underestimation).

<sup>112</sup> IDHUCA, *supra* note 45, at 7. Experts point to a number of factors that have impeded the effective implementation of laws, including societal attitudes. Carmen Elena Molina, a Family Court judge noted the "cultural aspect" to the problem, with police and judges both blaming the woman for bringing the abuse upon herself. CGRS/RHRC Interview with Carmen Elena Molina, *supra* note 39, at 5.

<sup>113</sup> See Alyson Zureick et al., *Physicians' Challenges under El Salvador's Criminal Abortion Prohibition*, 143 INT'L J. OF GYNECOLOGY & OBSTETRICS 121 (2018).

<sup>114</sup> Alyssa Julian, *Redefining LGBTQ and Abortion Rights in Latin America: A Transnational Toolkit*, 53 VAND. J. TRANSNAT'L L. 275, 317 (2020).

<sup>115</sup> *Id.*

Salvador's Constitution declared that life begins at conception.<sup>116</sup> Women convicted of the crime of abortion face a penalty of two to eight years; the penalty for doctors, nurses and other professionals is six to twelve years.<sup>117</sup> If they are charged with homicide, they can serve a much longer sentence.<sup>118</sup> The likelihood of being prosecuted falls much more heavily on poor women who are treated at public health facilities.<sup>119</sup> Women have been prosecuted and sentenced notwithstanding "credible claims that their pregnancies ended due to miscarriage."<sup>120</sup> The criminalization of abortion has led to El Salvador having one of the highest female incarceration rates in the world.<sup>121</sup> The reality that men who rape women most often enjoy impunity, while the women suffer the harshest consequences is another example of the profound societal inequality that persists.<sup>122</sup>

<sup>116</sup> Julian, *supra* note 114, at 318.

<sup>117</sup> *Id.* at 318 n.355. The criminalization also compromises the ethical obligations of Salvadoran medical professionals who are "incentivized to disclose their patients' confidential medical information, in violation of their ethical duties, and public healthcare facilities have become sites of criminal investigation." Zureick et al., *supra* note 113, at 121.

<sup>118</sup> A woman who miscarries can be charged with aggravated homicide and sentenced up to thirty years in prison. *El Salvador Woman Imprisoned After Miscarriage Released*, WASH. POST (Sept. 23, 2020, 7:17 PM), [https://www.washingtonpost.com/world/the\\_americas/el-salvador-woman-imprisoned-after-miscarriage-released/2020/09/23/863226e2-fdea-11ea-b0e4-350e4e60cc91\\_story.html](https://www.washingtonpost.com/world/the_americas/el-salvador-woman-imprisoned-after-miscarriage-released/2020/09/23/863226e2-fdea-11ea-b0e4-350e4e60cc91_story.html) [<https://perma.cc/Z3NC-X93E>] (reprinted from the Associated Press).

<sup>119</sup> CGRS/RHRC Interview with Flor de Maria Belloso, National Coordinator, American Friends Service Committee – El Salvador, at 16, in San Sal., El Sal. (Oct. 17, 2019) (on file with author) (explaining how private doctors can ensure that intra-uterine fetal deaths are not prosecuted as abortions).

<sup>120</sup> *Freedom in the World 2020: El Salvador*, FREEDOM HOUSE, <https://freedomhouse.org/country/el-salvador/freedom-world/2020> [<https://perma.cc/FNJ6-FUQW>] (last visited Mar. 15, 2021).

<sup>121</sup> Keith N. Hylton, *Whom Should We Punish, and How? Rational Incentives and Criminal Justice Reform*, 59 WM. & MARY L. REV. 2513, 2562-63 (2018).

<sup>122</sup> There is a double-standard; the system inverts itself. We put the responsibility on the woman, not on the man. We need a new way to understand this. He who is the man who impregnated [the accused] doesn't feel responsibility, and we discharge him. . . . [W]e have to take steps towards equality.

CGRS/RHRC Interview with Doris Rivas Galindo, *supra* note 110, at 6. Another judge commented on the difference between the sentences received by men and women: "Women receive harsher sentences. When a woman has a baby and the baby dies, or the baby is born dead, women are jailed for the maximum sentence. Men are not punished for this." CGRS/RHRC Interview with Carmen Elena Molina, *supra* note 39, at 10.

## ii. Violence against the LGBTQ Community

El Salvador is “frequently ranked as one of the most homophobic” countries in the Americas,<sup>123</sup> with long-standing violence and discrimination against the LGBTQ community.<sup>124</sup> Between 1995 and 2016, more than 500 members of the LGBTQ community were assassinated.<sup>125</sup> Gangs are often the perpetrators, but violence is also frequently at the hands of government security forces.<sup>126</sup> Although a 2010 Salvadoran law prohibits sexual orientation discrimination by public employees, NGOs have reported lack of enforcement,<sup>127</sup> and widespread denial of rights, with difficulty obtaining access to education, employment and health care.<sup>128</sup> Hatred and bias has driven LGBTQ individuals out of their communities, with at least 151 cases of forcible displacement from the beginning of 2018 to September 2019.<sup>129</sup>

In 2015 El Salvador amended the Penal Code to impose enhanced penalties for aggravated assault and homicide motivated by sexual orientation, however “[h]ate crimes against LGBTQ individuals are still commonplace and often go unpunished[.]”<sup>130</sup> The lack of investigation, prosecution and resolution, makes victims reluctant to even file

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<sup>123</sup> Carlos Iván Orellana & Ligia María Orellana, *Sexual Prejudice and the Relevance of Political Culture: Trends and Correlates in El Salvador*, 13 PSYCHOL. THOUGHT 37, 37 (2020). El Salvador’s Institute of Public Opinion reports that “the majority of the Salvadoran population considers homosexuality as not justified and as a perversion, rejects having homosexual people as neighbors, and opposes to [sic] the church supporting same-sex marriage.” *Id.* at 40. Other surveys of countries in the Americas and the Caribbean show that El Salvador ranks lowest for approval of same sex marriage, and highest for disapproval of the acceptance of homosexuality. *Id.*

<sup>124</sup> CONG. RSCH. SERV., *supra* note 2, at 14; U.K. COUNTRY NOTE, 2020, *supra* note 2, at 52-54; IDHUCA, *supra* note 45, at 8-9. Benjamin Bonilla commented on the “pervasive culture of homophobia” in Salvadoran society, and noted how frequently “[s]tate actors and people wearing the uniform [of police or military soldiers] are the perpetrators of this violence. CGRS/RHRC Interview with Benjamin Bonilla, *supra* note 98.

<sup>125</sup> IDHUCA, *supra* note 45, at 9.

The bodies of LGBTI victims of crime tend to show signs of torture, and media coverage blames the victim for provoking the crime, misgenders the victim (i.e. reporting the victim’s sex and name assigned at birth instead of their manifested gender identity), or the media omits that the crime was committed in response to the victim’s sexual orientation and/or gender identity.

Orellana & Orellana, *supra* note 123, at 40.

<sup>126</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 54. “The most visible perpetrators of anti-LGBTI crimes are gang members, and the police and army forces [citation omitted] but the most immediate sources of prejudice and threat for LGBTI people are their own family and community[.]” Orellana & Orellana, *supra* note 123, at 40.

<sup>127</sup> Julian, *supra* note 114, at 314.

<sup>128</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 52-53.

<sup>129</sup> IDHUCA, *supra* note 45, at 9.

<sup>130</sup> Julian, *supra* note 114, at 314.

complaints,<sup>131</sup> while some who have done so report harassment by the police or prosecutors.<sup>132</sup> A prevailing “culture of impunity” is widely recognized. Reports indicate that the situation has deteriorated further under President Bukele.<sup>133</sup>

### C. Contemporary Developments – President Nayib Bukele

Nayib Bukele won on a platform promising to address crime and violence,<sup>134</sup> and to tackle impunity and corruption.<sup>135</sup> He announced a seven stage Territorial Control Plan<sup>136</sup> to bring down gang violence, and committed

<sup>131</sup> Julian, *supra* note 114, at 314, n.325.

<sup>132</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 53.

<sup>133</sup> El Salvador’s laws and policies are rarely overtly hostile to LGBT people... In practice, however, El Salvador’s efforts to protect LGBT people’s rights at home have been inadequate, and *activists say that since President Bukele took office in 2019, initiatives put in place under the previous government aimed at promoting LGBT inclusion have been downgraded or not implemented.*

Human Rights Watch, “I’m Lucky to Still Be Alive” Violence and Discrimination Against LGBT People in El Salvador, HUMAN RIGHTS WATCH, 12 (Jan. 2021), [https://www.hrw.org/sites/default/files/media\\_2021/01/202101LGBT\\_ElSalvador\\_EN.pdf](https://www.hrw.org/sites/default/files/media_2021/01/202101LGBT_ElSalvador_EN.pdf) [<https://perma.cc/8SAR-YQTZ>] (emphasis added).

<sup>134</sup> CONG. RSCH. SERV., *supra* note 2, at 4; Ghitis, *supra* note 24.

<sup>135</sup> Roman Gressier, *Series of Corruption Allegations Stains El Salvador’s Promise – What Political Impact Will It Have?*, EL FARO (Sep. 11, 2020), [https://elfaro.net/en/202009/el\\_salvador/24796/Series-of-Corruption-Allegations-Stains-El-Salvador%E2%80%99s-Promise-%E2%80%94-What-Political-Impact-Will-It-Have.htm?st-full\\_text=all&tpl=11](https://elfaro.net/en/202009/el_salvador/24796/Series-of-Corruption-Allegations-Stains-El-Salvador%E2%80%99s-Promise-%E2%80%94-What-Political-Impact-Will-It-Have.htm?st-full_text=all&tpl=11) [<https://perma.cc/2HW7-YJFU>].

Nayib Bukele would likely not have become president of El Salvador in June 2019 had it not been for corruption. Three out of four of the Casa Presidencial’s preceding occupants were riddled with charges of profiteering, nepotism and the misuse of their public positions. Francisco Flores (1999-2004) died while on trial for embezzlement in 2016; Antonio Saca (2004-09) who pled guilty in 2018 to embezzlement and money laundering charges, will likely spend at least ten years behind bars; Mauricio Funes (2008-14) is dodging embezzlement charges of his own as an asylee in Daniel Ortega’s Nicaragua.

*Id.* One of Bukele’s campaign promises was to establish an international commission against impunity. Walter Sibrián, *CICIES Será Lanzada antes de Primeros 100 Días de Gobierno, Anuncia Bukele* [CICIES will be Launched before the First 100 Days in Office, Announces Bukele], LAPRENSAGRÁFICA (Aug. 9, 2019), <https://www.laprensagrafica.com/elsalvador/CICIES-sera-lanzada-antes-de-primeros-100-dias-de-Gobierno-anuncia-Bukele--20190809-0190.html> [<https://perma.cc/8VC5-SE59>].

<sup>136</sup> Marcos González Díaz, *Bukele y la Violencia en El Salvador: Cuánto Ha Influido en la Reducción de Homicidios el Plan de Seguridad por el que el Mandatario Militarizó el Congreso* [Bukele and the Violence in El Salvador: How Much Has the Security Plan Influenced the Reduction of Homicides for which the President Militarized Congress], BBC NEWS: MUNDO EN MÉXICO Y CENTROAMÉRICA (Feb. 18, 2020),

to appointing an anti-corruption czar as well as to establishing an international commission,<sup>137</sup> similar to the successful efforts of La Comisión Internacional Contra la Impunidad (CICIG) [International Commission

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<https://www.bbc.com/mundo/noticias-america-latina-51540641> [https://perma.cc/XK9W-9JAS].

<sup>137</sup> Gressier, *supra* note 135.

against Impunity in Guatemala]<sup>138</sup> to investigate and prosecute corruption. He also promised to attract economic investment.<sup>139</sup>

<sup>138</sup> CICIG was created in 2007 in response to advocacy by Guatemalan civil society organizations who feared that government complicity with organized crime networks would imperil Guatemala's consolidation of democracy following the 1996 peace agreement. *International and Civil Society Organizations Celebrate the Accomplishments of the CICIG*, WOLA: ADVOCACY FOR HUMAN RIGHTS IN THE AMERICAS (Aug. 22, 2019), <https://www.wola.org/2019/08/international-and-civil-society-organizations-celebrate-accomplishments-cicig/> [<https://perma.cc/GR7N-RBXL>]. It had the backing of the United Nations, and functioned as an independent investigative body, working alongside Guatemalan prosecutors within the country's legal system. CICIG's objective was to strengthen the country's justice system, and it was considered to be extremely successful. *Id.* As reported by the International Crisis Group:

The CICIG made impressive progress, playing a central role in numerous high-profile prosecutions and in reducing violence across the country. Among other things, the CICIG piloted reforms creating a witness protection program, tighter gun controls and rules for court-ordered wiretaps. It spurred the establishment of high-risk crime courts to protect the safety of individuals involved in the prosecution of especially grave crimes, and a special prosecutor's office against impunity (FECI in Spanish) within the Attorney General's office. It also trained dozens of prosecutors and police officers in scientific criminal investigation techniques. . . .

Hundreds of investigations hatched or supported by CICIG have successfully broken up rackets involving prominent officials, business leaders, drug traffickers, extortionists and street gangs. Its work helped oust a dozen corrupt judges, and led to the removal of 1,700 police officials accused of corruption and incompetence. According to the CICIG, unsolved murder cases fell from 95 per cent in 2009 to 72 percent in 2012.

As the Crisis Group has previously reported, these achievements saved lives. In the first seven years of the commission's operations, while the country's neighbours [sic] and regional peers experienced a 1 per cent annual rise in homicide rates on average, Guatemala saw an average 5 per cent decline, according to World Bank's figures. Overall, Crisis Group estimates that the CICIG has contributed to a net reduction of more than 4,500 homicides between 2007 and 2017.

Tiziano Breda, *Curtain Falls on Guatemala's International Commission against Impunity*, INT'L CRISIS GROUP (Sep. 3, 2019), <https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/curtain-falls-guatemalas-international-commission-against-impunity> [<https://perma.cc/MP36-YLL4>]. CICIG was not afraid to go after those in power. It investigated high level individuals in both the political and business sectors, which led to a concerted effort to shutter it. The U.S. had been a strong supporter of CICIG, but that changed with the election of Trump, and in January 2019, then Guatemalan president Jimmy Morales – who was being investigated by CIGIG for illegal campaign contributions – refused to renew its mandate, effectively shutting it down. WOLA, *supra* note 138.

<sup>139</sup> CONG. RSCH. SERV., *supra* note 2, at 4.

As discussed above, whether homicides have actually declined is still open to dispute, and if they have, it appears to be the result of negotiations with MS-13 rather than the launch of Bukele's Territorial Control Plan. To date, Bukele has failed to make good on his promise to appoint an anti-corruption czar and establish a commission similar to CICIG; and he and his administration have been mired in multiple claims of corruption and self-dealing. Many of his actions, which demonstrate lack of respect for rule of law, and his growing authoritarianism has caused alarm internationally, with threats to curtail funding to the country should such anti-democratic trends continue. Finally, although the impact of COVID-19 must be factored in, there is little indication of new economic investment or poverty reduction.<sup>140</sup> The following provides a brief analysis of the Bukele administration's actions in these key areas.

### **i. Public Security**

#### **a. Safe El Salvador Plan**

The public security plan in place when Bukele came to office was the *Plan El Salvador Seguro* (PESS or The Plan) [Safe El Salvador Plan]. A wide range of civil society organizations were involved in its development.<sup>141</sup> PESS had ambitious objectives of developing a strategy against violence, guaranteeing access to justice, protecting victims,<sup>142</sup> and addressing root causes.<sup>143</sup> It identified the need to strengthen governmental institutions as well as to rehabilitate and re-integrate offenders into society.<sup>144</sup> The Plan involved all State agencies and institutions in its execution,<sup>145</sup> and provided for the publication of an annual report monitoring its successes and

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<sup>140</sup> CONG. RSCH. SERV., *supra* note 2, at 10; *see also The World Bank in El Salvador, Overview*, THE WORLD BANK (last updated Oct. 9, 2020), <https://www.worldbank.org/en/country/elsalvador/overview> [<https://perma.cc/BK8S-P2VX>] (stating El Salvador had registered a moderate poverty reduction in 2019).

<sup>141</sup> Municipal mayors from more than 100 municipalities, representatives of the municipal councils, grassroots social organizations, government institutions, and representatives of private industries all participated in the elaboration of the Plan Seguro. National Legislative Bodies & National Authorities, *El Salvador: Plan El Salvador Seguro*, CONSEJO NACIONAL DE SEGURIDAD CIUDADANA Y CONVIVENCIA [NATIONAL COUNCIL FOR CITIZEN SECURITY AND COEXISTENCE], 11 (Jan. 2017), <https://www.refworld.org/docid/5b6d941c4.html> [hereinafter *Plan Seguro*].

<sup>142</sup> *Id.* at 8.

<sup>143</sup> Root causes include poverty, lack of education and job opportunities, the impact of organized crime, impunity and weakness in the justice system and gender inequality. *Id.* at 19.

<sup>144</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 57-58.

<sup>145</sup> *Plan Seguro*, *supra* note 141, at 8.



challenges.<sup>146</sup> The cost of the Plan, which was approximately \$200 million per year, was financed by the international community and an earmarked tax approved in November 2015.<sup>147</sup>

In its conception, PESS provided a holistic approach of reducing violence by addressing root causes, investing in communities, and strengthening institutions, in contrast to prior initiatives that relied only on counterproductive harsh law enforcement measures. However one of the main criticisms leveled against it was that although it recognized the need to address root causes, and thereby prevent violence, it invested far more money on prosecution and punishment than prevention.<sup>148</sup> The Plan had contemplated allocating around seventy-five percent of its budget for prevention, rehabilitation and reintegration, and just about twenty-five percent for prosecution, but the reality was that more than fifty percent was spent on prosecution.<sup>149</sup>

High levels of poverty in El Salvador also made implementation difficult;<sup>150</sup> poverty rates increased between 2014 and 2015, and the country's poor economic performance and worsening fiscal conditions made it difficult to create jobs for young men,<sup>151</sup> a critical component of addressing root causes. Corruption and the self-interest of politicians posed other barriers – local officials held up the Plan's implementation for election advantages,<sup>152</sup>

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<sup>146</sup> See Consejo de Seguridad Presenta Primer Informe de Monitoreo del Plan El Salvador Seguro [Security Council Presents First Monitoring Report of the Safe El Salvador Plan], PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO (UNDP) [UNITED NATIONS DEVELOPMENT PROGRAM] (Jul. 25, 2018), [https://www.sv.undp.org/content/el\\_salvador/es/home/presscenter/articles/2018/07/consejo-de-seguridad-presenta-primer-informe-de-monitoreo-del-pl.html](https://www.sv.undp.org/content/el_salvador/es/home/presscenter/articles/2018/07/consejo-de-seguridad-presenta-primer-informe-de-monitoreo-del-pl.html) [<https://perma.cc/MW97-G7JF>].

<sup>147</sup> *El Salvador's Politics of Perpetual Violence*, INT'L CRISIS GROUP, No. 64 (2017), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/64-el-salvadors-politics-perpetual-violence> [<https://perma.cc/9HNS-UAQ4>] [hereinafter INT'L CRISIS GROUP, *Politics of Perpetual Violence*].

<sup>148</sup> Rafael Castellanos, *Sobre la Continuidad del PESS y el CNSCC* [On the Continuity of the PESS and the CNSCC], LA PRENSA GRÁFICA (Apr. 10, 2019), <https://www.laprensagrafica.com/opinion/Sobre-la-continuidad-del-PESS-y-el-CNSCC-20190409-0543.html> [<https://perma.cc/K35H-E98G>].

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

<sup>150</sup> One government official commented how the absence of basic amenities impeded the implementation of PESS: “I arrived in a prioritised [sic] community [priority community for PESS due to high levels of violence] where I went to give a talk on peacebuilding, and I realised [sic] how far from reality we were when people told me they didn't even have drinking water.” INT'L CRISIS GROUP, *Politics of Perpetual Violence*, *supra* note 147 (quoting Crisis Group interview in San Miguel and San Salvador, June-Sept. 2017).

<sup>151</sup> *Id.*

<sup>152</sup> *Concejos Plurales Bloquean Prevención de la Violencia* [Plural Councils Blocks Violence Prevention] LA PRENSA GRÁFICA (Aug. 25, 2017),

while gang members have been accused of channeling funds for their own purposes.<sup>153</sup> Although PESS had achieved only limited success in bringing down violence, it was viewed positively overall.<sup>154</sup>

#### b. Territorial Control Plan

Shortly after taking office, Bukele terminated PESS, and initiated what he announced would be the first phase of a seven phase Territorial Control Plan to address the country's high levels of violence.<sup>155</sup> His plan was developed without any civil society consultation, or transparency, and its scope and nature remain unclear. As one observer noted, Bukele launched the Territorial Control Plan with a PowerPoint presentation of "a few pages,"<sup>156</sup> and to date has only described the first three of seven phases.<sup>157</sup>

Phase 1, named "Preparation," involved deploying increased military and police presence on public transportation, and to seventeen municipalities with the highest gang presence; it also included declaring a state of emergency in the country's prisons.<sup>158</sup> The tightening of security measures in the prisons and their impact on inmates' health in a time of COVID-19 raised concerns, which were heightened after a photograph was widely circulated which showed prison inmates, stripped to the waist, chained closely together,

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<https://www.laprensagrafica.com/elsalvador/Concejos-plurales-bloquean-prevencion-de-la-violencia-20170825-0121.html> [<https://perma.cc/J95Q-E96Z>].

<sup>153</sup> See Gabriel García, *FGR Investiga si Pandillas Recibieron Dinero de GOES* [Attorney General's Office (FGR) Investigates if Gangs Received Money from the Government of El Salvador (GOES)], LA PRENSA GRÁFICA (Nov. 20, 2017), <https://www.laprensagrafica.com/elsalvador/FGR-investiga-si-pandillas-recibieron-dinero-de-GOES-20171119-0040.html> [<https://perma.cc/QTJ8-8WVB>].

<sup>154</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 60. In August 2019 Salvadoran NGO stakeholders submitted a report to the UN Human Rights Committee as part of the Universal Periodic Review process. They stated that PESS was "a positive step" but that it lacked sufficient funds. In 2018 the U.N. Special Rapporteur on extrajudicial executions also spoke favorably of the Plan but also noted the lack of necessary resources "to truly implement the Plan as intended." *Id.* at 58-59.

<sup>155</sup> CONG. RSCH. SERV., *supra* note 2, at 9.

<sup>156</sup> Mario Beltrán, *Un Plan de Seguridad Confidencial y Desconocido* [An Unknown and Confidential Security Plan], GATOENCERRADO (June 2, 2020), <https://gatoencerrado.news/2020/06/05/un-plan-de-seguridad-confidencial-y-desconocido/> [<https://perma.cc/684N-65YS>].

<sup>157</sup> The secrecy around the remaining four phases of the seven-phase plan have led some experts to speculate that they do not actually exist. *Id.*

<sup>158</sup> Paola Nagovitch, *Explainer: Nayib Bukele's Territorial Control Plan*, AS/COA (Feb. 13, 2020), <https://www.as-coa.org/articles/explainer-nayib-bukeles-territorial-control-plan> [<https://perma.cc/FUU3-MKF8>]. Numerous Salvadoran experts criticized the effect increased police operations, often repressive and violating citizens' rights, were having on communities. See, e.g., CGRS/RHRC Interview with Laura Regina Andrade Cruz, IUDOP, *supra* note 98, at 2.

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mostly without masks. We now know that Bukele's government was negotiating with MS-13, using a lifting of these security measures as a bargaining chip.

Phase 2, dubbed "Opportunity," is focused on crime prevention and entails creating educational and employment opportunities for youth, beginning in the seventeen high crime municipalities where Phase 1 was initiated.<sup>159</sup> In these respects, Phases 1 and 2 of the Territorial Plan share some superficial similarity with PESS, but absent civil society input.

Phase 3, "Modernization," was intended to strengthen the police and military with "new resources and technology, including helicopters, surveillance equipment, night vision tools, drones and modern guns."<sup>160</sup> It expanded the number of high crime municipalities to twenty-two – up from the original seventeen. The increased reliance on the military in the Modernization phase has raised concerns evoking comparisons with failed *Mano Dura* plans of the past. This expanded role for the military was not without a cost; the executive's proposed budget for the Ministry of Defense rose from \$145.1 million in 2019 to \$220.3 million in 2020.<sup>161</sup> This increase in funds for the military occurred at the same time as programs for young people were cut, putting repression above prevention.<sup>162</sup>

Bukele obtained necessary funding for Phase 2 through a \$91 million loan from the Central American Bank for Economic Integration (CABEI)<sup>163</sup> which the Legislative Assembly approved. In order to finance Phase 3, Bukele needed the Legislative Assembly to approve an additional CABEI loan for \$109 million, which it refused to do.<sup>164</sup> The legislative impasse, along with the emergence of COVID-19, which has commanded government attention, have put the brakes on further implementation of the Territorial Plan. As noted above, although Bukele has claimed that the drop in homicides is due to the implementation of his Plan, the available statistics do not show a correlation between areas where the Plan has been put in place and a drop in killings.

## ii. Corruption

Bukele's most concrete commitments to tackle corruption were his campaign promises that he would appoint an anti-corruption czar and establish an international commission against impunity, the *Comision*

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<sup>159</sup> Nagovitch, *supra* note 158.

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

<sup>161</sup> Beltrán, *supra* note 156.

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

<sup>163</sup> Nagovitch, *supra* note 158.

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

*Internacional Contra la Impunidad en El Salvador* (CICIES) [International Commission against Impunity in El Salvador] modeled on the very successful *Comisión Internacional contra la Impunidad en Guatemala* (CICIG) [International Commission against Impunity in Guatemala].<sup>165</sup> CICIG followed corruption regardless of who it implicated; the widely heralded customs fraud case known as *La Linea* involved, and brought down then Guatemalan President Pérez Molina and his associates.<sup>166</sup>

As of December 2020, no anti-corruption czar has been appointed, and it appears that Bukele did not intend to adopt the CICIG model for El Salvador's Commission. He rejected a proposal by the United Nations that would have bestowed relative independence and autonomy on the newly created commission, which is under the authority of the executive branch.<sup>167</sup> Civil society organizations called on El Salvador's Legislative Assembly to create an independent commission, similar to CICIG,<sup>168</sup> and several European countries have stated that independence of CICIES is a condition for their funding.<sup>169</sup> In addition to lacking independence, unlike its counterpart in Guatemala, CICIES cannot investigate or be directly involved in the prosecution of a case.<sup>170</sup> Its access to information has even been restrained; in March 2020, Bukele asked CICIES to oversee the distribution of COVID-19 emergency funds. When CICIES requested information from the Ministry of Economy about the COVID fund, the Ministry rejected the request on the ground the information was classified.<sup>171</sup>

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<sup>165</sup> Breda, *supra* note 138 and accompanying text.

<sup>166</sup> CICIG's willingness to prosecute those in the highest governmental positions brought it into disfavor with Guatemalan president Jimmy Morales, who was being investigated by it for campaign finance violations. Although prior U.S. administrations had strongly supported CICIG, and there would have been diplomatic pressure to continue its presence in Guatemala, the Trump administration tacitly gave the green light to Morales to expel CICIG, which he did. *Id.*

<sup>167</sup> Violeta Rivas, *Organismos Sociales Proponen a Asamblea una CICIES Independiente* [Social Organizations Propose an Independent CICIES to the Assembly], ELSALVADOR.COM (Jun 11, 2020), <https://www.elsalvador.com/noticias/nacional/organismos-proponen-asamblea-legislativa-cicies-independiente/723243/2020/> [https://perma.cc/2S2L-X6WP].

<sup>168</sup> *Id.*

<sup>169</sup> Redacción [Editorial Staff], *Bukele Asegura Que CICIES Está Evaluando 5 Casos de Corrupción* [Bukele Ensures that CICIES is Evaluating 5 Cases of Corruption], DIARIO1.COM (Nov. 19, 2019), <http://diario1.com/politica/2019/11/bukele-asegura-que-cicies-esta-evaluando-5-casos-de-corrupcion/> [https://perma.cc/F7YM-XMFS].

<sup>170</sup> Rivas, *supra* note 167.

<sup>171</sup> Melissa Pacheco, *CICIES sin Datos sobre Emisión de Deuda Debido a la falta de Protocolo* [CICIES without Data on Debt Issuance Due to Lack of Protocol], ELECONOMISTA (May 26, 2020), <https://www.eleconomista.net/economia/CICIES-sin-datos-sobre-emision-de-deuda-debido-a-la-falta-de-protocolo-20200526-0006.html> [https://perma.cc/TLN6-PG4R].

Allegations of corruption in the Bukele administration have been legion. Much of it has centered around the government's expenditures related to the pandemic. As COVID spread globally, El Salvador appealed for international assistance, and received "hundreds of millions of dollars" including a loan from the International Monetary Fund for 389 million dollars.<sup>172</sup> This large influx of money "created ample opportunities for corruption."<sup>173</sup> Self-dealing has been a constant, with lucrative contracts awarded to family members or allies of the administration. The government has fought transparency, deleting previously available public information about expenditures,<sup>174</sup> and resisting or refusing to cooperate with audits or reporting on emergency spending.<sup>175</sup> There has been evidence of questionable expenditures concerning governmental actions beyond the pandemic.<sup>176</sup> In September 2020 the director of a Salvadoran watchdog non-profit stated that "[t]he amount of corruption that has come to light in the management of public resources over these five months has been scandalous."<sup>177</sup>

Given the constraints on CICIÉS, and its relatively low-profile presence since it was established in September 2019, there were diminished expectations that it could undertake an effective role.<sup>178</sup> But towards the end

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<sup>172</sup> Robert Looney, *Corruption Scandals Stain Bukele's Image Ahead of Kay Elections in El Salvador*, WORLD POLITICS REVIEW (Jan. 6, 2021), <https://www.worldpoliticsreview.com/articles/29328/corruption-scandals-stain-bukele-s-image-ahead-of-el-salvador-elections> [<https://perma.cc/X2CK-CR8T>].

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

<sup>174</sup> When allegations of government mismanagement of coronavirus funds began to mount in the fall of 2020, the administration's response was a brazen move to hide the information. The government website that provides information on all of the "country's contract expenditure suddenly went dark" and when it came back online, "all information pertaining to the Bukele presidency had been eliminated[.]" Héctor Silva Ávalos & Seth Robbins, *Corruption Cries Mount Over Pandemic Spending in El Salvador*, INSIGHT CRIME (Aug. 25, 2020), <https://www.insightcrime.org/news/analysis/corruption-cries-mount-over-pandemic-spending-in-el-salvador/> [<https://perma.cc/N4LN-74FX>]. Many in-country sources have commented on the lack of transparency of the Bukele administration, recounting that government websites containing information tracking homicides and other forms of violence were no longer accessible shortly after Bukele's assumption of the presidency. CGRS/RHRC Interview with Laura Regina Andrade Cruz, IUDOP, *supra* note 98 ("[I]n reality there is very little information accessible, it is very hard to access it, and the information is fragmented and limited.").

<sup>175</sup> Gressier, *supra* note 135.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting Roberto Rubio Fabián, director of the National Foundation for Development (FUNDE)).

<sup>178</sup> See Abraham Ábrego, *To Fight Corruption, El Salvador Needs an Anti-Impunity Commission with Teeth*, EL FARO (Nov. 20, 2020), [https://elfaro.net/en/202011/el\\_salvador/25020/To-Fight-Corruption-El-Salvador-Needs-an-](https://elfaro.net/en/202011/el_salvador/25020/To-Fight-Corruption-El-Salvador-Needs-an-)

of 2020, CICIES alerted the *Fiscalia General de la Republica* (FGR) [Prosecutor General of the Republic] of possible corruption in the expenditure of pandemic funds, which resulted in a major investigation into wrongdoing.<sup>179</sup> Prosecutors conducted more than twenty raids on various government offices aimed at gathering evidence on corrupt expenditures.<sup>180</sup> Notably the *Policia Nacional Civil* (PNC) [National Civilian Police] tried to block the entry of the prosecutors, which was alarming given that the police generally act as partners to the FGR in investigations.<sup>181</sup> Bukele's reaction to the raids was "furious," calling the prosecutors "scoundrels" and accusing them of attacking his "government's achievements."<sup>182</sup> Some observers see this collaboration between CICIES and the FGR as posing the question "whether the CICIES can play a more decisive role in the fight against corruption, despite its limitations, and whether the FGR can play a similarly strong and independent role in the fight against impunity – something that has always been demanded of it."<sup>183</sup> Regardless of the answer to that question, it appears that Bukele's claims of clean government have been badly damaged.

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Anti-Impunity-Commission-with-Teeth.htm?st-full\_text=all&tpl=11  
[<https://perma.cc/Z9Y6-VWAA>].

<sup>179</sup> Alex Papadovassilakis, *With Pandemic Raids, Bukele Government Faces Major Investigation in El Salvador*, INSIGHT CRIME (Nov. 23, 2020), <https://www.insightcrime.org/news/brief/pandemic-raids-bukele-investigation/> [<https://perma.cc/7UKP-VNW8>].

<sup>180</sup> The alleged improprieties include a \$225,000 contract for rubber boots granted to an auto parts company owned by the Health Minister Franciso Alabí's aunt, and \$20 million dollars expended in nine medical supply contracts which included the purchase of masks at twice the manufacturer's price from a company with links to Alejandro Zelaya, the Finance Minister. *Id.* The raids involved hundreds of prosecutors and included searches at the Ministry of Health, the Treasury, Agriculture and Livestock, the Environment and Natural Resources, and the National Administration of Aqueducts and Sewers. Marcos Alemán, *Fiscalía Salvadoreña Investiga Compras durante la Pandemia* [Salvadoran Prosecutor's Office Investigates Purchases during the Pandemic], SAN DIEGO UNION TRIBUNE EN ESPAÑOL (Nov. 11, 2020), <https://www.sandiegouniontribune.com/en-espanol/noticias/story/2020-11-11/fiscalia-salvadorena-investiga-compras-durante-la-pandemia> [<https://perma.cc/ZM47-XKFU>] (reprinted from the Associated Press).

<sup>181</sup> *Bukele Created CICIES, Now it Investigates his Government*, EL SALVADOR PERSPECTIVES (Nov. 20, 2020), <http://www.elsalvadorperspectives.com/2020/11/bukele-created-cicies-now-it.html> [<https://perma.cc/S8M5-NGMK>].

<sup>182</sup> Rodolfo Cardenal, *La Corrupción Sobresalta Casa Presidencial* [Corruption Shocks Presidential House], NOTICIAS UCA (Nov. 19, 2020), <https://noticias.uca.edu.sv/articulos/la-corrupcion-sobresalta-casa-presidencial> [<https://perma.cc/HGQ4-AZ7S>].

<sup>183</sup> Ábrego, *supra* note 178. See also Mirella Cáceres, *Cinco Oenegés Ven en Cicies "Enorme Potencial" tras Indagar Compras por Covid* [Five NGOs See "Enormous Potential" in Cicies after Investigating Purchases for Covid], ELSALVADOR.COM (Nov. 14, 2020), <https://www.elsalvador.com/noticias/nacional/cicies-comision-internacional-contra-la-impunidad-el-salvador-oeneges-indaga-compras-covid19-pandemia/775863/2020/> [<https://perma.cc/Y8JN-CNMP>].

### iii. Authoritarianism and Lack of Respect for Rule of Law

Bukele has carefully cultivated an image of himself as a “millennial figure, with his penchant for leather jackets, backward baseball caps and 90s hip-hop.”<sup>184</sup> His prolific use of Twitter<sup>185</sup> and other social media have bolstered that image. But his authoritarian tendencies, his lack of respect for rule of law, and his escalating attacks on the free press have evoked an image more in line with that of past Latin American dictators, and has raised alarms across the international community.

One of the earliest shows of his strongman tendencies occurred in February 2020 when the Legislative Assembly refused to meet on a Sunday to consider whether to authorize him to negotiate a loan to finance his Territorial Plan. Bukele sent uniformed security officers to the congressmembers’ homes and ordered them to attend; many still refused, denying him a quorum. Bukele then entered the legislative chamber accompanied by the heavily armed military and police, called the congressmembers criminals, and sitting in the seat reserved for the president of the Legislative Assembly, he declared, “Now I think it’s very clear who has control of the situation.”<sup>186</sup> Outside the building, Bukele’s followers were smashing pinatas designed to be stand-ins for his political opponents.<sup>187</sup> After he and the security forces departed, he ordered the legislators to approve the loan within a week.

So concerning were his actions that the Constitutional Chamber of El Salvador’s Supreme Court ordered Bukele to desist from actions which imperil “representative government, the pluralist political system, and the separation of powers[.]”<sup>188</sup> In a further attempt to bend the members of the

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<sup>184</sup> Emily Green & Deborah Bonello, *El Salvador’s Hipster President Is Attacking the Media*, VICE WORLD NEWS (Sept. 21, 2020, 10:41 AM), <https://www.vice.com/en/article/93548y/el-salvadors-hipster-president-is-attacking-the-media> [<https://perma.cc/N893-78HT>].

<sup>185</sup> There are aspects of his use of Twitter which reinforce his authoritarian image. A substantial percentage of his tweets are “orders” to do something (“Se le ordena que”) [“You are ordered to”] followed by a directive. Ruiz-Alba et al., *supra* note 25, at 268. Academics analyzing the content of his tweets have found that almost 40% (39.6%) fit in the category of “propaganda.” *Id.* One expert noted, “[t]here is a politic of major disinformation. – all of the media channels have images that are edited to maintain [a positive] image of the President, to show Bukele as not making mistakes.” CGRS/RHRC Interview with Laura Regina Andrade Cruz, IUDOP, *supra* note 98, at 4.

<sup>186</sup> Ghitis, *El Salvador Knew Bukele Was Brash*, *supra* note 28; *see also* Nóchez, *supra* note 28.

<sup>187</sup> Ghitis, *El Salvador Knew Bukele Was Brash*, *supra* note 28.

<sup>188</sup> Nagovitch, *supra* note 158 (quoting the Constitutional Chamber of the Supreme Court order).

Legislative Assembly to his will, he ordered their salaries withheld until they complied.<sup>189</sup> On another occasion, when the Legislative Assembly refused to extend a COVID-19 related state-of-emergency that Bukele requested, he issued an executive decree in contravention of the Assembly, an act characterized as an “usurpation of powers[.]”<sup>190</sup>

Bukele’s disregard for separation of powers has extended to the judiciary, as well as the legislative branch. When El Salvador’s Supreme Court ruled against some of his draconian COVID-19 measures, which included detaining individuals who violated stay-at-home orders in crowded quarantine centers, he tweeted: ““Five people [the judges] aren’t going to decide the death of hundreds of thousands of Salvadorans. . . . It doesn’t matter how much ink and seals they have.””<sup>191</sup> At the same time as his administration attempted to appear concerned about public health, it was well aware that its punishment for violating stay-at-home orders – the close confinement in quarantine centers – put individuals at increased risk of contracting the disease.<sup>192</sup> Other aspects of Bukele’s handling of the pandemic have been criticized for their wholesale violation of human rights.

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<sup>189</sup> *October 2, 2020: A New Migrant Caravan, Ongoing Attacks against the Press, and the Battle against Impunity*, EL FARO ENGLISH (Oct. 2, 2020), <https://us19.campaign-archive.com/?u=a822abdb775cca5db840e11e5&id=02ba0e86c8> [<https://perma.cc/S7VU-NLY7>] [hereinafter *A New Migrant Caravan*].

<sup>190</sup> Nóchez, *supra* note 28.

<sup>191</sup> Joshua Goodman, *US Official Warns El Salvador’s President that Aid at Risk*, ABC NEWS (Sept. 3, 2020), <https://abcnews.go.com/International/wireStory/us-official-warns-el-salvadors-president-aid-risk-72799276> [<https://perma.cc/J5HT-R5DM>] (reprinted from the Associated Press). On another occasion he issued an order in direct contradiction of the Supreme Court’s ruling around the requirement that all entrants to El Salvador had to present a negative COVID test. The Court had ruled that such an exceptional measure required legislative approval. Bukele ignored the ruling, warning that airlines passengers would not be permitted to enter without proof of a negative COVID test. Merlin Delcid, *Nayib Bukele Desafía a la CSJ y Exigirá a Pasajeros Prueba Negativa de Covid-19 para Ingresar a El Salvador [Nayib Bukele Challenges the CSJ and Will Demand Proof of Negative Covid-19 from Passengers to Enter El Salvador]*, CNN EN ESPAÑOL (Sept. 17, 2020, 2:56 PM), <https://cnnespanol.cnn.com/2020/09/17/nayib-bukele-desafia-a-la-csj-y-exigira-a-pasajeros-prueba-negativa-de-covid-19-para-ingresar-a-el-salvador/?eType=EmailBlastContent&eId=d2847601-d0bf-405c-94e7-e596702fbb8d> [<https://perma.cc/449J-WNV6>].

<sup>192</sup> Astrid Valencia & Diana Sánchez, *Some Things Never Change: Repression and the Militarization of Public Security in El Salvador*, AMNESTY INT’L (Oct. 5, 2020), <https://www.amnesty.org/en/latest/news/2020/10/repression-militarizacion-seguridad-publica-el-salvador/> [<https://perma.cc/K2RX-YFTC>]. “The Minister of Justice and Public Security warned . . . that people who violated the national lockdown would be sent to containment centres, ‘far from their families, and where they would also be at risk of contracting the virus.’” *Id.* (emphasis added).



Individuals who had to leave their homes and were encountered by security forces have been imprisoned, beaten, and shot.<sup>193</sup>

Journalists whose articles question Bukele's policies, or put him or his government in a negative light, have been the particular targets of Bukele's intimidation and harassment. Bukele retaliated against *El Faro* after it broke the story on his administration's secret negotiations and truce with MS-13, as well as its numerous articles on his administration's corruption, and mishandling of the COVID-19 pandemic.<sup>194</sup> He has denied *El Faro* access to his press conferences, attacked them on Twitter, been behind false accusations of misconduct at the publication, and most recently has subjected it to an audit by the Finance Ministry.<sup>195</sup> The audit is of particular concern as it seeks "minutes from the publication's board of director meetings, update reports *El Faro* sends its partners about journalistic projects, and the identities of its individual donors."<sup>196</sup> *El Faro* is not the only publication that has been in Bukele's bullseye, and his administration's ongoing attack on the free press led 600 journalists and scholars from around the world to sign a letter to the Special Rapporteur for Freedom of Expression of the Interamerican Commission on Human Rights.<sup>197</sup>

Bukele's disregard for rule of law and democratic processes, have drawn international concern and criticism. The United Nations High Commissioner for Human Rights, along with Amnesty International and Human Rights Watch, denounced his actions in fighting COVID-19.<sup>198</sup> A group of U.S. Congressmembers sent Bukele a letter expressing their "deep concern regarding your government's increased hostility toward independent and investigative media outlets in El Salvador."<sup>199</sup> The U.S. State Department also communicated its displeasure about encroachments on the independence of journalists.<sup>200</sup> And in a statement that could have implications for foreign assistance, Thomas Kelly, a senior official with the Millennium Challenge Corporation,<sup>201</sup> a U.S. foreign aid agency that has committed \$300 million in

<sup>193</sup> Valencia & Sánchez, *supra* note 192.

<sup>194</sup> Joel Simon, *In El Salvador, a Beacon of Truth Under Threat*, COLUM. JOURNALISM REV. (Oct. 8, 2020), <https://www.cjr.org/analysis/el-faro-nayib-bukele-press-freedom.php?https://perma.cc/8SSE-S5FK>.

<sup>195</sup> Green & Bonello, *supra* note 184.

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

<sup>197</sup> *A New Migrant Caravan*, *supra* note 189.

<sup>198</sup> Nóchez, *supra* note 28.

<sup>199</sup> Green & Bonello, *supra* note 184.

<sup>200</sup> The U.S. State Department letter stated: "Journalists do critically important jobs in a democracy and their independence must be respected[.]" *Id.* (quoting Michael Kozak, acting assistant secretary for Western Hemisphere Affairs).

<sup>201</sup> The Millennium Challenge Corporation operates independently, but reports to the State Department. To qualify for MCC funding, a country has to meet the criteria on a "scorecard" that rates performance in 20 categories, including political rights and civil

grants to El Salvador, indicated that funding is contingent on “strict adherence to the rule of law and the protection of fundamental freedoms,” and could therefore be at risk.<sup>202</sup>

Despite claims of corruption, and growing authoritarianism, Bukele remains popular with the public, and it is predicted that *Nuevas Ideas*, his political party, will gain seats in the legislative elections scheduled for February 2021.<sup>203</sup> It would not be a positive development for El Salvador’s democracy if *Nuevas Ideas* were to win a majority, which would further Bukele’s “worst instincts[.]”<sup>204</sup> As one critic observed, ““He’s a profoundly manipulative leader and is backed by the military. The development of his dictatorship is not something that will happen in the future, it’s an ongoing process.””<sup>205</sup>

#### **D. Climate Change, Natural Disasters, Corporate Exploitation, and Environmental Degradation**

Although the primary cause of forced migration is the violence, impunity, and corruption described above, environmental disasters and degradation also make survival precarious, contributing to displacement and forced migration.<sup>206</sup> Climate change has led to more powerful hurricanes, with related flooding and landslides,<sup>207</sup> and intensified drought conditions.<sup>208</sup> In addition to climate-related disasters, El Salvador has fault lines

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liberties. MCC was established with the purpose of “raising the goal for foreign assistance.” Goodman, *supra* note 191.

<sup>202</sup> Goodman, *supra* note 191.

<sup>203</sup> Looney, *supra* note 172.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (quoting Salvadoran economist Antonio Barrera).

<sup>206</sup> In 2019 there were 454,000 Salvadorans displaced due to conflict and violence, and 1,900 due to disasters. The number displaced by disasters rose sharply in 2020, with 13,000 Salvadorans displaced in the first six months of 2020. INTERNAL DISPLACEMENT MONITORING CENTER, *supra* note 52.

<sup>207</sup> See generally *infra* note 214.

<sup>208</sup> See FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, DRY CORRIDOR CENTRAL AMERICA SITUATION REPORT (June 2016), <http://www.fao.org/3/br092e/br092e.pdf> [<https://perma.cc/5DC7-LSEC>] [hereinafter FAO] (“Due to irregular rainfall during 2015, 60 percent of the maize crop was destroyed. The current impact of drought on the economy has increased with respect to the 2014 drought to approximately USD 100 million in 2015.”). See also Inter-American Development Bank, *Food Security and Emigration: Why People Flee and the Impact on Family Members Left Behind in El Salvador, Guatemala and Honduras*, WORLD FOOD PROGRAMME (2017), <https://docs.wfp.org/api/documents/WFP-0000019629/download/> [<https://perma.cc/3GKN-AEMH>]. “Communities in the Dry Corridor have seen a notable rise in food insecurity over the past two years because of two to four years of droughts or dry spells . . . [T]he area has increasingly become the focus of humanitarian interventions, as the cumulative impact of these recent dry seasons has led to negative coping strategies among those affected.” *Id.* at 20.

crisscrossing its territory, and has endured the destruction of powerful earthquakes.<sup>209</sup> The lack of protective environmental laws has allowed exploitation by large businesses and multinational corporations which have led to pollution, deforestation, and excessive water use, making clean potable water a scarce commodity.<sup>210</sup> All of these are additional push factors for migration.

## i. Climate Change and Natural Disasters

### a. Flooding and Droughts

El Salvador is part of the “Central America Dry Corridor,” which encompasses the Pacific coastal area from southern Mexico to Panama.<sup>211</sup> The Dry Corridor, which covers fifty-eight percent of the country, is heavily impacted by destructive hurricanes and tropical storms which cause flooding, landslides, death, and displacement. Particularly damaging ones included Mitch in 1998,<sup>212</sup> Ida in 2009,<sup>213</sup> and Amanda, Eta, and Iota in 2020.<sup>214</sup>

<sup>209</sup> See Martínez-Díaz et al., *infra* note 221.

<sup>210</sup> See Atkins, *infra* note 228.

<sup>211</sup> The Alliance for Climate Protection, *How The Climate Crisis is Driving Central American Migration*, CLIMATE REALITY PROJECT (May 31, 2019, 10:04 AM), <https://www.climaterealityproject.org/blog/how-climate-crisis-driving-central-american-migration> [<https://perma.cc/M6DK-MJ54>].

<sup>212</sup> Hurricane Mitch displaced 85,000 people and killed another 240. See William I. Rose, Julian J. Bommer & Ciro Sandoval, *Natural Hazards and Risk Mitigation in El Salvador: An Introduction*, 375 GEOLOGICAL SOC'Y AM. 1, 2 (2004), [<https://perma.cc/YEE3-T4NE>].

<sup>213</sup> Hurricane Ida displaced 15,000 people. THE NANSSEN INITIATIVE SECRETARIAT, DISASTERS AND CROSS-BORDER DISPLACEMENT IN CENTRAL AMERICA: EMERGING NEEDS, NEW RESPONSES 11 (2013), [http://www.nanseninitiative.org/wp-content/uploads/2015/02/FINAL\\_Background\\_Paper\\_Central\\_America\\_EN.pdf](http://www.nanseninitiative.org/wp-content/uploads/2015/02/FINAL_Background_Paper_Central_America_EN.pdf) [<https://perma.cc/H5G3-SUCT>]. The storm and its subsequent flooding and mudslides were reported to have killed at least 189 people. *Death Toll from El Salvador Flooding, Mudslides Rises to 189*, LATIN AM. HERALD TRIB. (Nov. 14, 2009), <http://www.laht.com/article.asp?ArticleId=347399&CategoryId=23558> [<https://perma.cc/74VM-TREW>].

<sup>214</sup> Tropical Storm Amanda contributed to at least 30 deaths in El Salvador and caused over \$200 million in damage. ROBBIE BERG, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NATIONAL HURRICANE CENTER TROPICAL CYCLONE REPORT: TROPICAL STORM AMANDA 4 (2020), [https://www.nhc.noaa.gov/data/tcr/EP022020\\_Amanda.pdf](https://www.nhc.noaa.gov/data/tcr/EP022020_Amanda.pdf) [<https://perma.cc/7ZWS-Y7JH>]. As of November 2020, Hurricane Eta has killed at least one Salvadoran. *El Salvador Reports First Death From Tropical Storm Eta*, HAITI NEWS (Nov. 5, 2020), <https://www.haitinews.net/news/266895112/el-salvador-reports-first-death-from-tropical-storm-eta> [<https://perma.cc/RG83-A4VM>]. Hurricane Iota killed at least one Salvadoran and displaced at least 880. Carlos Mario Marquez, *Iota Dissipates Over El Salvador After Leaving Wave of Deaths in Central America*, THE TICO TIMES (Nov. 18, 2020), <https://ticotimes.net/2020/11/18/iota-dissipates-over-el-salvador-after-leaving-wave-of-deaths-in-central-america> [<https://perma.cc/PJE3-RP82>].

Climate change and global warming contribute to the severity and frequency of the storms.<sup>215</sup>

The Dry Corridor experiences acute droughts, also related to climate change, resulting in the loss of crops and adding to food insecurity. Over half (54%) of El Salvador's rural population survive through the cultivation and sale of grains,<sup>216</sup> and are directly affected by the rising temperatures,<sup>217</sup> and the decrease in precipitation associated with climate change. The 2014-2015 drought led to the destruction of sixty percent of the maize crop. The Food and Agriculture Organization of the United Nations reported that as a result almost 200,000 Salvadorans experienced moderate to severe food insecurity.<sup>218</sup> The drought conditions that began in 2014 were significant drivers of migration to the United States.<sup>219</sup> These changes in climate, occurring in a time of declining international commodity prices, also had a negative impact on El Salvador's coffee export industry, which in turn, affects all of those employed in the industry.<sup>220</sup>

#### b. Earthquakes

Floods and droughts are not the only disasters impacting El Salvador. The country sits upon multiple fault lines, making it susceptible to powerful

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<sup>215</sup> See Ileana-Sînziana Pușcaș, *Central and North America: Migration and Displacement in the Context of Disasters and Environmental Change*, in 4 INT'L ORG. FOR MIGRATION, MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: POLICY BRIEF SERIES 1 (2018), [https://publications.iom.int/system/files/pdf/policy\\_brief\\_series\\_vol4\\_issue1.pdf](https://publications.iom.int/system/files/pdf/policy_brief_series_vol4_issue1.pdf) [<https://perma.cc/GU42-VQAH>]. “[C]limate change is also acknowledged as increasingly affecting the region, visibly seen through the heightened frequency and intensity of hydro-meteorological storms and reduced accumulated precipitation in the Dry Corridor in Central America.” *Id.* at 2. El Niño, whose scientific name is El Niño Southern Oscillation (ENSO) is a worldwide weather pattern that results when there is a temperature increase of at least 0.9 F in the equatorial waters of the eastern Pacific Ocean. It brings drought to some areas, and severe storm and flooding to others, including the Pacific Coast of the Americas. *El Niño*, NAT'L GEOGRAPHIC, RESOURCE LIBRARY—ENCYCLOPEDIA ENTRY, <https://www.nationalgeographic.org/encyclopedia/el-nino/> [<https://perma.cc/XU4P-5GKG>].

<sup>216</sup> WORLD FOOD PROGRAMME, *supra* note 208, at 20.

<sup>217</sup> FAO, *supra* note 208.

<sup>218</sup> *Id.*

<sup>219</sup> WORLD FOOD PROGRAMME, *supra* note 208, at 5.

<sup>220</sup> Between 2013 and 2014, over 140,000 Salvadorans lost their jobs in the coffee industry. Choetsow Tenzin, *A Caffeinated Crisis: An Unfiltered Look at the Struggles of the Coffee Industry in El Salvador*, 41 HARV. INT'L REV. 41, 43 (2020), <https://hir.harvard.edu/a-caffeinated-crisis-an-unfiltered-look-at-the-struggles-of-the-coffee-industry-in-el-salvador/>.

earthquakes.<sup>221</sup> The earliest recorded history is of a 1625 earthquake, which devastated the city of El Salvador and surrounding areas.<sup>222</sup>

More recently, there have been four highly destructive earthquakes, occurring in 1982 (7.2 magnitude), 1986 (5.7 magnitude), January 2001 (7.6-7.9 magnitude), and February 2001 (6.6 magnitude).<sup>223</sup> These quakes led to landslides, caused loss of life, destroyed buildings, and resulted in large-scale displacement and an increase in homelessness. It was estimated that 200,000 individuals became homeless after the 1986 earthquake, and that tens of thousands were left without housing after the January 2001 quake – either because they had lost their homes or were frightened to be inside due to ongoing aftershocks.<sup>224</sup> Beyond these immediate consequences, were those that arose from destruction of infrastructure, such as potable water systems, heightening the risk of water-borne infectious diseases.<sup>225</sup>

## ii. Corporate Exploitation and Environmental Degradation

Corporate exploitation and environmental degradation have worsened water scarcity by polluting and overusing available water sources. To date, efforts to enact laws regulating the use of water have stalled. The only – but not inconsequential – victory that activists have had around controlling their resources and prohibiting environmentally damaging practices has been through passage of a landmark ban on metals mining.

### a. Corporate Interests and their Impact on El Salvador's Water

El Salvador is considered to be the “most water-stressed nation in Central America,”<sup>226</sup> with aquifers across the country dropping by at least thirteen feet, a decline flagged as profoundly concerning by the country's Minister of Environment.<sup>227</sup> In the absence of controls, monied interests – multinational corporations, agribusiness, developers – have had unlimited access to water,

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<sup>221</sup> José J. Martínez-Díaz et al., *Triggering of Destructive Earthquakes in El Salvador*, 32 *GEOLOGY* 65, 66 (2004).

<sup>222</sup> *Earthquakes in El Salvador*, SATCAWEB.ORG, <http://www.satcaweb.org/el-salvador/> [<https://perma.cc/65HB-CMYX>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Heather Gies, *Once Lush, El Salvador is Dangerously Close to Running Dry*, *NAT'L GEOGRAPHIC—ENVIRONMENT* (Nov. 2, 2018), <https://www.nationalgeographic.com/environment/article/el-salvador-water-crisis-drought-climate-change> [<https://perma.cc/CFG9-UQA4>].

<sup>227</sup> *Id.*

greatly contributing to the scarcity.<sup>228</sup> Rivers and streams have also been affected. Unregulated industrial and agricultural run-off, as well as untreated sewage, has led to the contamination of 90% of El Salvador's surface water, leaving one and half million inhabitants without access to potable water.<sup>229</sup>

The operation of the brewing company *Industrias La Constancia* (ILC) provides an example of a corporation using unlimited amounts of water, leaving the local Salvadorans with virtually no access.<sup>230</sup> ILC, originally a Salvadoran company, is situated in Nejapa, atop one of the largest and most important aquifers in the region, which provides water not only to the local residents, but to forty percent of metropolitan San Salvador.<sup>231</sup> In 2005, ILC became a subsidiary for Coca Cola and the South African company, SABMiller, which is the second largest brewer in the world.<sup>232</sup> ILC drew enormous water from the aquifer, via two wells, and as a result of its operations, the population of Nejapa experienced water scarcity.<sup>233</sup> In 2019, it was reported that the water level in the aquifer had "shrunk by 20%" in the preceding five years.<sup>234</sup>

ILC also used large amounts of water from the San Antonio River, which the Nejapa residents relied upon; its operations contributed to the river's pollution.<sup>235</sup> ILC's proposal in August 2013 to increase its use of the aquifer's water by digging additional wells led to large-scale protests, which

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<sup>228</sup> Gies, *supra* note 226. See also Ed Atkins, *The Corporate Nullification of the Human Right to Water: The Case of El Salvador*, OPEN DEMOCRACY (Nov. 28, 2014), <https://www.opendemocracy.net/en/corporate-nullification-of-human-right-to-water-case-of-el-salvador/> [<https://perma.cc/J539-D762>].

In many parts of the world, local waterscapes have been dramatically transformed through the neoliberal era and its commodification of water. The hydrosocial flow of the resource, already dogged by the battles of gender, class and other power hierarchies, has become dominated by international finance. This is particularly evident in the nation of El Salvador.

*Id.*

<sup>229</sup> Sharon Hunter-Smith, *Water as a Human Right or Water as a Commodity?*, CHICAGO RELIGIOUS LEADERSHIP NETWORK ON LATIN AM. (Sept. 18, 2018), <https://crln.org/el-salvador-water/> [<https://perma.cc/8XPX-59VP>].

<sup>230</sup> See Atkins, *supra* note 228.

<sup>231</sup> *Id.* See also Nina Lakhani, *Living Without Water: The Crisis Pushing People Out of El Salvador*, GUARDIAN (Jul. 30, 2019), <https://www.theguardian.com/global-development/2019/jul/30/el-salvador-water-crisis-privatization-gangs-corruption> [<https://perma.cc/C4U4-DP88>].

<sup>232</sup> Atkins, *supra* note 228.

<sup>233</sup> *Id.*

<sup>234</sup> Lakhani, *supra* note 231.

<sup>235</sup> Karla Umanzor, *Industries Endanger Water Quality in El Salvador*, Borgen Mag. (Nov. 28, 2016), <https://www.borgenmagazine.com/water-quality-in-el-salvador/> [<https://perma.cc/CG5C-AL57>].

were successful in stopping the expansion.<sup>236</sup> However, attempts to implement a long-term solution through the passage of legislation which would ensure access to water for all, and limit the amount that corporations can use, have to date been unsuccessful.<sup>237</sup> Legislation was drafted by the FMLN, but stalled in the Legislative Assembly due to opposition from “a majority of conservative, business-aligned lawmakers.”<sup>238</sup> Critics of ILC’s exploitation of water have noted the high profits of both SABMiller and Coca Cola,<sup>239</sup> observing that “[while] the water of Nejapa is disappearing, its financial benefits are being enjoyed elsewhere.”<sup>240</sup>

Brewing companies such as ILC are not the only ones contributing to El Salvador’s water crisis; “priority water usage” has been given to powerful business interests “such as industrial plantations, mining corporations, [and] luxury housing developments[.]”<sup>241</sup> In an area outside San Salvador where local residents have difficulty accessing sufficient water, the developer of an exclusive housing development advertised “amenities [such] as a car wash, pet shower and swimming pool.”<sup>242</sup> Compounding El Salvador’s water woes is its antiquated water system – so full of leaks that “once in the system, 48% of water is lost[.]”<sup>243</sup>

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<sup>236</sup> See Edgardo Ayala, *Water Dispute Pits Communities Against Brewing Giant*, INTER PRESS SERVICE, NEWS AGENCY (Aug. 21, 2013), <http://www.ipsnews.net/2013/08/water-dispute-pits-communities-against-brewing-giant/> [<https://perma.cc/CBZ9-FYHD>].

<sup>237</sup> See Hunter-Smith, *supra* note 229.

<sup>238</sup> Gies, *supra* note 226.

<sup>239</sup> “Poor families without piped water pay up to two dollars for a barrel of water every day.... Coca Cola pays 0.06 cents of a dollar per cubic meter” the equivalent of six cents for eight barrels. Edgardo Ayala, *El Salvador: Most Water-Stressed Country in Central America*, INTER PRESS SERVICE, NEWS AGENCY (Dec. 9, 2010), <http://www.ipsnews.net/2010/12/el-salvador-most-water-stressed-country-in-central-america/> [<https://perma.cc/KC4X-3ZLG>].

<sup>240</sup> Atkins, *supra* note 228.

<sup>241</sup> Gies, *supra* note 226.

<sup>242</sup> *Id.* See also CIVICUS & PUBLISH WHAT YOU PAY, AGAINST ALL ODDS: THE PERILS OF FIGHTING FOR NATURAL RESOURCE JUSTICE 19 (2016), [https://media.business-humanrights.org/media/documents/files/documents/Against-All-Odds-PWYP-Civicus-Report\\_0.pdf](https://media.business-humanrights.org/media/documents/files/documents/Against-All-Odds-PWYP-Civicus-Report_0.pdf) [<https://perma.cc/3WAV-E8Q3>].

In El Salvador, Grupo Roble, a large corporate conglomerate, sued a woman activist for defamation. Sonia Sánchez, an inhabitant of El Porvenir, a town south of San Salvador, had protested against a building project involving the deforestation of a large area. The company insisted that she had lied when claiming that logging was severely damaging the local environment. It demanded US\$25,000 in compensation and a public apology. She was eventually acquitted of all charges.

*Id.*

<sup>243</sup> Lakhani, *supra* note 231.

b. A Rare Victory – El Salvador's Law Banning the Mining of Metals

In March 2017 El Salvador became the first country in the world to ban all mining of metals. The law, *Ley de Prohibición de la Minería Metálica* (Law Prohibiting Metal Mining)<sup>244</sup> was approved on a vote of sixty-nine in favor, none opposed, with fifteen of the Legislative Assembly's members not showing up to vote. Members of the FMLN and ARENA, as well as GANA, all supported the mining ban.<sup>245</sup> The law is comprehensive; it prohibits “exploration, extraction, exploitation, and processing, on the surface, or underground”<sup>246</sup> as well as “the use of toxic chemicals, such as cyanide, mercury or other substances used in mining.”<sup>247</sup> It calls for the closing of any existing metal mines, and for environmental remediation of areas damaged by the mines so that “conditions of a healthy environment” can be returned to the population.<sup>248</sup>

The story of El Salvador's successful efforts to ban mining is best understood in context; the primary threat came from industrial mining of gold, which is inherently environmentally harmful. Cyanide is used to separate the gold from the rocks in which it is embedded, and poisonous arsenic and sulfides are released which “contaminate soils and water for centuries.”<sup>249</sup> Salvadorans first had their experience of severe pollution from metal mining in the 1970s when an American-based company contaminated the San Sebastián River with cyanide, arsenic, and mercury, resulting in “numerous cases of cancer and respiratory diseases[.]”<sup>250</sup>

Most mining ceased during El Salvador's civil war, but once it ended, ARENA developed an economic plan which included mining, and pursuant

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<sup>244</sup> Decree No. 639, D.O. No. 60, Vol. 415 at 5-7, April 4, 2017 (El Sal.), <https://imprentanacional.gob.sv/archivo-digital-del-diario-oficial/> (clicking do-2017/, then 04-abril/, then 04-04-2017.pdf).

<sup>245</sup> See Sandra Cuffe, *El Salvador Becomes First Country to Ban Metals Mining*, MONGABAY (Mar. 30, 2017), <https://news.mongabay.com/2017/03/el-salvador-becomes-first-country-to-ban-metals-mining/> [<https://perma.cc/4JP3-22R6>].

<sup>246</sup> Decree No. 629, *supra* note 244, at art. 2. (“La prohibición a la minería metálica incluye las actividades de: exploración, extracción, explotación y procesamiento, ya sea, a cielo abierto o subterránea.”).

<sup>247</sup> *Id.* (“También, se prohíbe el uso de químicos tóxicos como cianuro, mercurio y otros, en cualquier proceso de minería metálica.”).

<sup>248</sup> *Id.* at art. 6. (“[P]ara devolver a la población las condiciones de un ambiente sano.”).

<sup>249</sup> Robin Broad & John Cavanagh, *Historic Wins for Democracy and Rights in El Salvador*, ETHICS & INT'L AFF. (June 2017), <https://www.ethicsandinternationalaffairs.org/2017/historic-wins-democracy-rights-el-salvador/> [<https://perma.cc/YT62-PQK8>].

<sup>250</sup> Esty Dinur, *How El Salvador Won on Mining*, PROGRESSIVE (Apr. 1, 2018), <https://progressive.org/magazine/how-el-salvador-won-on-mining/> [<https://perma.cc/K2PJ-S2XG>].



to the plan granted “twenty-eight exploration licenses to ten companies from the United States, Canada, and Australia, without consultation with the residents.”<sup>251</sup> The areas most impacted by the exploration were the departments of Chalatenango and Cabañas, “highly organized communities where land had been granted to the residents”<sup>252</sup> after the war. The residents of Chalatenango used direct action against Au Martinique Silver, a Canadian corporation engaged in exploratory activities, and through blockades and other actions “forced” the corporation to stop the project.<sup>253</sup> The conflict over mining in Cabañas did not resolve so quickly, and gave rise to organizing which eventually led to the passage of the law against mining.

In 2002, Pacific Rim, a Canadian company, purchased the right to explore gold in Cabanas; this was separate from the right to undertake mining operations.<sup>254</sup> The company touted the benefits to the community – including in the form of jobs – and initially residents were not opposed. However, as they became more educated about the environmental harms, opposition grew. The possibility of toxic contamination was especially alarming given that the Rio Lempa, the source of fresh water for over fifty percent of El Salvador’s population, runs through Cabañas.<sup>255</sup>

Local organizers in Cabañas gained the interest and support of civil society groups across El Salvador.<sup>256</sup> By 2005 a National Roundtable on Mining (*La Mesa Nacional Frente al Minteria Metálica*) was formed, and it “decided a key part of its work would be to push the national government to ban metallic mining.”<sup>257</sup> Between 2005 and 2007 there was a confluence of factors favorable to the anti-mining advocates. Cabinet level ministers in the national government “became increasingly concerned about the environmental and social impacts of mining”<sup>258</sup> and the government’s ability to regulate multinational corporations. The Catholic Church, which is a powerful actor in El Salvador, came out with strong opposition to gold mining activities, and public opinion had turned, with a poll reporting sixty percent of the population was against gold mining.<sup>259</sup> This was followed by the formation of “an unusual” alliance between El Salvador’s Ministry of

<sup>251</sup> Dinur, *supra* note 250.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Robin Broad, *Corporate Bias in the World Bank Group’s International Centre for Settlement of Investment Disputes: A Case Study of a Global Mining Corporation Suing El Salvador*, 36 U. PA. J. INT’L L. 851, 858 (2015), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1898&context=jil> [<https://perma.cc/Q5RE-HLCZ>].

<sup>255</sup> *Id.* at 859.

<sup>256</sup> *Id.* at 860.

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

<sup>258</sup> *Id.* at 860-61.

<sup>259</sup> *Id.* at 860.

Economy and Ministry of the Environment, who decided that a comprehensive “environmental review” needed to be conducted before any additional mining activities would be permitted, thus essentially imposing a mining moratorium.<sup>260</sup>

Pacific Rim, which has bought the right to explore, but not to mine, refused to accept the moratorium, and sued El Salvador in the International Centre for Settlement of Investment Disputes (ICSID), a World Bank arbitration tribunal. Pacific Rim, unable to carry the cost of the litigation independently, financed the suit through a 2013 sale to Canadian mining company OceanaGold.<sup>261</sup> The ICSID is a “controversial” body because it does not require corporations to first go to a country’s domestic court; it allows them to go directly to the World Bank tribunal.<sup>262</sup> This aspect of ICSID was harshly critiqued when it was created because it “confer[s] a privilege on the foreign investor”<sup>263</sup> exempting him from domestic law requirements. Pacific Rim’s litigation against El Salvador lasted seven years, and in what was hailed as a stunning and unlikely outcome, the ICSID ruled in favor of El Salvador in October of 2016. Many have written about the factors that resulted in such a surprising decision.<sup>264</sup> Noteworthy is the fact that the Salvadoran activists were able to build international solidarity outside their borders, with a network of “International Allies.”<sup>265</sup>

Shortly after the ICSID ruling against OceanaGold, the Legislative Assembly of El Salvador passed the landmark ban on mining, signaling success for what had been a decade-long campaign. In yet another sign of the international solidarity that had been forged, a delegation from the Philippines spoke to Salvadoran legislators about “environmental disasters” they suffered as a result of OceanaGold’s operations in their country,<sup>266</sup> disputing the company’s assertions that it deserved high marks for compliance with “standards on health, safety, environment, community and sustainability[.]”<sup>267</sup>

Salvadorans look to the improbable odds they overcame in becoming the first country to enact a total ban on metals mining, and hope that the strategy and support that made it possible can be mobilized in favor of a national water

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<sup>260</sup> Broad, *supra* note 254, at 861.

<sup>261</sup> *Id.* at 862 & 865–66.

<sup>262</sup> *See id.* at 853–54.

<sup>263</sup> *Id.* at 855.

<sup>264</sup> *See id.* at 854. *See also* Dinur, *supra* note 250; Sophie Hares, *Water Takes Gold as El Salvador Bans Metal Mining*, REUTERS (Apr. 4, 2017), <https://www.reuters.com/article/us-el-salvador-mining-water-idUSKBN1762AG> [<https://perma.cc/33YW-W8SV>].

<sup>265</sup> The allies included Institute for Policy Studies, Mining Watch Canada, Friends of the Earth, and Oxfam. *See* Broad & Cavanagh, *supra* note 249.

<sup>266</sup> Cuffe, *supra* note 245.

<sup>267</sup> *Id.*

law.<sup>268</sup> “[I]t gives a lot of hope and inspiration for what’s possible politically, as you have support from both the left and the right[.]”<sup>269</sup> It appears that it may be much more difficult to bring all sides together on a water law. On the mining issue, small and large interests – rural farmers and agribusiness – were on the same side, wanting to avoid toxic pollution of water.

A proposed General Water Law, first introduced in 2006 and then updated in 2013, would “define and protect water as a human right, as well as ensure universal access for the population and integrate community consultation into national decision-making regarding water usage.”<sup>270</sup> The legislature has yet to pass the bill; however, some legislators insist that “the private sector be included in the new regulatory bodies the General Water Law was proposing.”<sup>271</sup> According to environmental activists, “the reason they have not passed the General Water Law is that business leaders have close ties to right-wing legislators. These private, for-profit interests want to control water resources through privatization, and their representatives in the Legislature have been holding up the bill on . . . their behalf.”<sup>272</sup>

## II. UNITED STATES’ ASYLUM POLICY TOWARDS SALVADORANS

The conditions described above constitute powerful push factors for migration. Although environmental factors would not easily qualify them for refugee protection,<sup>273</sup> the violence from state and non-state actors that

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<sup>268</sup> Hares, *supra* note 264.

<sup>269</sup> *Id.* (quoting water advisor, Paul Hicks, from Catholic Relief Services in Latin America).

<sup>270</sup> See Hunter-Smith, *supra* note 229.

<sup>271</sup> *Id.*

<sup>272</sup> *The Legislative Assembly’s Environmental Debt*, VOICES ON THE BORDER (Apr. 9, 2015), <https://voiceselsalvador.wordpress.com/2015/04/09/the-legislative-assemblys-environmental-debt/> [<https://perma.cc/9FWT-Z9P8>].

<sup>273</sup> Numerous scholars have commented that individuals displaced or otherwise impacted by climate change do not easily fit within the international refugee definition, which the U.S. has adopted. See, e.g., Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 L. & POL’Y 502 (2008); Frank Bierman and Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENV’T’L POL. 60 (2010). An encouraging note is that one of President Biden’s refugee-related executive orders calls for a report that discusses “options for protection and resettlement of individuals displaced directly or indirectly from climate change[.]” Exec. Order No. 14,013, 86 Fed. Reg. 8839, § 6 (Feb. 4, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-09/pdf/2021-02804.pdf>. Individuals impacted by natural disasters, such as earthquakes or storms, can qualify for Temporary Protected Status. Immigration and Nationality Act, section 244(a)(b)(1), 8 U.S.C. section

Salvadorans have faced are viable bases for successful asylum claims. However, bias and the resulting procedural and substantive barriers have more often than not excluded Salvadoran asylum seekers from the ambit of protection. As described in the following section, their arrival to the U.S., where they could request protection, has frequently been thwarted. They have been coerced to abandon their claims, and a legal double-standard has been applied to their cases. The U.S. has also adopted improbable and strained interpretations of key elements of the refugee definition, which have disproportionately impacted Salvadoran asylum seekers as well as asylum seekers from Guatemala and Honduras. These policies have spanned Republican and Democratic administrations, but reached new heights under Trump. This is an opportune time to review these policies and to work towards reforming our asylum law system to bring it into greater compliance with our international obligations.

#### **A. From the Passage of the 1980 Refugee Act to the End of the Obama Administration**

The United States has undertaken international and domestic law commitments to protect individuals fleeing persecution. In 1968 it became a party to the 1967 Protocol Relating to the Status of Refugees<sup>274</sup> (1967 Protocol), by which it assumed all of the substantive obligations in the 1951 Convention Relating to the Status of Refugees (1951 Convention).<sup>275</sup> The Convention was drafted in the aftermath of World War II, and is the seminal international refugee protection instrument.<sup>276</sup> Its key provisions are articles 1, 33, and 34. Art. 1 sets forth the definition of a refugee,<sup>277</sup> Art. 33 prohibits

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1254(a)(b) (1)(2018). Salvadorans were granted TPS status in 2001, as a result of the devastating earthquake in January 2001.

<sup>274</sup> 1967 Protocol, *supra* note 7.

<sup>275</sup> Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150. [hereinafter 1951 Convention].

<sup>276</sup> Karen Musalo, *The Evolution of Refugee and Asylum Law in the United States*, in REFUGEES AND ASYLUM SEEKERS: INTERDISCIPLINARY AND COMPARATIVE PERSPECTIVES 17, 19 (S. Megan Berthold & Kathryn R. Libal eds., Praeger Press 2019).

<sup>277</sup> For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. 1951 Convention, *supra* note 275, at art. 1. In adopting this definition, "one of Congress' primary objectives. . . was to eliminate discrimination on the basis of outmoded geographical and ideological considerations." U.S. GOV'T ACCOUNTABILITY OFFICE, ASYLUM: UNIFORM

their *refoulement* or return to persecution,<sup>278</sup> while Art. 34 encourages State parties to provide a durable status to refugees.<sup>279</sup> Congress passed the 1980 Refugee Act to bring United States law into compliance with its international obligations, and adopted near verbatim the Protocol's refugee definition.<sup>280</sup>

The 1980 passage of the Refugee Act coincided with the beginning of the Salvadoran civil war, as well as with the execution of genocide as a strategy in Guatemala's internal armed conflict – both of which resulted in an increased exodus from the two countries. In response, the U.S. began to adopt exclusionary and biased policies towards these fleeing asylum seekers.<sup>281</sup> Mexico and key Central American countries were pressured to

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APPLICATION OF STANDARDS UNCERTAIN – FEW DENIED APPLICANTS DEPORTED 8 (Jan. 1987), <https://www.gao.gov/assets/ggd-87-33br.pdf> [hereinafter UNIFORM APPLICATION OF STANDARDS].

<sup>278</sup> “No Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” 1951 Convention, *supra* note 275, at art. 33.

<sup>279</sup> “The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” *Id.* at art. 34.

<sup>280</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

<sup>281</sup> Salvadorans have not been the only nationality subject to a biased application of the refugee definition. Impermissible factors – such as racial bias, or ideological affinities – have impacted overarching policy, as well as the individual adjudication of claims. For example, the Reagan administration attempted to prevent Haitian asylum seekers – Black asylum seekers – from reaching the United States. In 1981 it entered into an agreement with then Haitian dictator, Jean-Claude Duvalier, which permitted the United States Coast Guard to stop Haitian vessels at sea and to “return undocumented passengers to Haiti.” Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 295–96 (1993); KAREN MUSALO, JENNIFER MOORE, RICHARD A. BOSWELL & ANNIE DAHER, *REFUGEE LAW AND POLICY: AN INTERNATIONAL AND COMPARATIVE APPROACH* 106–07 (5th ed. 2018) [hereinafter MUSALO ET AL., *REFUGEE LAW AND POLICY*]. Denying that it was violating its obligations under the Protocol and the Refugee Act, the Reagan Administration issued an Executive Order, proclaiming that “no person who is a refugee will be returned without his consent.” Exec. Order No. 12,324, 46 Fed. Reg. 48,109, § 2(c)(3) (Sept. 29, 1981). The Coast Guard was required to screen Haitians to determine if they could qualify as refugees, and if so, they were not to be returned to Haiti, but were to be permitted to pursue their claims for asylum. Christina Carole De Matteis, *Forced Return of Haitian Migrants under Executive Order 12,807: A Violation of Domestic and International Law*, 18 N.C. J. INT'L L. & COM. REG. 431, 436–37 (1993). Between 1981 to 1990, a time during which human rights violations and political persecution were pervasive, 21,455 Haitians were interdicted and returned, and only six were permitted to come to the U.S. to pursue asylum claims. *Id.* at 432–33, 437.

It was not just fear of floodgates that led to restrictionism, ideological considerations also influenced policy and adjudication, in contravention of congressional intent to eliminate such factors. UNIFORM APPLICATION OF STANDARDS *supra* note 277, at 8. Asylum seekers fleeing countries the U.S. saw as ideological enemies were approved at far higher rates, than those fleeing countries which the U.S. supported. “A 1982 draft INS internal report [stated] that

“slow down the flow of illegal aliens into the United States,”<sup>282</sup> as well as to apprehend and deport them before they reached the U.S. border. The number of Salvadorans and Guatemalans apprehended in the U.S. decreased, while the number of apprehensions and deportations in Mexico went up.<sup>283</sup> At this point Mexico was not yet a party to the Refugee Convention or Protocol, so the U.S. could not justify its actions by arguing that the fleeing asylum seekers had the opportunity to request protection in Mexico.<sup>284</sup>

Those who reached the U.S. were subject to policies that had as their stated objective the “detention and quick deportation” of asylum seekers.<sup>285</sup> They were targeted with coercive tactics by the then Immigration and Naturalization Service (INS) while in detention, intended to pressure them to sign a form accepting “voluntary departure” thereby abandoning their right to seek asylum. These INS practices as applied to Salvadorans were successfully challenged in *Orantes-Hernandez v. Meese*,<sup>286</sup> with the court ordering a range of procedures to assure that Salvadorans were informed of, and able to avail themselves of the right to seek asylum. In issuing its ruling in *Orantes-Hernandez*, the court made extensive findings of fact, including that a “substantial number of Salvadorans who flee El Salvador possess a well-founded fear of persecution,” and that the persecutors were “primarily Salvadoran military and security forces.”<sup>287</sup>

During this same time period, the adjudication of their cases demonstrated bias – with denials of ninety-seven percent of Salvadoran asylum claims.<sup>288</sup> U.S. foreign policy provides an explanation.<sup>289</sup> The United

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‘different levels of proof are required of different asylum applicants.’” MUSALO ET AL., REFUGEE LAW AND POLICY, *supra* note 281, at 101. The report discussed the disparate treatment of Salvadoran asylum seekers with seven Polish sailors who had jumped ship; this was at a time when Poland was under communist control. At that time the Department of State (DOS), was required to issue an advisory opinion in every asylum case. While Salvadorans needed to have a “classic textbook case” to receive a positive DOS letter, it stood ready to approve the “extremely weak” cases of the Polish sailors. *Id.* See *infra*, notes 289–293 and accompanying text.

<sup>282</sup> Bill Frelick, *Running the Gauntlet: The Central American Journey in Mexico*, 3 INT’L J. REFUGEE L. 208, 211 (1991).

<sup>283</sup> *Id.* at 214.

<sup>284</sup> See JOAN FRIEDLAND & JESUS RODRIGUEZ Y RODRIGUEZ, SEEKING SAFE GROUND: THE LEGAL SITUATION OF CENTRAL AMERICAN REFUGEES IN MEXICO 53–55 (Mexico-U.S. L. Inst., Univ. of San Diego 1987).

<sup>285</sup> Frelick, *supra* note 282, at 210–11.

<sup>286</sup> 685 F. Supp. 1488 (C.D. Cal. 1988), *aff’d sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

<sup>287</sup> *Orantes-Hernandez v. Meese*, 685 F. Supp. at 1491–92.

<sup>288</sup> Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 594 (2019).

<sup>289</sup> As noted *supra*, note 281, the Department of State was required to submit an advisory opinion in every asylum case, which provided a direct route for the interjection of U.S. foreign

States had long provided financial assistance to support Salvadoran military forces which as noted by the *Orantes* court, were committing the overwhelming majority of human rights violations during that country's civil war. Loath to admit that it was funding a government engaged in gross human rights abuses, the U.S. opted to deny Salvadoran asylum claims.<sup>290</sup> U.S. policy towards Guatemalan asylum seekers – who were fleeing a civil war and genocide – and whose government it had also supported<sup>291</sup> – was similar, with a grant rate of less than one percent in the time period from June 1983 to September 1986.<sup>292</sup>

Accusations of bias led to a nationwide class action lawsuit, *American Baptist Churches v. Thornburgh (ABC)*.<sup>293</sup> The government agreed to settle *ABC* rather than litigate it, seen by many as a tacit admission of bias,<sup>294</sup> and an attempt to halt discovery which could have revealed the government's machinations to influence outcomes. A central provision of the settlement was the INS's agreement to re-adjudicate the asylum and withholding claims of every Salvadoran and Guatemalan class member who had previously been denied relief.<sup>295</sup> Claims were to be re-adjudicated under agreed-upon procedures to prevent the consideration of improper factors.<sup>296</sup> Most notable

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policy into asylum adjudication. Adjudicators did not ignore these advisory opinions; to the contrary, there was a high level of consistency between DOS opinions and immigration judges' decision in asylum cases. See Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/X2ZU-VSTN>]; MATTHEW GIBNEY, *THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES* 157 (Cambridge Univ. Press 2004). A personal anecdote demonstrates the degree to which judges reflexively followed DOS advisory opinions. In the mid-1980s I was representing two brothers in asylum proceedings in San Francisco Immigration Court. They were both union activists from the Salvadoran port city of Acajutla. Their facts were virtually identical, indistinguishable as to particulars. The brothers appeared before immigration judge Brian H. Simpson, who was known as a harsh judge, with a 92.8% asylum denial rate. Due to some inexplicable quirk, one of the brothers received a positive DOS letter, while the other received the usual (in Salvadoran cases) negative DOS letter. With no persuasive reasoning to support the different decisions in these pair of cases, Judge Simpson granted the brother with the positive letter, and denied the brother with the negative letter.

<sup>290</sup> Sherman-Stokes, *supra* note 288, at 592 & 594.

<sup>291</sup> See Gregory L. Smith, *Immune to Truth? Latin American Truth Commissions and U.S. Support for Abusive Regimes*, 33 COLUM. HUM. RTS. L. REV. 241, 261–64 (2001).

<sup>292</sup> JAMES SILK, *DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES* 8 (U.S. Comm. for Refugees, 1986).

<sup>293</sup> 760 F. Supp 796 (N.D. Cal. 1991).

<sup>294</sup> See SARA IGNATIUS, *AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION PROCESS* 19 (National Asylum Study Project, Harvard Law School, 1993).

<sup>295</sup> *Am. Baptist Churches*, 760 F. Supp. at 799–800.

<sup>296</sup> *Id.* at 799.

are the settlement agreement's provisions that "foreign policy and border enforcement considerations are not relevant to the determination of . . . a well-founded fear," nor is the fact that an individual is from a country "whose government the United States supports or with which it has favorable relations[.]"<sup>297</sup> In precluding these factors, the settlement agreement was directly addressing what had contributed to the restrictive and biased policies towards asylum seekers.

Successful challenges such as *Orantes* and *ABC* were important steps, but parallel to these affirmations of the right to seek asylum was the development of jurisprudence which increasingly limited protection. The major cases in this limiting trend involved Central Americans – many were Salvadorans – and adopted interpretations of the refugee definition out of step with international norms and directives.<sup>298</sup> There are many examples of this, but only two of the most significant which preceded Trump will be addressed in this section – the interpretations of the statutory terms "on account of," and "particular social group." The Trump administration took restrictive interpretations to new depths, with decisions and rules which would virtually rule out the possibility of protection for most asylum seekers, with a disproportionate impact on Central American claims.<sup>299</sup>

One of the earliest limiting interpretations came in the 1992 Supreme Court decision, *INS v. Zacarias*.<sup>300</sup> The refugee definition requires that feared harm (persecution) be "on account of" or with a "nexus" to one of the five protected grounds of race, religion, nationality, political opinion, or membership in a particular social group. Claiming to rely on plain meaning, the Supreme Court adopted a highly formalistic interpretation of "on account of," ruling that it requires proof of the persecutor's intent.<sup>301</sup>

Elias Zacarias, the Guatemalan asylum seeker in the case, feared harm at the hands of the guerrillas for his refusal to join them in their armed conflict against the government. He claimed that because his reason for refusing was political, and the guerrillas' goals were political, his impending persecution would be "on account of" political opinion. The Supreme Court disagreed,

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<sup>297</sup> *Am. Baptist Churches*, 760 F. Supp. at 799.

<sup>298</sup> See *infra*, notes 321-341 and accompanying text.

<sup>299</sup> The Trump administration issued successive sets of regulations impacting procedural rights as well as the substantive refugee definition. The regulation which had the most far-reaching impact on the substantive definition was titled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" (85 Fed. Reg. 36,264 (proposed June 15, 2020)), and was referred to by advocates as the "death to asylum regulation" because of its expansive attempt to rewrite asylum law in a manner which would essentially foreclose protection in the majority of cases. Litigation led to the issuance of a preliminary injunction against the implementation of this set of regulations. *Pangea Legal Servs., et al., v. U.S. Dep't of Homeland Sec.*, No. 20-cv-09253-JD (N.D. Cal., Jan. 8, 2021).

<sup>300</sup> 502 U.S. 478 (1992).

<sup>301</sup> *Id.* at 482.



ruling that “on account of” required proof that the guerrillas were motivated to harm him for his political opinion, rather than his refusal to join – no matter that his refusal arose from his political opinion, or that the guerrillas were political actors.<sup>302</sup>

The Supreme Court’s strained nexus interpretation was not limited to political opinion cases – but to all of the statutory grounds. For example, in another case, two Salvadoran Jehovah’s Witness<sup>303</sup> brothers, the Cañas, who faced imprisonment for their conscientiously motivated refusal to serve in the military, could not establish persecution on account of religion.<sup>304</sup> Pursuant to *Zacarias*, the Salvadoran government’s application of a universal conscription law to them, requiring them to violate their religious beliefs of pacifism or to be imprisoned, was not religious persecution because there was no intent to harm them for their religious beliefs, simply an intent to enforce conscription law.<sup>305</sup> This analysis runs counter to UNHCR guidance.<sup>306</sup>

Interpretations of “on account of” which do not require proof of intent are more in keeping with the humanitarian objectives of the 1980 Refugee Act and the Convention.<sup>307</sup> As the UNHCR pointed out in an amicus brief in the *Zacarias* case,<sup>308</sup> proof of intent is appropriate when criminal liability is

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<sup>302</sup> *Zacarias*, 502 U.S. at 483.

<sup>303</sup> A central tenet of the Jehovah’s Witness faith is to not bear arms. THE NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS, WORDS OF CONSCIENCE: RELIGIOUS STATEMENTS ON CONSCIENTIOUS OBJECTION 38 (7th ed. 1970).

<sup>304</sup> *Cañas-Segovia v. INS*, 970 F. 2d 599 (9th Cir. 1992). Although the Cañas case involved the traditional religiously grounded objection to military service required by a State, young men who do not want to join gangs should be seen as conscientious objectors also. This perspective is shared by human rights experts in El Salvador:

Take a seventeen-year-old-boy – he did not want to participate in the gang and that is why they threatened him and his family. We have argued that this is conscientious: the young man, for reasons of convictions this person does not want to belong to a criminal structure. That is conscientious objection for us.

CGRS/RHRC Interview with Celia Medrano, Cristosal, *supra* note 42, at 10.

<sup>305</sup> *Cañas-Segovia*, 970 F. 2d at 603.

<sup>306</sup> See Karen Musalo, *Conscientious Objection as a Basis for Refugee Status: Protection for the Fundamental Right of Freedom of Thought, Conscience and Religion*, 26 REF. SUR. Q. 69 (2007).

<sup>307</sup> The overarching humanitarian objective of a treaty is to be taken into consideration in interpreting it. Art. 31(1) of the Vienna Convention on the Law of Treaties provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*.” Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (emphasis added).

<sup>308</sup> Brief for the United Nations High Commissioner for Refugees as Amicus Curiae Supporting Respondent at 16, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (“Refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor” but to give protection to victims of persecution, an objective undermined by the intent standard).

being determined, but not when the purpose is protection to victims of persecution. The protective objectives of the Refugee Convention could be better served by the application of either a “but for” (but for their religion, they would not be persecuted) or an “effects” analysis (a law punishing the Cañas brothers had the effect of punishing them for their religion).<sup>309</sup>

Since the proof of intent requirement was imposed in 1992, it has been heightened to make it even more difficult to establish. Persecutors may have more than one motive in targeting an individual, and under the REAL ID Act of 2005, not only does the asylum seeker need to prove that one of them is a protected ground, the individual must establish it was “one central” reason.<sup>310</sup> The impact of *Zacarias* and its proof of intent requirement cannot be overstated – no matter how grievous the harm feared – failure to prove what is in the mind of the persecutor will result in denial of protection.<sup>311</sup>

Another jurisprudential area which narrowed, and in many cases foreclosed protection was the interpretation of the statutory ground, “particular social group.” Much has been written attempting to divine what the drafters of the Refugee Convention intended by its inclusion,<sup>312</sup> and in the absence of clear legislative intent, how U.S. courts should interpret it.<sup>313</sup> The

<sup>309</sup> Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1235–39 (1994); Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 2 (2016). For a critique of various approaches to nexus, and the recommendation of a “contributing cause” approach (which would find nexus if a protected ground was a “contributing cause” of the persecution), see Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265 (2002).

<sup>310</sup> The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.  
REAL ID Act, § 101(a)(3), 8 U.S.C. § 1158 (2009).

<sup>311</sup> A case of a Salvadoran woman denied asylum which preceded *Zacarias*, but applied the standard which the Supreme Court ultimately adopted, illustrates the indisputable failure of protection. The Salvadoran female asylum seeker had been brutally raped and forced to watch members of her family hacked to death by a group that chanted political slogans while doing so. However, her claim failed because the court found her evidence insufficient to establish the motivation of the attackers. *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987).

<sup>312</sup> See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in A Particular Social Group*, 26 CORNELL INT'L L.J. 505, 509–10 (1993) (discussing the introduction of the “particular social group ground” as an amendment to the draft Convention, and noting the absence of a record “discussing the purpose or meaning” of the term).

<sup>313</sup> See Nitzan Sternberg, *Do I Need to Pin a Target to My Back?: The Definition of “Particular Social Group” in U.S. Asylum Law*, 39 FORDHAM URB. L. J. 245 (2011); Fatma

Board of Immigration Appeals (BIA) addressed that question in the 1985 decision, *Matter of Acosta*,<sup>314</sup> ruling that it would be guided by the interpretive principle of *ejusdem generis*, Latin for “of the same kind or class.”<sup>315</sup> The other four protected grounds are characteristics of a person that are immutable and cannot be changed,<sup>316</sup> or so fundamental to a person such that they should not be required to change.<sup>317</sup> Applying *ejusdem generis*, the BIA held that a “particular social group” was a group of persons defined by characteristics they could not change or should not have to change to avoid persecution.<sup>318</sup> The BIA provided examples such as “sex, color or kinship ties,<sup>319</sup> or a shared past experience such as former military leadership or land ownership.”<sup>320</sup>

The approach of *Acosta* was applied without modification until 1999 when the BIA issued *Matter of R-A*,<sup>321</sup> the decision in a case of a Guatemalan woman fleeing domestic violence. For the first time, the “immutable or fundamental” standard was described as only a threshold, insufficient to find a particular social group legally cognizable.<sup>322</sup> In addition, it had to be shown that the members of a group perceived themselves as a group, as did the

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Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C.J. INT’L L. 487 (2019).

<sup>314</sup> 19 I. & N. Dec. 211, 233–34 (BIA 1985).

<sup>315</sup> *Ejusdem generis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed”).

<sup>316</sup> Race and nationality are immutable; race is not susceptible to change, and the same is true of nationality if we understand it to mean the country of one’s birth.

<sup>317</sup> Religion and political opinion are fundamental; one should not have to change one’s political opinion or religion to avoid persecution.

<sup>318</sup> *Matter of Acosta*, 19 I. & N. Dec. at 233–34.

<sup>319</sup> *Id.* at 233.

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

<sup>321</sup> *In re R-A*, 22 I. & N. Dec. 906 (BIA 1999).

<sup>322</sup> *Id.* at 918.

society.<sup>323</sup> This requirement later became known as “social visibility”<sup>324</sup> and was subsequently renamed “social distinction.”<sup>325</sup> Because many of the claims involving gender-based violence, including from Guatemala and El Salvador, could not be successfully argued on the grounds of race, religion, nationality, or political opinion, the particular social group ground is especially important, and anything that heightens the standard makes it more difficult for women to prevail. The application of the new social group standard resulted in the reversal of a grant of protection to Rody Alvarado, the asylum seeker in *R-A-*.<sup>326</sup>

Subsequent BIA decisions continued to limit the use of the particular social group ground – having a notable impact on cases of Central Americans

<sup>323</sup> *In re R-A-*, 22 I. & N. Dec. 906, 918-19 (BIA 1999). *Matter of R-A-* had a long and complicated procedural history. Attorney General Janet Reno vacated it in it in January 2001, remanding it to the BIA with instructions to stay a decision until regulations the Department of Justice had proposed were issued as final. *In re R-A-*, 22 I. & N. Dec. 906 (A.G. 2001). In February 2003 Attorney General John Ashcroft certified *R-A-* to himself, and then ended up sending it back to the BIA with the same order as Janet Reno had – to stay the case until regulations issued. In September 2008 Attorney General Michael Mukasey became the third A.G. to certify *R-A-*; he lifted the stay and remanded the case to the BIA for a decision. *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008). Ultimately the case was remanded to an immigration judge, who granted in a summary decision on December 10, 2009. For additional background on *Matter of R-A-*, see MUSALO ET AL., REFUGEE LAW AND POLICY, *supra* note 281 at 811–13, and Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REF. SURV. Q. (Special Issue) 46, 58–60 (2010).

<sup>324</sup> *In re C-A-* was the first decision in which the BIA explicitly stated that social visibility was required. 23 I. & N. Dec. 951 (BIA 2006), *aff’d*, *Castillo-Arias v. U.S. Att’y. Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 549 U.S. 1115 (2007). It justified this approach by incorrectly stating that its addition of “social visibility” to *Acosta*’s immutable/fundamental approach was in conformance with Guidelines issued in 2002 by the United Nations High Commissioner for Refugees (UNHCR). *In Re C-A-*, 23 I. & N. at 956 (citing UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <https://www.unhcr.org/3d58de2da.pdf> [hereinafter UNHCR, *Guidelines on Particular Social Group*]). Contrary to the BIA’s assertion, the UNHCR Guidelines did not add an additional requirement, but instead provided alternative approaches to establishing social group membership; the “protected characteristic” approach tracked *Acosta*, while the “social perception” approach recognized groups which did not meet *Acosta*’s requirements, but were “recognized as a group” in society. UNHCR, *Guidelines on Particular Social Group*, *supra* note 324, ¶¶ 6–9.

<sup>325</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014).

<sup>326</sup> As described *supra* note 323, Ms. Alvarado was ultimately granted relief, but after years of controversy which included the direct intervention of three successive Attorneys General.

fleeing gang violence.<sup>327</sup> In 2008, in two cases<sup>328</sup> involving youth fleeing gangs, the BIA imposed not only social distinction, but the additional requirement of “particularity,” which it explained as requiring a showing that the group is “sufficiently distinct” to be recognized “in the society in question, as a discrete class of persons.”<sup>329</sup> Applying those criteria, it denied both claims. Some circuit court decisions had questioned whether the departure from *Acosta* was reasonable and entitled to deference.<sup>330</sup> In 2014 the BIA issued two decisions<sup>331</sup> pertaining to fear-of-gang claims; both of them attempting to make the case that the BIA’s addition of social distinction and particularity were reasonable and entitled to deference.

Just as the jurisprudence requiring proof of persecutor’s intent to establish nexus runs counter to the humanitarian objectives of the Refugee Convention and 1980 Refugee Act,<sup>332</sup> so does the interpretation of “particular social group.” UNHCR Guidelines recommend the recognition of social groups that meet the immutable/fundamental criteria of *Acosta*, without more. In addition, they recognize groups that are not defined by immutable or fundamental characteristics, but that are nonetheless perceived by society to be a group.<sup>333</sup> The U.S. approach has a severe limiting impact on protection, while UNHCR’s approach expands it.

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<sup>327</sup> Many asylum claims from El Salvador, Guatemala and Honduras involve gender violence and fear of gangs. See, e.g., UNHCR, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (2015), <https://www.unhcr.org/56fc31864.html> [<https://perma.cc/Q5HC-84ZX>].

The women from the NTCA reported multiple reasons for flight. Many women spoke of severe instances of violence due to *maras* or other criminal armed groups, including assaults, extortion, and disappearances or murder of family members. Likewise, many women described brutal domestic violence. Many emphasized that being women compounded the difficulties they faced; this was especially true for transgender women.

*Id.* at 15; Press Release, Death Threats and Gang Violence Forcing More Families to Flee Northern Central America, UNHCR Press Release (Dec. 17, 2020), <https://www.unhcr.org/en-us/news/press/2020/12/5fdb14ff4/death-threats-gang-violence-forcing-families-flee-northern-central-america.html> [<https://perma.cc/8D2N-ADZZ>] (“Death threats, gang recruitment, extortion and other forms of targeted violence are driving more families in northern Central America to flee their homes and seek safety in other countries, a new UNHCR and UNICEF survey reveals today.”).

<sup>328</sup> *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008).

<sup>329</sup> *Id.* at 584.

<sup>330</sup> See *Gatimi et al. v. Holder*, 578 F.3d 611 (7<sup>th</sup> Cir. 2009), *Benitez-Ramos v. Holder*, 589 F.3d 426 (7<sup>th</sup> Cir. 2009).

<sup>331</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227; *Matter of W-G-R-*, 26 I. & N. Dec. 208.

<sup>332</sup> See *supra*, notes 307-309 and accompanying text.

<sup>333</sup> See UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 95 (reissued Feb. 2019), <https://www.unhcr.org/en->

The interpretation of these key terms of the refugee definition did not occur in a vacuum. It occurred in the context of claims from El Salvador, Guatemala, and Honduras – beginning with *INS v. Zacarias*<sup>334</sup> (Guatemala), *Cañas-Segovia*<sup>335</sup> (El Salvador), continuing with *Matter of R-A*<sup>336</sup> (Guatemala), *Matter of S-E-G*<sup>337</sup> (El Salvador), and *Matter of M-E-V-G*<sup>338</sup> (Honduras). Furthermore, the restrictive interpretations took place against the backdrop of multiple procedural barriers which clearly were intended to thwart the claims of these Central American asylum seekers.<sup>339</sup> We should see the trend towards restrictive interpretation in that light, rather than as an exercise in principled decision-making – especially since so many of the interpretations were driven by judges of the BIA – a body without judicial independence, and one that has been politicized in the past<sup>340</sup> as well as in the present.<sup>341</sup>

us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

<sup>334</sup> 502 U.S. 478 (1992).

<sup>335</sup> 970 F. 2d 599 (9th Cir. 1992).

<sup>336</sup> 22 I. & N. Dec. 906 (BIA 1999).

<sup>337</sup> 24 I. & N. Dec. 579 (BIA 2008).

<sup>338</sup> 26 I. & N. Dec. 227 (BIA 2014).

<sup>339</sup> See *supra*, notes 281-297.

<sup>340</sup> Appointments to the Board of Immigration Appeals have historically had enforcement backgrounds. This changed for a short period of time during Bill Clinton's presidency. In response to a growing caseload, the Clinton administration expanded the size of the Board, and among its new appointees were individuals with academic or non-profit backgrounds. This was a short-lived change. During the administration of George W. Bush, Attorney General Ashcroft reduced the Board's membership, using the reduction as a means to remove most of those with non-enforcement backgrounds, who had shown more independence in their decision-making, and had "disagreed. . . ideologically" with Ashcroft. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 352-53 (2007).

<sup>341</sup> The Trump administration increased the size of the Board of Immigration Appeals from seventeen to twenty-three, and the judges that it added had denial rates in asylum cases which were the highest in the country. Felipe de la Hoz, *The Shadow Court Cementing Trump's Immigration Policy*, THE NATION (June 30, 2020), <https://www.thenation.com/article/society/trump-immigration-bia/> [https://perma.cc/QF5Q-PNWC]. Two of the six judges, Keith Hunsucker and William Cassidy, denied every case they heard in 2019, while others denied at rates high above the national average. Brian Johnson, *Immigration Judges Asylum Grants & Denials in FY 2018-2019*, AMOACHI & JOHNSON, PLLC (Dec. 24, 2019), <https://amjlaw.com/2019/12/24/immigration-judges-asylum-grants-denials-in-fy-2018-2019/> [https://perma.cc/N5FK-RMRL].

The denial rates of the newly appointed BIA judges in 2019, rounded to the closest whole number were: Stuart Couch, 95%, Earle Wilson 97.4%, Stephanie Gorman 96%, and Judge Goodwin, 97%. *Id.* Paul Wickham Schmidt, a former chair of the BIA from 1995-2001, criticized the decision to pack the BIA with denying judges, stating that, "It's not a court anymore. It's an enforcement mechanism." De la Hoz, *supra* note 341.

## B. Asylum Policy under the Trump Administration

Any criticism one might have of the policies described in the preceding section pales in comparison to those implemented by the Trump administration. Numerous articles have detailed the unrelenting roll-out of policies, which taken cumulatively, were an attempt to put an end to the ability to seek asylum at the U.S. southern border.<sup>342</sup> Each successive policy was more extreme.

There was “metering,” by which asylum seekers who showed up at land ports of entry were falsely told that Customs and Border Protection had limited capacity to process them; they were directed to wait on the Mexico side of the border.<sup>343</sup> Next, breast-feeding infants, toddlers, and young children were taken away from their parents as part of the now-notorious Family Separation policy, which separated 2,800 children, more than 1,000 under the age of 10.<sup>344</sup> A court ordered an end to the policy, and the return

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<sup>342</sup> See, e.g., Nicole Narea, *The Demise of America’s Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp> [<https://perma.cc/L39E-NSJC>]; Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL’Y INST. (Feb. 27, 2020), <https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum> [<https://perma.cc/6JS3-5DES>]; *A Timeline of the Trump Administration’s Efforts to End Asylum*, NATIONAL IMMIGRANT JUSTICE CENTER (last updated June 2020), <https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-06/06-01-2020-asylumtimeline-final.pdf> [<https://perma.cc/7N4T-FZTP>]; Ian Gordon, *Asylum Is Dead. The Myth of American Decency Died With It.*, MOTHER JONES (Oct. 2020), <https://www.motherjones.com/politics/2020/10/donald-trump-asylum-stephen-miller-guatemala-central-america/> [<https://perma.cc/22LG-DMV2>]; Mneesha Gellman, *The Trump Administration Keeps Making It Harder to Claim Asylum. Here’s How — And Why*, WASH. POST (Aug. 15, 2019), <https://www.washingtonpost.com/politics/2019/08/15/trump-administration-keeps-making-it-harder-claim-asylum-heres-how-why/> [<https://perma.cc/363U-N93N>].

<sup>343</sup> Savitri Arvey & Steph Leutert, *Thousands of Asylum-Seekers Left Waiting at the US-Mexico Border*, THE WORLD (June 17, 2019), <https://www.pri.org/stories/2019-06-17/thousands-asylum-seekers-left-waiting-us-mexico-border> [<https://perma.cc/8839-XCCN>].

<sup>344</sup> Kids in Need of Defense (KIND), *Family Separation: Two Years Later, the Crisis Continues*, KIND 3 (2020), <https://supportkind.org/wp-content/uploads/2020/07/Family-Separation-Report-2020-FINAL-2.pdf> [<https://perma.cc/4CTD-LD9A>]. Details regarding the policy can be found in a House Judiciary Committee Report released in Oct. 2020. MAJORITY STAFF OF THE SUBCOMM. ON IMMIGRATION & CITIZENSHIP OF THE H.R. COMM. ON THE JUDICIARY, 116TH CONG., *THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS* (Oct. 2020), [https://judiciary.house.gov/uploadedfiles/the\\_trump\\_administration\\_family\\_separation\\_policy\\_trauma\\_destruction\\_and\\_chaos.pdf?utm\\_campaign=4526-519](https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519) [hereinafter H.R., *THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY*].

of children to their parents.<sup>345</sup> However, the government launched this program without the intent to reunify families, and therefore had not maintained records which would facilitate unification.<sup>346</sup> As of October 2020, the families of 545 children could not be located despite the efforts of a non-profit contracted to find the parents of the separated children.<sup>347</sup>

Family separation was followed by regulations that mandated the denial of asylum to anyone who entered the United States between ports of entry.<sup>348</sup> This was in violation of the plain language of the 1980 Refugee Act,<sup>349</sup> and was enjoined by the courts.<sup>350</sup> Next, came the “Migrant Protection Protocol,” (MPP) implemented in January 2019.<sup>351</sup> It forced asylum seekers to await their hearings in Mexico, in border towns with high levels of violence, limited humanitarian amenities, and very little access to attorneys to represent them in their U.S. immigration proceedings.<sup>352</sup> As of May 13, 2020, it was reported

<sup>345</sup> H.R., THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY, *supra* note 344, at 17.

<sup>346</sup> *Id.* at 10.

<sup>347</sup> Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html> [<https://perma.cc/8GLU-SJL4>].

<sup>348</sup> *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018); *see also* Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 15, 2018).

<sup>349</sup> 8 U.S.C. § 1158(a)(1) (2009) (providing the right to apply for asylum to all persons in the U.S. or who arrive to the U.S. “whether or not at a designated port of arrival”).

<sup>350</sup> The rule was challenged in *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018). Judge Tigar, U.S. District Court for the Northern District of California, issued a temporary restraining order (TRO) against the policy. The Ninth Circuit Court of Appeals, and then the Supreme Court, denied the government’s requests for stays of the preliminary injunction pending appeal. In February 2020, the Ninth Circuit Court of Appeals affirmed the grant of a nationwide preliminary injunction. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

<sup>351</sup> U.S. Dep’t of Homeland Sec., Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) [<https://perma.cc/C8D6-ZELY>].

<sup>352</sup> Karen Musalo & Brianna Krong, *48,000 Asylum Seekers Have Been Put in Harm’s Way by the Trump Administration*, MS. MAGAZINE (Oct. 3, 2019), <https://msmagazine.com/2019/10/03/the-trump-administration-has-placed-48000-asylum-seekers-in-harms-way-the-courts-must-step-in-now/> [<https://perma.cc/QG8A-VYZK>]. Human Rights First has issued a number of reports on the implementation of MPP. *See* Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process*, HUMAN RIGHTS FIRST (Aug. 2019), <https://www.humanrightsfirst.org/resource/delivered-danger-illegal-remain-mexico-policy-imperils-asylum-seekers-lives-and-denies-due> [<https://perma.cc/5FHK-CPHH>]; Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, HUMAN RIGHTS FIRST (Oct. 2019), <https://www.humanrightsfirst.org/resource/orders-above-massive-human-rights-abuses-under-trump-administration-return-mexico-policy> [<https://perma.cc/C9G3-3P2E>]; Human



that there had been more than 1,114 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers forced back into Mexico under MPP.<sup>353</sup> There were multiple legal challenges to the program,<sup>354</sup> with one of them, *Innovation Law Lab v. Wolf*, reaching the U.S. Supreme Court. Argument in *Innovation Law Lab* was canceled as a result of the Biden administration's suspension of its application to arriving asylum seekers.<sup>355</sup>

The Trump administration also attempted to end special obligations to child migrants which had been secured by way of a settlement agreement in *Flores v. Reno*,<sup>356</sup> a class action lawsuit brought to challenge the inhumane detention conditions for Central American children in the 1980s. The settlement agreement set standards for the care and custody of children, providing that they be released without unnecessary delay, held in the "least restrictive" settings possible, and that any facilities housing them be licensed by state child protection authorities.<sup>357</sup> The Trump administration attempted to upend the settlement agreement by way of proposed regulations which contravened its key requirements, and would have allowed indefinite detention of children.<sup>358</sup> Litigation ensued and U.S. District Court Judge Dolly Gee ordered the regulations permanently enjoined;<sup>359</sup> the government appealed her order to the Ninth Circuit Court of Appeals, which mostly upheld Judge Gee's earlier decision.<sup>360</sup>

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Rights First, *Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue*, HUMAN RIGHTS FIRST (Dec. 2019), <https://www.humanrightsfirst.org/resource/human-rights-fiasco-trump-administration-s-dangerous-asylum-returns-continue> [https://perma.cc/864F-SMBU]; Human Rights First, *A Year of Horrors: The Trump Administration's Illegal Returns of Asylum Seekers to Danger in Mexico*, HUMAN RIGHTS FIRST (Jan. 2020), <https://www.humanrightsfirst.org/resource/year-horrors-trump-administration-s-illegal-returns-asylum-seekers-danger-mexico> [https://perma.cc/P224-298B].

<sup>353</sup> Human Rights First, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger*, HUMAN RIGHTS FIRST, 1 (May 2020), <https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf>.

<sup>354</sup> E.g., *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020); *Nora v. Wolf*, No. CV 20-0993 (ABJ), 2020 WL 3469670 (D.D.C. June 25, 2020); *Immigrant Defenders Law Center et al. v. Chad Wolf et al.*, No. CV-09893 (C.D. Cal. Oct. 28, 2020).

<sup>355</sup> Press Release, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, U.S. DEP'T OF HOMELAND SEC. (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [https://perma.cc/D56V-U5N5] [hereinafter DHS Statement].

<sup>356</sup> *Flores v. Reno*, Case No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

<sup>357</sup> *Flores v. Reno*, Case No. CV 85-4544-RJK(Px) at 7, (C.D. Cal. Jan. 17, 1997).

<sup>358</sup> *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 84 Fed. Reg. 44392-01 (proposed Aug. 23, 2019).

<sup>359</sup> *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019), *appeal docketed*, No. 19-56326 (9th Cir. Nov. 15, 2020).

<sup>360</sup> *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020).

In March 2020<sup>361</sup> the Trump administration, under the pretext of protecting public health during the COVID-19 pandemic, issued interim regulations that shut down the border to asylum seekers. The regulations provide for the expulsion of all non-citizens, who arrive by land, and do not have valid travel document. The regulations were issued under the authority of public health provision 42 U.S.C. 265, which had never been used to close the border, but simply to quarantine for a reasonable amount of time persons or goods where there a risk of infectious disease.<sup>362</sup> It later was revealed that the border closure was not motivated by public health concerns; high level CDC personnel opposed the measure, but were pressured by the White House to impose it.<sup>363</sup>

In addition to these unprecedented procedural barriers to asylum, the Trump administration attempted to rewrite the refugee definition, and to override forty years of precedent interpreting the 1980 Refugee Act. It did this through regulations,<sup>364</sup> as well as decisions by his successive Attorneys General, who have authority to “certify” BIA decisions to themselves, and to reverse or vacate them.<sup>365</sup> Trump’s Attorneys General have aggressively used the certification authority, issuing more than fifteen decisions as of July 2020; in comparison, President Obama’s Attorneys General issued four in an eight year period, President George W. Bush’s sixteen in an eight year period, and President Clinton’s three in an eight year period.<sup>366</sup>

A number of the Attorneys General decisions were clear attempts to roll back jurisprudence relevant to Central American asylum cases, particularly

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<sup>361</sup> See *supra* note 3 (discussing the CDC order shutting down the border in March 2020).

<sup>362</sup> *Id.*

<sup>363</sup> *Pence Ordered Borders Closed, supra* note 3.

<sup>364</sup> The most extensive attempt to rewrite all of asylum law was through the regulation entitled *Procedures for Asylum and Withholding of Removal: Credible Fear and Reasonable Fear*. 85 Fed. Reg. 36,264 (proposed June 15, 2020) (also known as the “monster rule”). See *supra* note 299 for a discussion. Other regulations have imposed additional bars to asylum including: an expansion of criminal bars (see 85 Fed. Reg. 67,202 (Oct. 21, 2020) (currently enjoined)); an expansion of the national security risk bar to exclude from protection those who simply passed through countries with high levels of COVID-19 infections (see 85 Fed. Reg. 41,201 (July 9, 2020)); and, a new bar for individuals who did not apply for and receive a denial of asylum in countries of transit (see 84 Fed. Reg. 33,829 (July 16, 2019) (discussed *infra* note 370)).

<sup>365</sup> 8 C.F.R. § 1003.1(h).

<sup>366</sup> See *Comprehensive List of A-G- Certified Opinions in Trump Administration to Date*, LAW PROFESSOR BLOGS NETWORK (Nov. 9, 2020), <https://lawprofessors.typepad.com/immigration/2020/11/comprehensive-list-of-ag-certified-opinions-in-trump-administration-to-date.html> [<https://perma.cc/E6WG-87B3>]; see also Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. 60-63 (July 2020), [https://www.migrationpolicy.org/sites/default/files/publications/MPI\\_US-Immigration-Trump-Presidency-Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf) [<https://perma.cc/2F2C-M4KN>].

those based on gender violence and fear of gangs.<sup>367</sup> The decisions also restricted claims based on family membership,<sup>368</sup> which come up frequently in gender or gang cases with girls often being targeted because of what other family members may have done to invoke the ire of the gang.<sup>369</sup>

Among the many policies, regulations, and decisions rolled out by the Trump administration, there may be no two measures as willfully blind to conditions in the region as the Transit Ban<sup>370</sup> and the Asylum Cooperative Agreements (ACAs).<sup>371</sup> The Transit Ban barred asylum for all individuals who transited a third country en-route to the U.S. unless they applied for and were denied protection in the countries through which they passed.<sup>372</sup> This bar is based on the fiction that the countries of transit – El Salvador, Honduras, Guatemala, and Mexico—are safe havens, in which individuals fleeing persecution could apply for and obtain meaningful protection. The Asylum Cooperative Agreements take this a step further. They allow the United States to send asylum seekers from any country in the world to Honduras, Guatemala, and El Salvador to seek protection – even if these individuals never transited the three countries. The U.S. used the threat of tariffs,<sup>373</sup> as well as cutting off foreign aid to pressure the three countries to agree to the ACAs.<sup>374</sup>

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<sup>367</sup> *Matter of A-B- (A-B- I)*, 27 I&N Dec. 316 (AG 2018); *Matter of A-B- (A-B- II)*, 28 I&N Dec. 199 (A.G. 2021). For an excellent discussion of the impact of the first A-B- decision, see Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum through Litigation and Legislation*, 18 SANTA CLARA J. INT'L L. 48 (2020).

<sup>368</sup> *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).

<sup>369</sup> It has been well-documented that when gang members have been thwarted in inflicting harm on their chosen victim, they target that individual's entire family:

[T]he way the gangs operate is that if they can't find the son [who they are looking for] they will harm the family. . . . [I]f a family of eight lives in a dangerous zone, and one leaves [due to a gang threat], then the gangs go after the seven that stayed. In this case all of them are at risk.

CGRS/RHRC Interview with Karen Sánchez Reyes, *supra* note 53, at 8.

<sup>370</sup> Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

<sup>371</sup> Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019).

<sup>372</sup> In June 2020, the D.C. Circuit issued a vacatur of the Transit Ban rule. See *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F.Supp.3d 25 (D.D.C. 2020), *appeals docketed*, No. 20-5271 (D.C. Cir. Aug. 31, 2020) and No. 20-5273 (D.C. Cir. Aug. 31, 2020).

<sup>373</sup> John Wagner et al., *Trump Threatens Guatemala After it Backs Away from 'Safe Third Country' Asylum Deal*, WASH. POST (Jul. 23, 2019), [https://www.washingtonpost.com/politics/trump-threatens-guatemala-over-delay-in-safe-third-country-asylum-deal/2019/07/23/cc22417e-ad45-11e9-bc5c-e73b603e7f38\\_story.html](https://www.washingtonpost.com/politics/trump-threatens-guatemala-over-delay-in-safe-third-country-asylum-deal/2019/07/23/cc22417e-ad45-11e9-bc5c-e73b603e7f38_story.html) [<https://perma.cc/BF9Z-T92E>].

<sup>374</sup> Press Release, Michael R. Pompeo, Secretary of State, United States Resumes Targeted U.S. Foreign Assistance for El Salvador, Guatemala, and Honduras (Oct. 16, 2019),

The Asylum Cooperative Agreements were entered into pursuant to the “safe third country” provision in U.S. law, which allows the U.S. to refuse to consider the claim of an asylum seeker if she could be sent to a third country to request protection.<sup>375</sup> The statute requires that the U.S. have an agreement with the third country, that it be safe for the asylum seeker, and that he or she would have “access to a full and fair procedure for determining a claim for asylum or equivalent protection[.]”<sup>376</sup> The safe third country provision has existed in U.S. law for almost twenty-five years, and the only country with which the U.S. has had such an agreement is Canada, which enjoys a high standard of protection of human rights,<sup>377</sup> and has a robust and well-regarded refugee determination system.<sup>378</sup>

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<https://hn.usembassy.gov/united-states-resumes-targeted-us-foreign-assistance-el-salvador-guatemala-honduras/> [<https://perma.cc/EB4L-KAPS>].

<sup>375</sup> 8 U.S.C. § 1158(a)(2)(A) (2009).

<sup>376</sup> The country of removal must be one in which the person’s “life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group or political opinion, and where the individual would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection[.]” *Id.*

<sup>377</sup> Freedom in the World 2020: Canada, FREEDOM HOUSE (last visited Mar. 2021), <https://freedomhouse.org/country/canada/freedom-world/2020> [<https://perma.cc/GM94-MNNV>] (“Canada has a strong history of respect for political rights and civil liberties. . .”).

<sup>378</sup> It is notable that U.S. refugee advocates have never questioned the safety of Canada under this agreement, while Canadian human rights and refugee organizations have brought litigation on two separate occasions, arguing that the U.S. is not a safe country for asylum seekers. A Canadian federal court ruled for the plaintiffs in the first case, but that decision was overturned on appeal. *Canadian Council for Refugees v. R.*, [2009] 3 F.C.R. 136 (Can.). A second challenge was brought in 2017. In explaining the basis of the challenge, Claire Roque, the president of the Canadian Council for Refugees noted,

how refugees are treated heartlessly in the U.S. under President [Donald] Trump: children separated from their parents, long-term detention in horrific conditions, criminal prosecution of people just for crossing the border to seek safety, new policies closing the door on women fleeing gender based violence. The conclusion is clear: The U.S. cannot be considered a safe country for refugees.

Beth Persky & Federica Dell’Orto Hadar, *Recent Developments in Safe Third Country Agreements Feasibility and Approach: US-Guatemala, US-Canada, and EU*, 67 FED. LAW. 16, 17 (2020), <https://heinonline.org/HOL/P?h=hein.barjournals/fedlwr0067&i=18>

[<https://perma.cc/L9DA-D3EX>]. The Federal Court of Canada held that provisions of Canadian law enacting the Safe Third Country Agreement were unconstitutional under Section 7 of the Canadian Charter of Rights and Freedoms. The court held that U.S. detention policies violated the Charter’s guarantee of “the right to life, liberty or security of the person,” and created a risk of refoulement. *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, [2019] F.C. 418 (Can.). The Court suspended its decision for six months. The Canadian government appealed, and as of December 2020, the appeals court has not rendered a decision.

It was particularly cynical for the U.S. to enter into these agreements, as it was undoubtedly aware of the dire conditions in all three countries.<sup>379</sup> As detailed in Part I of this article, El Salvador is not a safe country,<sup>380</sup> Salvadoran government officials acknowledge their inability to protect their own citizenry, much less to extend that protection to asylum seekers from

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<sup>379</sup> Levels of violence and instability in all three countries has been well-documented, and there can be no doubt the architects of these policies in the Trump administration were quite aware of them. See, e.g., CONG. RSCH. SERV., *supra* note 2, at 5 (“El Salvador has been dealing with escalating homicides and generalized crime committed by gangs, drug traffickers, and other criminal groups for more than two decades.”); Human Rights First, *Is Honduras Safe for Refugees and Asylum Seekers—Fact Sheet*, HUMAN RIGHTS FIRST (May 1, 2020), <https://www.humanrightsfirst.org/sites/default/files/IsHondurasSafeForRefugeesandAsylumSeekersFINAL.pdf> [<https://perma.cc/K5HY-NAHM>].

Many Hondurans are fleeing violence and seeking refuge in other countries because their government fails to protect them. According to the UNHCR, 24,000 Hondurans fled their country to seek asylum in the United States in 2018. More than 76,000 asylum applications by Hondurans are currently pending adjudication worldwide. There were an estimated 191,000 persons displaced within Honduras due to violence, national and transnational gang activity, and human trafficking, according to the U.S. State Department. According to the Congressional Research Service, Honduras “remains one of the most violent countries in the world.” In 2019, the number of murders rose in Honduras making its homicide rate the highest in Central America. Despite restrictions imposed by the government due to COVID-19, the murder rate remains high in 2020. In 2019, two Nicaraguan refugees were among those murdered in Honduras; other Nicaraguan asylum seekers have reportedly been tracked by persecutors and killed in Honduras.

*Id.* at 2. See also Human Rights First, *Is Guatemala Safe for Refugees and Asylum Seekers?—Fact Sheet*, HUMAN RIGHTS FIRST (June 2019), [https://www.humanrightsfirst.org/sites/default/files/GUATEMALA\\_SAFE\\_THIRD.pdf](https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf) [<https://perma.cc/9UKM-RKNN>] [hereinafter Human Rights First, *Is Guatemala Safe?*].

The Congressional Research Service reports that Guatemala has some of the highest levels of violence, inequality, and poverty in the region. Guatemala “remains among the most dangerous countries in the world” according to the State Department’s Overseas Security Advisory Council with an “alarming high murder rate.” Guatemala has the third highest femicide rate in the world.

*Id.* at 2.

<sup>380</sup> In determining whether a country is safe for purposes of safe third country agreements, UNHCR has advised an assessment of, among other factors, the country’s “respect for human rights and the rule of law, its record of not producing refugees[.]” *UNHCR Position Relating to the Resolution on Safe Countries of Origin*, UNHCR, 1 (1992), <https://www.refworld.org/docid/3fa7c4f04.html> [<https://perma.cc/8S3V-GW79>] (“Countries where there is more than an insignificant risk of persecution or other threats to life and freedom should not be considered ‘safe.’”).

other countries,<sup>381</sup> and representatives of NGOs have expressed the same.<sup>382</sup> Some have stated the additional concern that El Salvador's commitment to take in asylum seekers, when it is unable to respond to the needs of its own nationals, could lead to scapegoating and xenophobia.<sup>383</sup>

El Salvador also lacks the required full and fair procedure for determining claims to protection, which should exist not only in law, but in "actual practice."<sup>384</sup> Although the country has ratified the relevant international treaties,<sup>385</sup> joined regional agreements and initiatives,<sup>386</sup> enacted

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<sup>381</sup> When asked if El Salvador could protect asylum seekers from other countries, Marina Haydee Martinez de Ortega responded:

My God! What will we be able to do if we cannot even protect our own victims and witnesses? Women are beaten and we cannot protect them. It is very contradictory. There are no shelters. Look at the witness protection program and programs for victims – we have so few resources. And people are leaving to save their lives. We cannot guarantee it [safety]. And people are leaving to save their lives.

CGRS/RHRC Interview with Marina Haydee Martinez de Ortega, *supra* note 55, at 8.

<sup>382</sup> "We cannot even guarantee the rights of our citizens. Really, we do not have the conditions to where people can live with dignity, much less protect the rights of those who seek asylum." CGRS/RHRC Interview with Karen Sánchez Reyes, *supra* note 53, at 9.

<sup>383</sup> Ima Guirola, a women's rights expert, pointed to the anti-immigrant attitudes which surged in Colombia as a result of the large number of Venezuelan immigrants, and observed the need to "ensure that the human rights of migrants and foreigners [sent to El Salvador] are not violated." She expressed the hope that treatment accorded to migrants would be consistent with the guidance of UNHCR, the International Organization of Migration, Amnesty International, and other human rights organizations "involved in the protection of the rights of migrant populations." CGRS/RHRC Interview with Ima Guirola, CEMUJER, *supra* note 92, at 14.

<sup>384</sup> *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers*, UNHCR 1-2 (2013), <https://www.refworld.org/docid/51af82794.html> [<https://perma.cc/JV3U-AK8Q>].

<sup>385</sup> El Salvador became a party to the 1951 Convention and its 1967 Protocol in 1983 (*States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR (as of Sept. 2019), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/44SS-XCKY>]); to the Convention Against Torture in 1996 (*Signatories to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION (as of Mar. 2021), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en) [<https://perma.cc/NM79-7UDA>]); and to the Convention Relating to the Status of Stateless Persons in 2015 (*Signatories to Convention Relating to the Status of Stateless Persons*, UNITED NATIONS TREATY COLLECTION (as of March 2021), [https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en) [<https://perma.cc/U6KP-MVMT>]).

<sup>386</sup> El Salvador is an original signatory of the Cartagena Declaration on Refugees (*Cartagena Declaration on Refugees*, UNHCR 4 (Nov. 22, 1984), <https://www.unhcr.org/en-us/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html> [<https://perma.cc/AZF8-9Y7Z>]) and it adopted the Brazil Declaration and Plan of Action, "agreeing to work together to maintain the highest standards

laws and regulations providing for the protection of refugees, and established refugee determination procedures,<sup>387</sup> its system is so underdeveloped and under-resourced that it is unable to process more than a trickle of asylum seekers.<sup>388</sup> El Salvador's refugee determination body, the *Comisión para la*

of protection at the international and regional level[.]” *A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean*, BRAZIL DECLARATION AND PLAN OF ACTION (Dec. 14, 2014), <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf> [<https://perma.cc/9F83-MDE5>]. It is also a member of the Marco Integral Regional Para la Protección y Soluciones (MIRPS) (Comprehensive Regional Protection and Solutions Framework), a government led initiative, assisted by the UN and OAS, for regional cooperation to respond to protection needs. *About the MIRPS*, GLOBAL COMPACT ON REFUGEES (Oct. 8, 2020), <https://globalcompactrefugees.org/mirps-en/about-mirps> [<https://perma.cc/D73X-HVKK>].

<sup>387</sup> Law and policy pertaining to asylum seekers are set forth in the *Ley Especial de Migración y Extranjería* (LEME) [Migration Law] (Decree 286, April 2, 2019 (El Sal.)), <https://goldservice.com.sv/wp-content/uploads/2019/04/LEY-ESPECIAL-DE-MIGRACION-C3%93N-Y-DE-EXTRANJERIA-C3%8DA.pdf> [<https://perma.cc/WTY4-P8M6>] and its regulations (Reglamento de la Ley Especial de Migración y Extranjería [Regulations for the Migration Law], Decree 35, D.O. No. 75, Vol. 423, April 25, 2019 (El Sal.)), <https://www.transparencia.gob.sv/institutions/dgme/documents/311490/download> [<https://perma.cc/DS2D-84ZV>]). It is also included in the *Ley para la Determinación de la Condición de Personas Refugiadas* [Law for the Determination of the Status of Refugees or Refugee Law] (Decree 918, D.O. No. 148, Vol. 365, Aug. 14, 2002 (El Sal.)), [https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117\\_072947707\\_archivo\\_documento\\_legislativo.pdf](https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072947707_archivo_documento_legislativo.pdf) [<https://perma.cc/3VTA-BQQD>] and its regulations (Reglamento de la Ley para la Determinación de la Condición de Personas Refugiadas [Regulations for the Law for the Determination of the Status of Refugees or Refugee Law], Decree 79, D.O. No. 165, Vol. 368, Sept. 7, 2005 (El Sal.)), <https://www.acnur.org/fileadmin/Documentos/BDL/2005/3792.pdf> [<https://perma.cc/QD87-CCRG>]). The Refugee Law establishes refugee determination procedures, creating a new body, the *Comisión para la Determinación de la Condición de Personas Refugiadas* (CODER) [Commission for the Determination of Refugee Status]. Decree 918, *supra* note 387, at art. 5. Individuals who present at the Salvadoran border, or who are within the country, are permitted to apply for refugee status if they meet an initial screening standard of demonstrating that their request is not “manifestly unfounded, clearly fraudulent or does not meet the criteria for refugee status[.]” Decree 79, *supra* note 387, at art. 15. The screenings are carried out by a Sub-Commission of CODER, and are to take place within 72 hours. *Id.* Asylum seekers may be detained during the screening procedure. *Centro Atención Integral para el Migrante (CAIM)*, GLOBAL DETENTION PROJECT (2015), <https://www.globaldetentionproject.org/countries/americas/el-salvador/detention-centres/1879/centro-atencion-integral-para-el-migrante-caim> [<https://perma.cc/MXQ5-QF8F>]. Once screened in, the individual's claim for protection is submitted to and decided by CODER, which must reach a unanimous decision. Decree 918, *supra* note 387, at art. 27–28. Appeals from denials do not go to a different body, but must be made to CODER. *Id.* at art. 32. There is only one dedicated immigration detention facility in the entire country, the *Centro de Atención Integral para el Migrante* (CAIM) [Center for Integral Attention to Migrants]. See GLOBAL DETENTION PROJECT, *supra* note 387.

<sup>388</sup> *Solicitud de Acceso a la Información Pública* [Request for Access to Public Information] SAI-230-2019, DATOS ESTADÍSTICOS DE LA CODER [CODER STATISTICAL

*Determinación de la Condición de Personas Refugiadas* (CODER) [Commission for the Determination of Refugee Status], is composed of a total of nine persons. In the five-year period between September 2014 and September 2019, El Salvador reported a total of 99 claims for asylum,<sup>389</sup> with 85 pending claims as of December 2019. After El Salvador signed the ACA, it was reported that the U.S. hoped to send 2,000 asylum seekers in its first year of implementation,<sup>390</sup> a wildly unrealistic number in light of the country's lack of capacity.

### C. Moving Forward from the Status Quo

The Biden administration has begun the process of rolling back some of the Trump policies described above, and has committed to reviewing others. It ended prospective application of the Migrant Protection Protocols,<sup>391</sup> and stated that it would “consider a phased strategy” for allowing the entry of those stranded in Mexico.<sup>392</sup> It condemned family separation and set up a task force to reunify families.<sup>393</sup> It terminated the Asylum Cooperative Agreements, first ending it with Guatemala,<sup>394</sup> which was the only one which had been in full implementation, and then announcing an end with all three countries.<sup>395</sup> Among the policies that it has committed to review are the Title 42 border closure,<sup>396</sup> the Transit Ban,<sup>397</sup> and “rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum

DATA] (last visited Mar. 2021), [https://www.transparencia.gob.sv/system/documents/documents/000/337/930/original/Informaci%C3%B3n\\_sobre\\_SAI\\_230-](https://www.transparencia.gob.sv/system/documents/documents/000/337/930/original/Informaci%C3%B3n_sobre_SAI_230-2019_%281%29._Datos_estad%C3%ADsticos_CODER.pdf?1579023553)

2019\_%281%29.\_Datos\_estad%C3%ADsticos\_CODER.pdf?1579023553

[<https://perma.cc/EEJ2-S8F2>] [hereinafter CODER STATISTICAL DATA, *SAI-230-2019*].

<sup>389</sup> CODER STATISTICAL DATA, *SAI-230-2019*, *supra* note 388.

<sup>390</sup> Hamed Aleaziz, *Trump Officials are Finalizing Plans for Sending Asylum-Seekers to El Salvador*, BUZZFEED NEWS (Mar. 10, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/el-salvador-us-asylum-seekers-plan> [<https://perma.cc/Z2TF-S7AG>].

<sup>391</sup> DHS Statement, *supra* note 355.

<sup>392</sup> *See* E.O. Creating a Comprehensive Regional Framework, *supra* note 10, at § 4 (a)(ii)(B).

<sup>393</sup> *See* Exec. Order No. 14,011, 86 F.R. 8237 (Feb. 2, 2021), available at <https://www.federalregister.gov/documents/2021/02/05/2021-02562/establishment-of-interagency-task-force-on-the-reunification-of-families>.

<sup>394</sup> Melissa Angell, *U.S. Exits Trump Admin. 's Guatemala Asylum Agreement*, LAW 360 (Feb. 5, 2021).

<sup>395</sup> Sabrina Rodriguez, *Biden Administration Takes Steps to Dismantle Trump-Era Asylum Agreements*, POLITICO (Feb. 6, 2021), <https://www.politico.com/news/2021/02/06/biden-dismantle-trump-era-asylum-agreements-466565> [<https://perma.cc/WXV9-58X4>].

<sup>396</sup> E.O., Creating a Comprehensive Regional Framework, *supra* note 10, at § 4(a)(ii)(A).

<sup>397</sup> *See id.* at § 4(a)(ii)(C).



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claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards.”

A complete reversal of Trump era policies would be a welcome and necessary first step. But in light of restrictive measures which have been put in place over the decades, more than a return to the 2016 status quo is in order. This is the time to reexamine procedural barriers to protection, and to revisit the key interpretations of the refugee definition which stray from international norms, and which have resulted in the denial of protection to Salvadorans and other bona fide asylum seekers. The focus in this section has been on the interpretation of “nexus” and “particular social group” but there are many other substantive interpretations and procedural rules which are inconsistent with the spirit and letter of the Refugee Protocol. Scholars and advocates have laid out priority areas for reform,<sup>398</sup> and will be urging the Biden administration to include our refugee protection system in its overarching plan to “build back better.”<sup>399</sup>

### III. ADDRESSING ROOT CAUSES OF MIGRATION

The first section of this article details the conditions in El Salvador which are major drivers of migration, while the second section critiques policies which have often resulted in the denial of protection. A fair and rational approach needs to tackle both – providing asylum consistent with international norms while addressing the root causes of migration. A number of recent publications<sup>400</sup> have discussed policies that would begin to ameliorate the conditions which lead to forced migration. This last section

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<sup>398</sup> See, e.g. Human Rights First, *Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy*, 26-49 (Oct. 2020), <https://www.humanrightsfirst.org/campaigns/2021-policy-blueprints>. Center for Gender & Refugee Studies, *Asylum Priorities for the Next Presidential Term* (Nov. 2020), [https://cgrs.uchastings.edu/sites/default/files/CGRS%20Asylum%20Priorities%20-%20Next%20Term\\_Nov.%202020.pdf](https://cgrs.uchastings.edu/sites/default/files/CGRS%20Asylum%20Priorities%20-%20Next%20Term_Nov.%202020.pdf)

<sup>399</sup> The Biden administration’s “Build Back Better” agenda does not explicitly include re-envisioning and strengthening the U.S. refugee and asylum protection framework. *Build Back Better*, THE WHITE HOUSE, <https://www.whitehouse.gov/build-back-better/>.

<sup>400</sup> See, e.g., Latin America Working Group Education Fund et al., *Serve Your People, A Roadmap for Transforming Relations between the United States & the Northern Countries of Central America*, LATIN AMERICAN WORKING GROUP 6-7 (Jul. 2020), <https://www.lawg.org/wp-content/uploads/LAWG-Central-America-recommendationsFIN2.pdf> [<https://perma.cc/854Q-8JVL>] [hereinafter *Serve Your People*]; Nicholas Copeland, *A New Deal for Central America: In Central America, Addressing the Root Causes of Mass Migration Requires Reversal of Destructive U.S. Foreign Policies in Favor of Redistributive, Ecologically Sustainable Development*, 52 NACLA REP. ON THE AM. 67 (2020).

will provide a brief overview of these policies. International assistance, including that of the U.S., could be conditioned to encourage and fund the initiatives described below.<sup>401</sup>

## **A. Investing in Prevention, Strengthening Rule of Law, and Reducing Impunity**

### **i. Violence Prevention**

Gangs are a major source of violence. Many young people join gangs to “escape difficult family circumstances, degrading treatment and limited educational and job prospects.”<sup>402</sup> Effective prevention measures must address this reality. The creation of “well-trained, well-resourced, and accountable child protection systems,”<sup>403</sup> the funding of early childhood development, and a much greater investment in education is a necessary first step.<sup>404</sup> El Salvador’s spending on education is currently the lowest in Central America.<sup>405</sup> Education should “denormalize” gender violence and include “healthy masculinity programming” to counter the existing deeply entrenched machismo and homophobia,<sup>406</sup> and include “effective job training and employment programs. . . and ensure that job training programs connect to the workforce[.]”<sup>407</sup>

Providing education and employment opportunity is a necessary factor in dissuading youth from joining gangs, but it needs to be accompanied by other reforms, such as the cessation of security policies which have resulted in indiscriminate violence against, and mass detention of, youth as suspected

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<sup>401</sup> The United States cut funding to El Salvador, Guatemala and Honduras under Trump. Milton Castillo & Daina Beth Solomon, *U.S. Aid Helped Guatemalan Farmers Stay Rooted to their Lands*, REUTERS (Apr. 4, 2018), <https://www.reuters.com/article/us-usa-immigration-aid/u-s-aid-helped-guatemalan-farmers-stay-rooted-to-their-lands-idUSKCN1RH0B4> [<https://perma.cc/HD2H-VR6V>]. While “U.S. assistance expanded under former President Barack Obama,” under whose administration “funds appropriated for Central America hit a high of \$754 million,” aid under President Donald Trump “steadily decreased” from \$700 million in his first year to \$627 million in 2018. *Id.* For El Salvador in particular, funding dropped from \$46.3 million in 2018 to \$45.7 million in 2019. Chantal Da Silva, *How Much Aid Does U.S. Give to Central America? Trump Says He’s Cutting Funding to El Salvador, Guatemala and Honduras Over Migrant Caravan*, NEWSWEEK (Oct. 22, 2018), <https://www.newsweek.com/how-much-aid-does-us-give-central-america-trump-says-hes-cutting-funding-el-1180732> [<https://perma.cc/UZK9-HSMJ>].

<sup>402</sup> Int’l Crisis Group, *Mirage or Miracle?*, *supra* note 35, at 30.

<sup>403</sup> *Serve Your People*, *supra* note 400, at 6.

<sup>404</sup> *Id.* at 7.

<sup>405</sup> Int’l Crisis Group, *Politics of Perpetual Violence*, *supra* note 147, at 24.

<sup>406</sup> *Serve Your People*, *supra* note 400, at 8.

<sup>407</sup> *Id.* at 6.

gang members.<sup>408</sup> This has led to a lack of trust in law enforcement, and undermined public security.<sup>409</sup> It has also had the consequence of El Salvador holding the unenviable record of the “second highest per capita prison population rate in the world,”<sup>410</sup> second only to the U.S.

El Salvador should also turn away from a purely punitive policy towards gang offenders, and engage in sustained means of rehabilitation and reinsertion into society. Prisons are not only overcrowded, but the conditions are dehumanizing, with gang members imprisoned in “sealed cells with no access to sunlight, for long periods of time.”<sup>411</sup> During periods when the government has declared a state of emergency, conditions in the prisons worsened, with families unable to visit and bring necessities such as medicine or funds for the purchase of food, resulting in cases of severe malnutrition.<sup>412</sup> And although experts have identified rehabilitation of gang members as “an essential step toward a lasting reduction in violence, little has been achieved in this regard.”<sup>413</sup> Legislative proposals to mandate rehabilitation have been “bogged down” in the Salvadoran Legislative Assembly since 2010.<sup>414</sup>

Beyond these targeted measures is the imperative to address the social inequality and marginalization that persists in El Salvador, leaving so many in poverty<sup>415</sup> with limited to no pathways forward.<sup>416</sup> El Salvador’s fiscal policies have contributed to these inequalities. Taxing and spending is a means to redistribute wealth, and at sixteen percent, El Salvador has one of the lowest tax rates in Latin America.<sup>417</sup> The U.S. and other foreign donors could encourage fiscal reforms that would begin to lessen inequality, by increasing the tax rate, closing loopholes to tax evasion, and using monies to

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<sup>408</sup> Int’l Crisis Group, *Mirage or Miracle?*, *supra* note 35, at 7. Tough law enforcement policies “together with the weakness of security forces’ internal accountability mechanisms, created a permissive environment for an increase in police and military abuses.” *Id.*

<sup>409</sup> *Id.* at 8. “El Salvador’s police and army ranked among the least trusted security bodies in Latin America in 2018.” *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 31.

<sup>412</sup> IDHUCA, *supra* note 45, at 19.

<sup>413</sup> Int’l Crisis Group, *Mirage or Miracle?*, *supra* note 35, at 30.

<sup>414</sup> *Id.* at 31, n.187.

<sup>415</sup> Although poverty dropped under successive FMLN Administrations, it is still high. It dropped from 50.1% in 2009, to 44.5% in 2014, to 26.3% in 2018; and, extreme poverty dropped from 17.1% to 11.7% to 5.7%. U.N. Economic Commission for Latin American and the Caribbean (ECLAC), *El Salvador: National Socio-Demographic Profile*, CEPALSTAT: DATABASES AND STATISTICAL PUBLICATIONS (last visited March 2021), [https://estadisticas.cepal.org/cepalstat/Perfil\\_Nacional\\_Social.html?pais=SLV&idioma=english](https://estadisticas.cepal.org/cepalstat/Perfil_Nacional_Social.html?pais=SLV&idioma=english) [<https://perma.cc/URU2-KBJ3>].

<sup>416</sup> CONG. RSCH. SERV., *supra* note 2, at 12. “El Salvador has had the highest percentage of youth aged 15-24 who are not employed, in school, or in vocational training (28.4%) in Central America.” *Id.*

<sup>417</sup> *Serve Your People*, *supra* note 400, at 12.

“strengthen domestic markets, create jobs, and improve food security,” instead of spending it to provide tax incentives for multinational corporations.<sup>418</sup>

The U.S. could engage in concrete measures to reduce poverty and inequality by redesigning trade agreements to support labor rights, the environment, and small-scale farmers,<sup>419</sup> and ensuring that all projects funded by the U.S. “comply with human rights, core labor and environmental standards” and are developed in partnership with the affected communities.<sup>420</sup>

## ii. Strengthening the Rule of Law and Reducing Impunity

Impunity and pervasive corruption are long-standing problems in El Salvador. A 2007 study commissioned by the United Nations Development Fund (UNDP) reported a 97% impunity rate.<sup>421</sup> A subsequent investigation in 2015 reported a 98.7% impunity rate in homicide cases.<sup>422</sup> A more recent analysis issued in 2018 by the United Nations Special Rapporteur for Internally Displaced Persons noted the failure to carry out investigations for “even the most serious crimes, including homicides,”<sup>423</sup> reporting that the overall criminal conviction rate in El Salvador was less than 5%. There is “near total impunity for sexual crimes,”<sup>424</sup> as well as for abuses committed by state security forces.<sup>425</sup> Deep-seated deficiencies, including incompetency and corruption, have been identified across the key institutions responsible for effective law enforcement – the police, prosecutors, and the judiciary.

### a. The National Civil Police

The Peace Accords which brought an end to El Salvador’s civil conflict created the National Civil Police (PNC) to replace security forces which had

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<sup>418</sup> *Serve Your People*, *supra* note 400, at 13.

<sup>419</sup> *See id.* at 10-12.

<sup>420</sup> *Id.* at 12.

<sup>421</sup> Musalo, *supra* note 1, at 66-67.

<sup>422</sup> U.K. HOME OFFICE, COUNTRY POLICY AND INFORMATION NOTE, EL SALVADOR: FEAR OF GANGS 79 (Jan. 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/951926/El\\_Salvador\\_-\\_CPIN\\_-\\_Fear\\_of\\_gangs\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951926/El_Salvador_-_CPIN_-_Fear_of_gangs_.pdf) [https://perma.cc/9HNP-SXTE] [hereinafter U.K. COUNTRY NOTE, 2021] (finding that only 1.3% of all homicides cases resulted in convictions).

<sup>423</sup> U.K. COUNTRY NOTE, 2021, *supra* note 422, at 79.

<sup>424</sup> *Id.* at 82.

<sup>425</sup> *See World Report 2021: El Salvador Events of 2020*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2021/country-chapters/el-salvador#194231> [https://perma.cc/W4CU-EH8V].

carried out massive human rights violations during the war.<sup>426</sup> The PNC was constituted of twenty percent former police, twenty percent FMLN, and sixty percent civilian recruits,<sup>427</sup> and was “[o]riginally designed in the peace accord to have a community-oriented role[.]”<sup>428</sup> Ninety percent of the officers come from “humble social backgrounds” and their salaries are relatively low, resulting in many of them living in areas under the control of gangs, which puts them at risk.<sup>429</sup> At the same time, the PNC has been involved in an increasing number of human rights violations, with credible allegations of extrajudicial executions, extortion and sexual abuse of minors,<sup>430</sup> among other crimes. In order to conceal their misdeeds, the PNC have lied and destroyed or rearranged evidence at the scene of the crime. The problem of abuses has been exacerbated by the incorporation of the military in security operations. The high levels of violence at the hands of the police and military have led some Salvadorans to state that they fear the authorities as much as the gangs.<sup>431</sup>

The situation of violence and corruption by the PNC is compounded by lack of competency and professionalism. The Salvadoran Constitution<sup>432</sup> assigns to the PNC the role of collaborating in the investigation of crime. The lack of proper coordination between the PNC and the FGR has been a long-standing deficiency,<sup>433</sup> worsened by the PNC’s faulty or inadequate collection and preservation of evidence at the crime scene, its lack of interest in improving and modernizing techniques for crime investigation, and failure to identify and interview witnesses.<sup>434</sup> Most recently, the PNC not only failed to coordinate with the FGR, but it blocked the entry into government offices of prosecutors carrying out raids related to allegations of corruption in the expenditure of pandemic funds.<sup>435</sup> This was a monumental act of obstruction, leading the FGR to express its lack of confidence in the PNC, and to call for,

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<sup>426</sup> See Charles T. Call, *Democratisation, War and State-Building: Constructing the Rule of Law in El Salvador*, 35 J. LATIN AM. STUD. 827, 831-34 (2003).

<sup>427</sup> *Id.* at 833.

<sup>428</sup> Int’l Crisis Group, *Politics of Perpetual Violence*, *supra* note 147, at 6.

<sup>429</sup> *Id.* at 5-6.

<sup>430</sup> *Id.* at 6.

<sup>431</sup> U.K. COUNTRY NOTE, 2021, *supra* note 422, at 80.

<sup>432</sup> See *El Salvador’s Constitution of 1983 with Amendments through 2014*, COMPARATIVE CONSTITUTIONS PROJECT (July 15, 2016), <http://extwprlegs1.fao.org/docs/pdf/els127410E.pdf> [<https://perma.cc/M8BU-XKZP>] [hereinafter *El Salvador Constitution, Eng.*].

<sup>433</sup> CGRS/RHRC Interview with Sidney Blanco Reyes, *supra* note 46.

<sup>434</sup> *Id.* (listing these as issues which existed when he completed his United Nations Development Program (UNDP) report, and which still persist today).

<sup>435</sup> EL SALVADOR PERSPECTIVES, *supra* note 181.

among other things, the creation of a new body to replace the PNC in the collaborative role of a partner in crime investigation.<sup>436</sup>

There is need for a major overhaul of the approach to public security. Removing the military from its current law enforcement function, and reforming the police are critically necessary first steps. The Salvadoran Constitution requires that the PNC act “in accordance with the law and with strict respect for Human Rights,”<sup>437</sup> – training should reflect that mandate. Putting in place procedures to identify, investigate, and act promptly in all cases of officer misconduct<sup>438</sup> would ensure that commitments to respect human rights are not toothless.<sup>439</sup> Police involvement in the rape and killing of women and members of the LGBTQ community underscores the urgency for human rights training to counter normalized violence against these populations. The international community, including the U.S., should support and encourage such training. NGOs have cautioned against U.S. direct involvement in training, observing that it was not “well-placed” to do so, given the “controversy over policing in the United States today.”<sup>440</sup> And, a September 2018 report by the Government Accountability Office found that U.S. police training in El Salvador had not succeeded in establishing “consistent human rights-related objectives in its police professionalization programs.”<sup>441</sup> A more fruitful approach would be to involve Salvadoran and international NGOs in training, including on how to develop a community policing approach,<sup>442</sup> and to incorporate Salvadoran civil society organizations in police oversight.

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<sup>436</sup> Gabriela Cáceres & Roxana Lazo, *Así Sería la Nueva Policía Fiscal Que Raúl Melara Pide a la Asamblea* [This Would be the New Prosecutor’s Police that Raul Melera Requests of the Assembly], EL FARO (Nov. 26, 2020), [https://elfaro.net/es/202011/el\\_salvador/25032/As%C3%AD-ser%C3%ADa-la-nueva-polic%C3%ADa-fiscal-que-Ra%C3%BAI-Melara-pide-a-la-Asamblea.htm](https://elfaro.net/es/202011/el_salvador/25032/As%C3%AD-ser%C3%ADa-la-nueva-polic%C3%ADa-fiscal-que-Ra%C3%BAI-Melara-pide-a-la-Asamblea.htm) [https://perma.cc/WB43-EJBN].

<sup>437</sup> *El Salvador Constitution, Eng.*, *supra* note 432, at 41, art. 159.

<sup>438</sup> *Serve Your People, supra* note 400, at 9.

<sup>439</sup> Very few violations by police officers are prosecuted and end in a conviction. Washington Office on Latin America (WOLA) et al., *Gaps in Human Rights Protections in El Salvador*, 1 CENT. AM. MONITOR 1, 9-11 (Sept. 2019), <https://www.wola.org/wp-content/uploads/2020/04/Derechos-Humanos-SV-ENG-4.1.pdf> [https://perma.cc/VL46-QKE5] (showing, for example, that in 2017-2018, of the 1,590 human rights complaints handled by the Ombudsman for the Defense of Human Rights, about 70% of these complaints were against PNC officers, and demonstrating that very few human rights violations were prosecuted, and even fewer ended up in a conviction).

<sup>440</sup> *Serve Your People, supra* note 400, at 9.

<sup>441</sup> CONG. RSCH. SERV., *supra* note 2, at 27.

<sup>442</sup> Int’l Crisis Group, *Mirage or Miracle?*, *supra* note 35, at 31-32.

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b. The Prosecutor General of the Republic

The *Fiscalia General de la Republica* (FGR) [Prosecutor General of the Republic] is responsible for directing criminal investigations, and initiating prosecution of those accused of crimes.<sup>443</sup> The head of the FGR, the Prosecutor General, is appointed by majority vote of the Legislative Assembly. This has tended to politicize the institution, resulting in the protection of corrupt incumbents, and the prosecution of political enemies.<sup>444</sup>

The FGR has been criticized for lack of competency, disregard for human rights, and malfeasance.<sup>445</sup> Failure to effectively carry out investigations has led to exceedingly high levels of impunity. The majority of homicides “are not investigated, nor go to trial, and of those that do go to trial, only a minority reach a verdict.”<sup>446</sup> At the same time, there is pressure on prosecutors to meet a certain monthly quota of accusations and arrests, in order to give the appearance of being effective.<sup>447</sup> The presumption of innocence is frequently ignored, with massive sweeps and arrests of suspected gang members, and lengthy pre-trial detention.<sup>448</sup> Affirmative misconduct has also been alleged, implicating prosecutors in acting in concert with the police in destroying or tampering with evidence at the scene of a crime.<sup>449</sup>

Training is an essential first step in addressing deficiencies of the FGR; the improvement of investigative abilities, especially in complex cases is

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<sup>443</sup> *El Salvador Constitution, Eng.*, *supra* note 432, at 50, art. 193.

<sup>444</sup> See Sonja Wolf, *Subverting Democracy: Elite Rule and the Limits to Political Participation in Post-War El Salvador*, 41 J. LATIN AM. STUD. 429 (2009).

<sup>445</sup> A recent editorial discussing meaningful reform of the FGR began by listing its deficiencies:

El nombramiento politico de su titular, las deficiencias en la investigacion, las relativamente pocas condenas que se consiguen en los tribunales, la impunidad, el centralismo autoritario, la mala relacion con la PNC en casos importantes, y, a la vez, la tendencia a aceptar sin critica la information policial sobre delitos sin mayor repercussion social son algunas de las multiples deficiencias de la institucion. [The political appointment of its head official, the deficiencies in investigations, the relatively few convictions that are obtained in the courts, impunity, authoritarianism, the poor relationship with the PNC in important cases, and, at the same time, the tendency to uncritically accept police information on crimes without any significant social repercussion are some of the multiple deficiencies of the institution.]

Editorial UCA, *Una Propuesta Disparatada [A Wild Proposal]*, NOTICIAS UCA (Nov. 30, 2020) <https://noticias.uca.edu.sv/editoriales/una-propuesta-disparatada> [<https://perma.cc/4WMQ-5JLL>].

<sup>446</sup> U.K. COUNTRY NOTE, 2020, *supra* note 2, at 71.

<sup>447</sup> IDHUCA, *supra* note 45, at 39.

<sup>448</sup> *Id.* at 38.

<sup>449</sup> *Id.* at 39.

“indispensable.”<sup>450</sup> There is also the necessity of incorporating international human rights standards into the FGR’s operations.<sup>451</sup> Performance standards related to professional competency and ethics should be put in place as a means of evaluation and oversight, and support by the U.S. and other donors should impose clear benchmarks for continued funding. An additional positive reform to the FGR would be adopting an appointment process for the Fiscal General that is transparent, involves civil society, and is based on qualifications, not political connections.<sup>452</sup>

As mentioned in Section I.C.2, the recent collaboration of CICIES with the FGR in investigating allegations of financial impropriety against various high-level government officials is an encouraging sign. The CICIG experience in Guatemala demonstrates the measurable contribution to strengthening rule of law that such a body can have. International endorsement and support for an independent CICIES, expressed through diplomacy as well as funding, would be a positive development in El Salvador, and align with the calls of civil society.

### c. The Judiciary

When El Salvador’s civil war came to an end, a Truth Commission was created to investigate human rights violations committed during the conflict. The inadequate state of El Salvador’s judiciary at the time is illustrated by the Truth Commission’s decision not to send any cases to the domestic courts for prosecution, finding that “El Salvador has no system for the administration of justice which meets the minimum requirements for objectivity and impartiality so that justice can be rendered reliably.”<sup>453</sup> Judicial reforms implemented since have led to some improvement, but a more recent assessment noted that, notwithstanding substantial foreign assistance, El Salvador still did not have the “kind of judiciar[y] usually associated with a liberal democracy.”<sup>454</sup> Partisan influence, corruption, and lack of competency are rife within the judicial system.

The selection process of judges contributes to undue influence of political parties, and opportunities for corruption.<sup>455</sup> The Legislative Assembly appoints Supreme Court magistrates, who in turn select the judges for all the lower courts, choosing from a list generated by the *Consejo Nacional de la Judicatura* (CNJ) [National Judicial Council], which is also

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<sup>450</sup> Editorial UCA, *supra* note 445.

<sup>451</sup> *Id.*

<sup>452</sup> IDHUCA, *supra* note 45, at 36-37.

<sup>453</sup> RACHEL E. BOWEN, *THE ACHILLES HEEL OF DEMOCRACY: JUDICIAL AUTONOMY AND THE RULE OF LAW IN CENTRAL AMERICA* 137 (2017).

<sup>454</sup> *Id.* at 3.

<sup>455</sup> *Id.* at 141.



appointed by the legislature. The CNJ includes appellate court judges, representatives from the Public Ministry, public and private law schools, and members of the legal profession.<sup>456</sup> This selection process, with the heavy involvement of the legislature and other influential actors, “opens up multiple avenues for corruption beyond simple partisan influence.”<sup>457</sup> The payment of bribes is common,<sup>458</sup> and “[p]owerful individuals can evade justice by exerting pressure on the judiciary.”<sup>459</sup> Misconduct is so prevalent that in the eight month period from January to August 2019, El Salvador’s Supreme Court, which has the authority to discipline judges, “heard cases against 110 judges accused of various irregularities, including collusion with criminal groups.”<sup>460</sup> The quality and knowledge level of many judges has also been considered to be inadequate, with the system lacking ongoing evaluations to ensure that judges understand new legislative developments, as well as interpretations underlying rationales of significant national and international jurisprudence.<sup>461</sup>

Another impediment to the effective functioning of the courts is the manner in which judges and their staff are assigned throughout the country.<sup>462</sup> Instead of distributing them on the basis of case volume, they are assigned according to “administrative divisions” with the result that judges working in areas with high levels of violence “process up to ten times more cases than colleagues in quieter municipalities[.]”<sup>463</sup> The saturation of cases has contributed to delays in prosecutions, which have resulted in long periods of pretrial detention.<sup>464</sup> The crushing number of cases in some courts have also led to the “dehumanization” of judicial personnel who do not see the person being prosecuted “as an innocent person as the Constitution guarantees,” but as someone who is presumed to be guilty.<sup>465</sup>

Recommendations for addressing problems in the judiciary are not dissimilar to those made above in relation to the FGR. The selection process should be non-partisan and based on qualifications rather than political connections. There should be ongoing training, as well as a means to evaluate judges as to knowledge, competency, and ethics. The process of acting on complaints against judges should be depoliticized, perhaps taking it out of the hands of the Supreme Court, and assigning it to a neutral commission.

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<sup>456</sup> BOWEN, *supra* note 453, at 214.

<sup>457</sup> *Id.*

<sup>458</sup> See Int’l Crisis Group, *Politics of Perpetual Violence*, *supra* note 147, at 7.

<sup>459</sup> FREEDOM HOUSE, *El Salvador*, *supra* note 120.

<sup>460</sup> CONG. RSCH. SERV., *supra* note 2, at 8.

<sup>461</sup> IDHUCA, *supra* note 45, at 40.

<sup>462</sup> See Int’l Crisis Group, *Politics of Perpetual Violence*, *supra* note 147, at 5.

<sup>463</sup> *Id.*

<sup>464</sup> IDHUCA, *supra* note 45, at 39.

<sup>465</sup> *Id.* at 40.

As was noted in relation to international assistance to the FGR, aid should be conditioned on measurable benchmarks.

There are a number of non-governmental organizations – many within El Salvador – which have long dedicated themselves to analyzing these issues. Their investigations and recommendations provide an invaluable resource for policymakers crafting U.S. initiatives addressing violence prevention, impunity and strengthening of rule of law. The measures mentioned in this section are just a condensed overview of recommendations which have been developed in much more depth by these organizations.

## **B. Addressing the Impact of Climate Change**

Climate change and water scarcity are significant factors in forced migration. Increasingly frequent and severe tropical storms, which kill people and destroy homes, have impacted the agricultural sector, with devastating impact on small farmers. Crop failures exacerbate food insecurity and make it even more difficult for rural farmers to support themselves. Government failure to properly regulate the water supply has allowed private interests to restrict public access to water through overuse and pollution. Although addressing global climate change is a larger challenge, which is beyond the scope of this article, the U.S. and international donors could direct funding towards adaptation and mitigation measures, and could encourage El Salvador to adopt policies consistent with these goals.

### **i. Enacting a Water Law**

Among the most pressing matters facing Salvadorans is lack of access to potable water.<sup>466</sup> By passing the General Water Law, thereby “protect[ing] water as human right” and integrating community concerns into water policy, El Salvador would regain power over its own waters, laying the groundwork for better water protections and broader access for more Salvadorans.<sup>467</sup> Absent passage of sweeping water legislation, the status quo of “priority water usage” for “industrial plantations, mining corporations, luxury housing developments, and bottling companies,” as well as the resulting “gap in [potable water] access,” is likely to persist.<sup>468</sup> “Water management must not be left to the market but include the participation of civil society organizations and communities.”<sup>469</sup>

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<sup>466</sup> See Hunter-Smith, *supra* note 229.

<sup>467</sup> *Id.*

<sup>468</sup> Gies, *supra* note 226.

<sup>469</sup> *Serve Your People*, *supra* note 400, at 15.

## ii. Upgrading El Salvador's Water System

Compounding El Salvador's water scarcity problem is the degraded condition of its water system, which allows for extensive leakage and loss of water. Continued investment in improved piping could increase access to water. A prior U.S. Millennium Challenge Corporation (MCC) Compact,<sup>470</sup> from 2007-2012, included a water and sanitation component, whose objective was to "enhance access to water systems and to improve sanitation services to the poorest inhabitants in the Northern Zone of El Salvador."<sup>471</sup> Through this project new pipelines were installed or existing pipes were upgraded in more than 7,500 homes.<sup>472</sup> This increased the percentage of Salvadorans that had access to water and the quality of the water sanitation.<sup>473</sup> Projects such as these need to be scaled in light of the challenges; as of 2016, more than 600,000 Salvadorans remained without access to any drinking water, and over a million had access to only poor water service.<sup>474</sup>

## iii. Constructing Irrigated Greenhouses

Small scale farmers whose survival depends on the success of their crops can be devastated by drought or storms that result in meager or no harvests. The construction of irrigated greenhouses has been a successful measure in mitigating the impact of climate change. The greenhouses can be constructed at a relatively low-cost, using wood, netting, plastic, and coconut fiber.<sup>475</sup>

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<sup>470</sup> MCC compacts are "large, 5-year grants for countries that pass MCC's eligibility criteria" that "complement other U.S. and international development programs." *Millennium Challenge Corp.*, OFFICE OF INSPECTOR GENERAL, <https://oig.usaid.gov/MCC?page=7> [<https://perma.cc/7SRA-JKBM>].

<sup>471</sup> *Measuring Results of the El Salvador Water and Sanitation Sub-Activity*, MILLENNIUM CHALLENGE CORP. (Apr. 3, 2017), <https://www.mcc.gov/resources/doc/summary-measuring-results-of-the-el-salvador-water-and-sanitation-sub-activ> [<https://perma.cc/X8KE-8QX2>] [hereinafter *Measuring Results*].

<sup>472</sup> Marissa Taylor, *10 Facts About Sanitation in El Salvador*, BORGENT PROJECT (Apr. 8, 2020), <https://borgenproject.org/10-facts-about-sanitation-in-el-salvador/> [<https://perma.cc/KT8X-KYQX>].

<sup>473</sup> *Measuring Results*, *supra* note 471.

<sup>474</sup> *Observaciones Preliminares del Relator Especial sobre el Derecho Humano al Agua Potable y al Saneamiento al Concluir su Misión Oficial a El Salvador del 11-18 de Mayo de 2016* [*Preliminary Observations of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation at the Conclusion of his Official Mission to El Salvador on May 11-18, 2016*], UNITED NATIONS: OFF. OF THE HIGH COMMISSIONER (May 18, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19974&LangID=E> [<https://perma.cc/EE52-ZR7D>].

<sup>475</sup> Food and Agriculture Organization of the United Nations (FAO) et al., *The International Symposium on Agricultural Innovation for Family Farmers: 20 Success Stories*

The building of irrigated greenhouses “has drastically reduced crop losses and improved farmers’ incomes.”<sup>476</sup> The green houses allow for high quality vegetable production “year round . . . with fewer inputs, pesticides and fertilizers,” even in the face of drought and storms.<sup>477</sup> In an area where farmers came together to build greenhouses for common use, they later “upscaled their activities and markets by creating a cooperative.”<sup>478</sup>

#### **iv. Diversifying Crops and Switching to Drought Resistant Crops**

Diversifying crops, including switching to drought resistance crops increases resilience in the face of climate change. For example, in 2018, the World Food Program (WFP) assisted farmers who grew only grains to incorporate the growing of vegetables into their planting.<sup>479</sup> These farmers could select from among a variety of “heat and water-stress resistant crop varieties.”<sup>480</sup> This benefited the families by increasing their “dietary diversity,” and generating “additional incomes” for them.<sup>481</sup>

Selection of crops that can better survive unpredictable weather conditions is an integral adaptation strategy. Increased and ongoing development assistance in this area would “help [both] small and medium producers increase food security.”<sup>482</sup> The selection of appropriate crops can also contribute to the health of the environment by preventing soil erosion.<sup>483</sup> A switch to the use of heirloom seeds in lieu of imported seeds can also result in “crops that are more resilient and produce greater yields.”<sup>484</sup>

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of *Agricultural Innovation from the Innovation Fair*, FAO 14 (2018), <http://www.fao.org/3/CA2588EN/ca2588en.pdf#page=12> [<https://perma.cc/6YEV-VHQS>].

<sup>476</sup> Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (Jul. 23, 2020), [https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html?campaign\\_id=9&emc=edit\\_nn\\_20200723&instance\\_id=20544&nl=the-morning&regi\\_id=44027771&segment\\_id=34125&te=1&user\\_id=666e6273b0ec9e39469dfaa9117dc16a](https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html?campaign_id=9&emc=edit_nn_20200723&instance_id=20544&nl=the-morning&regi_id=44027771&segment_id=34125&te=1&user_id=666e6273b0ec9e39469dfaa9117dc16a) [<https://perma.cc/A3L5-GL6F>].

<sup>477</sup> FAO, *The International Symposium*, *supra* note 475, at 14.

<sup>478</sup> *Id.*

<sup>479</sup> *El Salvador Annual Country Report 2018: Country Strategic Plan 2017-2021*, WORLD FOOD PROGRAMME 11 (2018), <https://docs.wfp.org/api/documents/WFP-0000104305/download/> [<https://perma.cc/52BR-M67J>] [hereinafter WFP, *El Salvador 2018*].

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Serve Your People*, *supra* note 400, at 16.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

### v. Adopting Policies to Conserve Water and Reduce Pollution in Coffee Production

Existing practices in the coffee industry result in the waste and pollution of water. “Wet mills,” are a key step in the process of transforming a coffee “cherry” into the coffee bean.<sup>485</sup> Traditional wet mills use large quantities of water and discard the untreated wastewater and coffee pulp after use, dumping them into waterways.<sup>486</sup> Such wet mills use over seventy-five liters of water per kilogram of parchment coffee (untreated coffee beans), which contributes to the strain on El Salvador’s clean water supply.<sup>487</sup> By contrast, ecological mills that use gravity instead of water use less than one liter of water to process the same amount.<sup>488</sup>

There are examples of positive experiences with the use of ecological mills in Nicaragua. During the 2016-2017 harvest, Catholic Relief Services’ Blue Harvest Project replaced six traditional wet mills in Nicaragua with improved ecological wet mills, allowing farmers to process 1,760 quintales<sup>489</sup> of green coffee while saving 1.1 million liters of water.<sup>490</sup> El Salvador is expected to export over 451,000 sixty-kilogram bags of coffee for the marketing year 2019-2020, which, while low by historic standards, is still a large drain on the country’s already strained water supply.<sup>491</sup> Supporting investment in more efficient ecological wet mills could save the country millions of liters to be redirected for “drinking water or other productive purposes such as irrigating crops.”<sup>492</sup>

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<sup>485</sup> Kraig Kraft, *Wet Mills and Water Use*, CATHOLIC RELIEF SERVICES: COFFEELANDS (Oct. 5, 2016), <https://coffeelands.crs.org/2016/10/wet-mills-and-water-use/> [<https://perma.cc/2MY8-VGET>].

<sup>486</sup> Kraig Kraft, *Coffee Wet Mill Makeovers on the Cheap!*, CATHOLIC RELIEF SERVICES: COFFEELANDS (Jan. 24, 2018), <https://coffeelands.crs.org/2018/01/coffee-wet-mill-makeovers-on-the-cheap/> [<https://perma.cc/5D4W-GDFP>].

<sup>487</sup> SPECIALTY COFFEE ASS’N AM., WHITE PAPER: A BLUEPRINT FOR WATER SECURITY IN THE COFFEELANDS 6 (2016), <http://www.scaa.org/PDF/scaa-wp-water-security.pdf> [<https://perma.cc/FZ8U-CLHU>].

<sup>488</sup> Kraig Kraft, *Saving Water with New Ecological Wet Mill Designs*, CATHOLIC RELIEF SERVICES: COFFEELANDS (Mar. 6, 2018), <https://coffeelands.crs.org/2018/03/saving-water-with-new-ecological-wet-mill-designs/> [<https://perma.cc/GJU3-PAJV>].

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> MIGUEL HERRERA, U.S. DEP’T OF AGRIC. FOREIGN AGRIC. SERV., ES2020-0010, EL SALVADOR: COFFEE ANNUAL 4-5 (2020), [https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Coffee%20Annual\\_San%20Salvador\\_El%20Salvador\\_05-15-2020](https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Coffee%20Annual_San%20Salvador_El%20Salvador_05-15-2020) [<https://perma.cc/FK6R-3FCT>].

<sup>492</sup> Kraft, *Saving Water*, *supra* note 488.

## **vi. Investing in Environmentally Beneficial Measures and Supporting Disaster Risk Strategies**

There are strategies that protect the environment, and help subsistence farmers build resilience through adaptation.<sup>493</sup> The World Food Program has trained farmers in “sustainable soil and water conservation practices, agroforestry and reforestation,” and the use of organic fertilizers and renewable energy sources for irrigation systems.<sup>494</sup> WFP also worked with small farmers to plant fruit and forest trees, an important contribution in a country with high levels of deforestation and soil erosion.<sup>495</sup>

Preparing for and responding to natural and climate change disasters is another key strategy towards mitigation of the impacts of climate change; it not only save lives, but helps communities rebuild post-disaster.<sup>496</sup> The U.N. Food and Agricultural Organization implemented a “resilience programme” in El Salvador’s Dry Corridor “to strengthen the disaster risk management capacities of the national and local authorities[.]”<sup>497</sup> U.S. and international assistance to support such planning, especially if it is carried out with the involvement of civil society organizations, can ameliorate the worst impacts of disasters such as drought and storms.<sup>498</sup>

All of the above measures can help reduce the impact of climate change and contribute to the well-being of Salvadorans facing storms, droughts, and environmental degradation.

## **CONCLUSION**

The legal and moral obligations of the United States in response to forced migration should be twofold: the protection of migrants fleeing for their lives, and the commitment to address root causes for flight. The imperative to do so is more pronounced in light of the U.S.’s role in contributing to the current situation in El Salvador – whether by supporting the brutal military during El Salvador’s civil war, deporting gang members back to a country ill-equipped to deal with them, or encouraging neoliberal economic policies that deepened inequality.

This article details the conditions which compel Salvadorans to flee. In doing so, it provides a context for evaluating our asylum policies, as well as

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<sup>493</sup> See WFP, *El Salvador 2018*, *supra* note 479.

<sup>494</sup> *Id.* at 15.

<sup>495</sup> *Id.*

<sup>496</sup> *Serve Your People*, *supra* note 400, at 16.

<sup>497</sup> Food and Agriculture Organization of the United Nations, *2015-2016 El Niño: Early Action and Response for Agriculture, Food Security and Nutrition*, FAO 22 (working draft, Aug. 2016), <http://www.fao.org/3/i6049e/i6049e.pdf>.

<sup>498</sup> *Serve Your People*, *supra* note 400, at 16.

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envisioning root cause strategies. The transition from the Trump to Biden administration provides a unique opportunity to reform our asylum system to bring it into greater compliance with international standards and the humanitarian objectives of the Refugee Protocol. It is also an opportune time to reset relations between the two countries, so as to ensure that our engagement ameliorates rather than worsens the conditions that result in forced migration.

Over the four years of Trump's presidency, we heard quite a bit of rhetoric about building walls, and witnessed significant resources allocated to their actual construction.<sup>499</sup> It should not have to be said, but real solutions do not consist in the building of walls. People desperate to save their lives will not be deterred by walls, although the building of walls will make their journey more dangerous and lead to greater death and suffering.

The priest and human rights activist Peter Hinde expressed this sentiment quite eloquently, cautioning that it is a false belief that "something so frail and ephemeral as a wall can ever be an effective shield against the tide of history [i.e. the forced migration of desperate people]."<sup>500</sup> But it is not only that walls are ineffective; building walls to keep out those who are struggling to survive is a betrayal of U.S. commitment to human rights and the protection of refugees. It is also a profound moral failure: "'If we don't develop a different attitude. . . we're going to be like people in a lifeboat, beating on those who are trying to climb in.'"<sup>501</sup>

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<sup>499</sup> It was reported that under Trump, \$15 billion was allocated for building 453 miles of border wall. Jane Tim, *Fact check: Mexico never paid for it. But what about Trump's other border wall promises?*, NBC NEWS (Jan. 12, 2021), <https://www.nbcnews.com/politics/donald-trump/fact-check-mexico-never-paid-it-what-about-trump-s-n1253983>.

<sup>500</sup> Lustgarten, *supra* note 476.

<sup>501</sup> *Id.* (quoting Rev. Peter Hinde).