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Daniel E. Rabbani

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INTRODUCTION

For Jorge, growing up in San Pedro Sula, the second largest city in Honduras, gangs pervaded all aspects of life.¹ As an able-bodied young man, the prospect of recruiting Jorge appealed to the gang.² When a gang member told Jorge, “You’re going to work for us for free . . . Or you want to die? Choose one of the two,” he knew it was the final straw.³ Jorge knew that for the sake of his own survival, remaining in Honduras was no longer an option. For Jorge, the United States represented a beacon of safety.⁴

Jorge’s journey brought him to Tijuana, a Mexican city that straddles the U.S.-Mexican border.⁵ For Jorge, making it to Tijuana meant his dream of reaching America was almost complete.⁶ One afternoon in Tijuana, Jorge set out from the children’s shelter where he was staying and never returned.⁷ Tragically, Jorge was murdered after being on the wrong end of a robbery attempt.⁸ The assailants, who were hoping to make a quick score, were incensed that Jorge did not have any money on his person.⁹ Jorge’s story is not unique.¹⁰ Scores of asylum seekers like Jorge die in Mexico before they reach the safety of the United

¹ Julia Gavarrete & Heather Gies, *Honduran Teen Fled Gangs at Home Only to be Murdered While Stranded at The U.S.-Mexico Border*, INTERCEPT (Feb. 23, 2019, 9:00 AM), <https://theintercept.com/2019/02/23/unaccompanied-minor-migrants-us-border-policy/> [<https://perma.cc/P69R-QU3T>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *See id.*

⁷ *Id.*; Emily Green, *Two Migrant Teens Brutally Executed in Tijuana as Asylum Cases Piles Up*, VICE NEWS (Jan. 3 2019, 11:38 AM), <https://www.vice.com/en/article/8xpp9z/two-migrant-teens-brutally-executed-in-tijuana-as-asylum-cases-pile-up> [<https://perma.cc/LF77-RMS2>].

⁸ *See* Gavarrete & Gies, *supra* note 1.

⁹ *Id.*

¹⁰ *See* Patrick Timmons, *Mexico No ‘Safe Third Country’ for Refugees*, UPI (Oct. 30, 2018, 4:09 PM), https://www.upi.com/Top_News/US/2018/10/29/Mexico-no-safe-third-country-for-refugees/5671540827649/ [<https://perma.cc/G38F-YG6W>].

States.¹¹ And yet, the United States, under the Trump administration, made this absurd claim: for purposes of asylum, Mexico is a safe country.¹²

A safe-third country (STC) agreement enables a nation to send an asylum seeker back to a country they already passed through during the course of their journey if that country can grant the asylum seeker protection.¹³ These agreements have also been referred to as “[t]he country of first asylum” and require the asylum seeker to return to the transit country “to pursue their asylum claim.”¹⁴ If, for example, a safe third country agreement went into effect between the United States and Mexico, an asylum seeker that passed through Mexico on the way to the United States would be required to seek asylum in Mexico.¹⁵ The asylum seeker is thought to be safe in the country that is a party to the agreement.¹⁶

Although the Biden administration will discontinue negotiations for a STC agreement with Mexico and will suspend all other preexisting agreements, the Trump administration entered into STC agreements with Guatemala, El Salvador, and Honduras, and aggressively pursued an agreement with Mexico.¹⁷ Ironically,

¹¹ Roberto A. Ferdman, *Nearly 50,000 Migrants Have Died in Mexico on the Way to the US Since 2007*, QUARTZ (Dec. 31, 2013), <https://qz.com/162545/nearly-50000-migrant-s-have-died-in-mexico-on-the-way-to-the-us-since-2007/> [<https://perma.cc/6KW2-XEZD>] (“Mexico’s alarming homicide rate is the likeliest culprit.”).

¹² See Timmons, *supra* note 10.

¹³ B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 133 (2018); see also HEBREW IMMIGRANT AID SOC’Y (HIAS), DEFINITIONS: REFUGEE, ASYLUM SEEKER, IDP, MIGRANT 1, https://www.hias.org/sites/default/files/definitions_of_refugee2c_asylum_seeker2c_idp2c_and_migrant.pdf [<https://perma.cc/C63C-RBYG>] (“An asylum seeker is a person who has fled persecution in their home country and is seeking safe haven in a different country, but has not yet received any legal recognition or status.”).

¹⁴ Gabriela I. Coman, Note, *European Union Policy on Asylum and Its Inherent Human Rights Violations*, 64 BROOK. L. REV. 1217, 1234 (1998).

¹⁵ See Claire Felter & Amelia Cheatham, *Can ‘Safe Third Country’ Agreements Resolve the Asylum Crisis?*, COUNCIL ON FOREIGN REL. (Aug. 29, 2019, 9:23 AM), <https://www.cfr.org/in-brief/can-safe-third-country-agreements-resolve-asylum-crisis> [<https://perma.cc/XK77-C3F7>] (“Asylum seekers are required to make their claims in the first country they enter that is a party to the safe third country agreement. If they don’t, the other countries in the agreement can dismiss their claims and send them back to that country.”).

¹⁶ Eirik Christophersen, *What Is a Safe Third Country?*, NORWEGIAN REFUGEE COUNCIL (Mar. 9, 2016), <https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/> [<https://perma.cc/BC5F-HGNZ>].

¹⁷ As it stands, the Biden Administration suspended the STC agreements made under the Trump administration. Hamed Aleaziz, *The Trump White House Wants ‘Safe Third Country’ Deals With Central American Countries By October*, BUZZFEED NEWS (Sept. 9, 2019, 7:36 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/us-asylum-safe-third-country-honduras-el-salvador> [<https://perma.cc/M6CE-2BZM>]; Lauren Carasik, *Trump’s Safe Third Country Agreement With Guatemala Is a Lie*, FOREIGN POL’Y (July, 30, 2019, 2:10 PM), <https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/> [<https://perma.cc/FED2-M3QE>]; Colleen Long & Astrid Galvan, *US, El Salvador Sign Asylum Deal, Details To Be Worked Out*, ASSOCIATED PRESS (Sept. 20, 2019), <https://www.apnews.com/de6a00632755415fad2a952c7cd4bd72> [<https://perma.cc/BC5F-HGNZ>].

these countries are all plagued with the same gang violence that is causing people to flee in droves in the first place.¹⁸ In fact, the majority of asylum seekers come to the United States from the very countries the United States sought STC agreements with.¹⁹ To put this into perspective, paradoxically, under the now-suspended STC agreement with Guatemala, a Honduran national who fled gang violence in his home country would have been required to make a claim for asylum in Guatemala, a country also plagued by gang violence.²⁰ Many Guatemalans themselves are making the decision to seek asylum in the United States because of gang violence and violence against women, undermining the notion that Guatemala had been a safe country for asylum seekers.²¹

Despite this, it is not hard to understand why the Trump administration was so eager to make a deal with Mexico and the countries that make up the Northern Triangle.²² At face value, STC agreements are “logical and convenient.”²³ It could be argued that STC agreements were just a natural extension of the Trump administration’s plan to minimize the influx at the border.²⁴ The U.S. border is having trouble handling the number of asylum

cc/Y2AZ-4VHN]; Camilo Montoya-Galvez, *Mexico Writes Off “Safe Third Country” Deal With U.S., Citing Drop in Border Crossings*, CBS NEWS (Sept. 10, 2019, 8:25 PM) <https://www.cbsnews.com/news/mexico-writes-off-safe-third-country-deal-with-us-citing-drop-in-border-crossings/> [https://perma.cc/MX6B-75E7]; Reuters Staff, *Biden Administration Suspends Trump Asylum Deals With El Salvador, Guatemala, Honduras*, REUTERS (Feb. 6, 2021, 10:26 PM), <https://www.reuters.com/article/us-usa-immigration-centralamerica/biden-administration-suspends-trump-asylum-deals-with-el-salvador-guatemala-honduras-idUSKBN2A702Q> [https://perma.cc/S9CA-T36L]; Felter & Cheatham, *supra* note 15 (“[The agreement with Guatemala] was challenged by the country’s constitutional court, and it’s unclear whether it [could have] be[en] implemented.”).

¹⁸ Nicole Narea, *Trump’s Agreements in Central America Are Dismantle the Asylum System As We know It*, VOX (Nov. 20, 2019, 3:08 PM), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained> [https://perma.cc/2D49-DVHB] (noting it is likely that the Trump administration refrained from labeling these agreements as “safe-third country agreements” because these countries are not safe by any means, however they are in their essence safe third country agreements).

¹⁹ *Id.*

²⁰ See Carasik, *supra* note 17.

²¹ See *id.*

²² See generally *Is There a Crisis on the US-Mexico border?*, BBC NEWS (July 11, 2019), <https://www.bbc.com/news/world-us-canada-44319094> [https://perma.cc/ZMC8-EWE5]. The Northern Triangle consists of Honduras, Guatemala, and El Salvador. Amelia Cheatham, *Central America’s Turbulent Northern Triangle*, COUNCIL ON FOREIGN REL. (Oct. 1, 2019, 8:00 AM), <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle> [https://perma.cc/PRK6-NFP4].

²³ See Drake & Gibson, *supra* note 13 (posing the question “[i]f a nation through which an asylum seekers transited has, or could have, provided adequate protection, why should the asylum seeker not be required to return there to seek protection?”).

²⁴ See Carasik, *supra* note 17 (noting that “[o]ther efforts to staunch the flow of migrants include[d] the ‘Remain in Mexico,’ program, implemented in January, which return[ed] apprehended migrants to Mexico to await processing of their asylum claims, and metering, which limit[ed] the number of migrants who can approach U.S. border outposts to request asylum in any given day”).

seekers currently arriving at the border, which is pushing the immigration system to its limits.²⁵ The United States will likely continue to have trouble in the foreseeable future, well into the Biden administration, as the COVID-19 pandemic places an even greater strain on our system.²⁶ This issue is not going away any time soon simply because the United States shifted from Trump's outwardly abrasive immigration policies to Biden's stance, which is regarded as softer. In fact, President Joe Biden's seemingly more tolerant approach to migration than that of his predecessor will likely result in a large spike in migration.²⁷

STC agreements serve as an exception to traditional immigration law statutes.²⁸ Under U.S. immigration law, the Immigration and Nationality Act (INA) affords any alien the right to apply for asylum if they are either "physically present in the United States or [they] arrive[] in the United States."²⁹ This right applies regardless of whether the alien is unlawfully present in the United States or has lawfully entered the United States through "a designated port of arrival."³⁰ This right is unavailable, however, to asylum seekers who have passed through a STC,³¹ which is known

²⁵ Quinn Owen, *Trump Administration Overwhelmed by Record Border Crossings, Asylum Requests*, ABC NEWS (May 8, 2019, 3:35 PM), <https://abcnews.go.com/Politics/trump-administration-overwhelmed-record-border-crossings-asylum-requests/story?id=62904545> [<https://perma.cc/X5EH-ZEU4>] ("The overwhelming surge . . . [had been] the highest seen in a decade.").

²⁶ Julia Ainsley, *Incoming Biden Administration to Migrant Caravan: Don't Come, You Won't Get in Immediately*, NBC NEWS (Jan. 17, 2021, 3:05 PM), <https://www.nbcnews.com/politics/immigration/incoming-biden-administration-migrant-caravan-don-t-come-you-won-t-1254550> [<https://perma.cc/V9QU-BPLX>] ("[I]n the past increases in immigration have occurred around U.S. elections and transitions of power Prior to the recent caravan, there were already tens of thousands of migrants who had been stopped at the U.S. border by the Trump administration and told to wait in Mexico until their court dates to present their asylum cases. Many had given up and returned south, but thousands remain in poor conditions in Northern Mexico waiting to enter the U.S."); Mimi Dwyer et al., *Biden's Pledges Could Spur More Migration. But in a Pandemic, The Border Is Unprepared*, REUTERS (Dec. 15, 2020), <https://www.reuters.com/article/us-usa-biden-immigration-border-insight/bidens-pledges-could-spur-more-migration-but-in-a-pandemic-the-border-is-unprepared-idUSKBN28P18G> [<https://perma.cc/3QL8-LQM3>] ("[Shelter organizations stated] they wanted Trump's policies to be reversed as quickly and safely as possible, but feared pandemic-related factors—including reduced shelter capacity, fewer volunteers and medical workers, a lack of government testing of migrants, and fewer donations—would make it difficult for them to cope with a surge without additional resources.").

²⁷ See Dwyer et al., *supra* note 26.

²⁸ 8 U.S.C. § 1158 (a)(2)(A).

²⁹ 8 U.S.C. § 1158 (a)(1) ("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum").

³⁰ *Id.*

³¹ 8 U.S.C. § 1158 (a)(2)(A) (stating the asylum provision is not applicable if "the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race,

as the STC exception.³² The STC exception does afford asylum seekers some protection. Under the provision, an asylum seeker cannot be deported to a country where they would face harm based on “race, religion, nationality, membership in a particular social group, or political opinion.”³³ Further, the designated safe country must offer a “full and fair procedure” to determine whether the asylum seeker is actually eligible for asylum.³⁴

Notwithstanding this language, the STC exception does not provide any guidelines to help ascertain if a country is in fact safe for the asylum seeker.³⁵ Furthermore, the ambiguous language of the provision left the door open for the Trump administration to take advantage of the exception, to the detriment of asylum seekers. Take for example, the requirement in the STC exception that the country must offer “full and fair procedure” to determine one’s eligibility for asylum.³⁶ Mexico has an agency designed to process asylum claims known as the Mexican Commission for Refugee Assistance (COMAR).³⁷ Despite COMAR being so overburdened that it cannot process every single asylum application, the U.S. government could argue that Mexico offers “a full and fair procedure” merely because there is a system in place to receive asylum.³⁸

The language used under the provision also potentially subjects asylum seekers to dangers they faced back in their home country.³⁹ Removal to a safe third country is allowed if “the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴⁰ These are known as the “five

religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection”).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *See id.*

³⁶ *Id.*

³⁷ Lizbeth Diaz & Delphine Schrank, *Mexico’s Refugee Agency Turns to U.N. Amid Asylum Surge, Funding Cuts*, REUTERS (May 21, 2019, 10:47 PM), <https://www.reuters.com/article/us-usa-immigration-mexico/mexicos-tiny-refugee-agency-turns-to-un-amid-asylum-surge-funding-cuts-idUSKCN1SS06N> [<https://perma.cc/MQ95-85AJ>].

³⁸ *See* 8 U.S.C. § 1158 (a)(2)(A); Rachel Schmidtke, *A New Way Forward: Strengthening The Protection Landscape in Mexico*, REFUGEES INT’L (Nov. 12, 2020), <https://www.refugeesinternational.org/reports/2020/11/9/a-new-way-forward-strengthening-the-protection-landscape-in-mexico> [<https://perma.cc/86M8-BEWP>]. (“For years, COMAR suffered from a woefully low budget that contributed to a mounting backlog of unresolved claims . . . [Though COMAR’S budget increased] from 2019 to 2020 . . . the budget for 2021 decreased by 14.3 percent, despite the overwhelming need to increase funding.”); Diaz & Schrank, *supra* note 37.

³⁹ *See* 8 U.S.C. § 1158 (a)(2)(A).

⁴⁰ *Id.*

protected grounds.”⁴¹ Therefore, fleeing one’s own country due to gang violence and being sent to a safe third country similarly plagued by gang violence would be allowed because general gang violence is not rooted in the five protected grounds.⁴²

The statute itself does not allow any judicial oversight of the Attorney General’s (AG) decision to remove an asylum seeker to a safe third country.⁴³ Thus, current and future administrations may shirk moral obligations in order to curtail migration, leaving asylum seekers with no recourse. This is evidenced by the Trump administration’s efforts to sign agreements with the United States’ southern neighbors that are ill-equipped to safely handle an influx of asylum seekers.⁴⁴ While the Biden administration will most likely take a more lenient approach to refugees than the prior administration, the statute itself remains unchanged.⁴⁵ The Trump administration’s efforts to sign STC agreements showed how the STC provision can be exploited to the detriment of asylum seekers, merely accelerating the need for legislative reform.⁴⁶ STC agreements are an effective way to mitigate an overburdened asylum system,

⁴¹ Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 17 (2016).

⁴² See 8 U.S.C. § 1158 (a)(2)(A); Gupta, *supra* note 41, at 17; see also *In re A-B*, 27 I. & N. Dec. 316, 320 (A.G. 2018) (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”), *abrogated in part by* *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020) (explaining that there is no blanket prohibition on claims pertaining to domestic violence or gang violence, but that such claims must be “analyzed on a case-by-case basis”).

⁴³ 8 U.S.C. § 1158 (a)(3) (“No court shall have jurisdiction to review any determination for the Attorney General under paragraph (2).”).

⁴⁴ See Narea, *supra* note 18.

⁴⁵ See 8 U.S.C. § 1158 (a)(2)(A); Adolfo Flores & Hamed Aleaziz, *Biden Started the Process of Unwinding Trump’s Assault on Immigration, But Activists Want Him to Move Faster*, BUZZFEED NEWS (Feb. 2, 2021, at 8:54 PM), <https://www.buzzfeednews.com/article/adolfoflores/biden-immigration-executive-orders-review> [<https://perma.cc/PPT3-9DXU>]. On February 2, 2021, President Biden signed an executive order calling “for a review of Trump’s ‘[S]afe third country’ agreements with El Salvador, Honduras, and Guatemala to provide US-bound asylum-seekers protection instead. Secretary of State Antony Blinken [] said in a statement that the [United States] ‘intends to suspend and terminate’ the bilateral agreements.” *Id.* On February 6, 2021, these agreements were formally suspended. Reuters Staff, *supra* note 17. However, it is important to note that executive orders can be reversed with each successive administration and the focus of these countries is to show how the STC provision can lead to dire consequences for asylum seekers and to make the case that reform is needed. See generally Flores & Aleaziz, *supra* note 45 (noting how Biden is using executive orders to reverse Trump’s policies).

⁴⁶ See Narea, *supra* note 18. It is extremely important to note that while the author understands that the issue of STC agreements may seem like something in the rearview mirror, it is an issue very likely to reappear in the near future. Donald Trump’s anti-immigration rhetoric helped fuel his rise to the White House in 2016, a playbook some future presidential hopefuls may choose to follow. Philip Klinkner, *Op-Ed: Yes, Trump’s Hard-Line Immigration Stance Helped Him Win the Election—But it Could Be His Undoing*, L.A. TIMES (Apr. 17, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-klinker-immigration-election-20170417-story.html> [<https://perma.cc/GM3L-AMKQ>].

but as it stands now, the provision sits ripe for exploitation. Ultimately, the STC exception to the INA needs to be reformed in order to guarantee safety for asylum seekers.

While there are solutions that involve removing the AG's autonomy, there are effective solutions that can work within the current framework.⁴⁷ Therefore, this note does not argue for removal of the provision that prohibits judicial review of AG decisions to remove an asylum seeker to a safe third country. This note instead argues that because the AG is free from judicial review, clear guidelines must be woven into the statute to help the AG determine whether a STC is, in fact, safe for an asylum seeker. These suggested guidelines include a number of factors: (1) looking at a country's "laws, practices, and human rights record;"⁴⁸ (2) taking into account the United Nations High Commission on Refugees (UNHCR) country reports and guidelines;⁴⁹ (3) considering whether the country recognizes the vulnerability of certain population groups such as minors;⁵⁰ (4) determining whether the country's asylum system is "overburdened";⁵¹ (5) whether the country would afford the asylum seeker the ability to "enter and remain" there;⁵² (6) whether the asylum seeker will be "protected there against refoulement and is treated in accordance with basic human standards;" (7) whether the asylum seeker will be subject to "persecution threats to safety and liberty;"⁵³ and (8) whether the country provides the asylum seeker with "access to a durable solution."⁵⁴ Such guidelines would prevent the abuse of discretion stemming from the current ambiguity of the statute and would enable the AG to accurately determine if a country is in fact safe for an asylum seeker's removal.

⁴⁷ See 8 U.S.C. § 1158 (a)(3). The author accepts the reality that this provision was likely important to the legislature and is unlikely to be amended or rescinded in the near future. Thus, the author works from a practical standpoint that accepts the political realities and probabilities of success.

⁴⁸ *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 8 (Can. Ont.).

⁴⁹ *Background Note on the Safe Country Concept and Refugee Status EC/SCP/68*, UNHCR (July 26, 1991), <https://www.unhcr.org/en-us/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html> [<https://perma.cc/66Y7-4HG8>] [hereinafter *Background Note*].

⁵⁰ Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002 [hereinafter United States and Canada Safe Third Country Agreement].

⁵¹ Kúria [Curia of Hungary] [On Certain Questions Related To The Application Of The Safe Third Country Concept], Dec. 10, 2012, 2/2012 (XII.10) KMK (Hung.).

⁵² See *Background Note*, *supra* note 49.

⁵³ *Id.*

⁵⁴ *Id.*

Part I of this note lays out the framework and history of STC agreements. Part II shows why reliance on the current construction of the statute could lead to devastating results for asylum seekers, using the agreements with Guatemala, El Salvador, and Honduras, and the contemplated agreement with Mexico as a case study. Part III crafts a solution to the STC exception by looking at multiple sources, including laws and judicial opinions from Canada and Europe, and recommendations issued by the United Nations High Commissioner for Refugees (UNHCR). Part IV explains why less comprehensive solutions do not go far enough in preventing an asylum seekers' removal to a country that is not truly safe.

I. HISTORY AND BACKGROUND OF STC AGREEMENTS

A. *The Creation of an International Framework for Refugees and the Advent of the STC*

The concept of STC can be traced back to World War II and the advent of the modern refugee.⁵⁵ During the war, the international community's response to opening its doors to those seeking refuge was shameful. In 1939, nearly 1000 Jews hoping to escape the anti-Semitic genocide engulfing Europe, boarded *S.S. St. Louis* in Hamburg, Germany.⁵⁶ Cuba refused to allow the ship to dock, after which, "the ship sailed along the coast of the United States."⁵⁷ President Roosevelt made the decision to deny entry to the passengers aboard the ship, and the United States left the ship with no choice but to return to Europe.⁵⁸ 254 of those passengers were killed in the Holocaust.⁵⁹

At the time, "[t]he United States did not have a system [in place to] evaluat[e] refugee claims" and there was no international standard for determining who was a refugee.⁶⁰ The war left in its wake scores of people who were uprooted from their homes, without a place to go.⁶¹ The international community's failure to come to the aid of those in need during

⁵⁵ See *The Refugee Convention at 50*, UNHCR (July 2, 2001), <https://www.unhcr.org/en-us/news/editorial/2001/7/3b4c06f0d/refugee-convention-50.html> [<https://perma.cc/G2FK-YKTB>].

⁵⁶ See Michael J. Churgin, *Is Religion Different? Is There a Thumb on the Scale In Refugee Convention Appellate Court Adjudication In The United States? Some Preliminary Thoughts*, 51 TEX. INT'L L.J. 213, 214 (2016).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Voyage of the St. Louis*, U.S. HOLOCAUST MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis> [<https://perma.cc/UM7G-ZTL8>].

⁶⁰ See Drake & Gibson, *supra* note 13, at 98.

⁶¹ See *The Refugee Convention at 50*, *supra* note 55.

the war left a scar on human history, and faced with that reality, the world decided that something needed to change.⁶²

In 1945, the international community created the United Nations (U.N.), hoping to create a world of everlasting peace in an era that just witnessed what the worst of mankind could become.⁶³ This new body adopted the belief that the international community shared a duty to help refugees.⁶⁴ In 1948, the United Nations drafted the Universal Declaration of Human Rights (UDHR).⁶⁵ With the refugee crisis in the backdrop, Article 14 states “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”⁶⁶ Though the Declaration is certainly inspirational, as a declaration, it is unable to legally hold countries accountable.⁶⁷

In 1950, not long after World War II, the U.N. created the UNHCR “to help millions of Europeans who had fled or lost their homes,” signaling the role the U.N. sought to take in responding to the post war refugee crisis.⁶⁸ The following year, the U.N. issued the 1951 Convention Relating to the Status of Refugees (Convention), representing a major breakthrough for the international community.⁶⁹ Under the Convention, the international community created a standard definition for who could be classified as a

⁶² See Drake & Gibson, *supra* note 13, at 98 (“In the aftermath of World War II, it was clear the world required an international legal system to set standards to hold governments accountable and codify individual rights beyond those afforded by one nation to its peoples.”).

⁶³ *United Nations*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/world-war-ii/united-nations> [<https://perma.cc/BR5N-7YZV>].

⁶⁴ Dara Lind, *How America’s Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX (Jan. 27, 2017, 8:12 AM), <https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust> [<https://perma.cc/3FKE-28F6>] (“Modern refugee policy, in other words, is largely a response to the failure of the Holocaust era.”).

⁶⁵ Andrew F. Moore, *Unsafe in America: A Review of the U.S.-Canada Safe Third Country Agreement*, 47 SANTA CLARA L. REV. 201, 215 (2007).

⁶⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948).

⁶⁷ See Moore, *supra* note 65, at 215 (“The UDHR was not a binding treaty, but instead represented the common belief of the nations of the world that human beings enjoyed rights, privileges and freedoms based up their inherent human dignity.”); *Declaration on Human Rights Defenders*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx> [<https://perma.cc/B69J-VHVQ>].

⁶⁸ *History of UNHCR*, UNHCR, <https://www.unhcr.org/en-us/history-of-unhcr.html> [<https://perma.cc/J6FN-RQQG>].

⁶⁹ See *generally* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

refugee.⁷⁰ Though the Convention defines who a refugee is, it does not compel a party to the Convention to grant asylum to a refugee.⁷¹

The key concept to emerge out of the Convention was the prohibition against “refoulement,” or the return of the asylum seeker to their home country.⁷² Under Article 33 of the Convention, “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁷³ This has come to be known as non-refoulement.⁷⁴ Non-refoulement is simply understood to be the “forbidding [of] states from returning refugees to a country where they may be persecuted on account of one of the five protected grounds.”⁷⁵ This principle is recognized to be part of customary international law.⁷⁶ Customary international law has been defined as law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁷⁷ Therefore, “through the actual practice of states and their acceptance of such practices that customary international law becomes binding international law.”⁷⁸ This means that abiding by non-refoulement is a legal obligation placed upon all nations, as it is customary international law.⁷⁹

⁷⁰ *Id.* art. 1 (“As a result of events occurring before 1 January 1951 and 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.”) *Id.* (defining refugee to relate to the “result of events occurring before 1 January 1951,” meaning the initial definition of refugee was a very World War II, Euro-centric definition).

⁷¹ *Id.*

⁷² *Id.* art. 33.

⁷³ *Id.* (noting the exception to “refoulement” when “there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”).

⁷⁴ *Frequently Asked Questions About the 1951 Refugee Convention*, UNHCR (June 1, 2001), <https://www.unhcr.org/en-us/news/stories/2001/6/3b4c06578/frequently-asked-questions-1951-refugee-convention.html> [<https://perma.cc/TT2H-7GEQ>] [hereinafter *1951 Refugee Convention*].

⁷⁵ Tina Javaherian, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 427 (2012).

⁷⁶ See *1951 Refugee Convention*, *supra* note 74.

⁷⁷ Beth Fain, *The International Criminal Court: An Eminent Impact on a Hesitant United States*, 35 TEX. TECH L. REV. 163, 168 (2004) (quoting The Restatement (Third) of Foreign Relations); *id.* (“This definition of customary international law is comprised of the following elements: (1) the general practice of states and (2) states’ acceptance of this practice as law.”).

⁷⁸ *Id.*

⁷⁹ See *1951 Refugee Convention*, *supra* note 74. Customary international law legally binds all nations, and therefore, when applicable, it is applied by domestic courts. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010) (applying

Under the principle of non-refoulement, while a country must refrain from sending someone back to a place where they will face persecution on account of one of the five protected grounds, there is still no legal obligation to grant someone asylum.⁸⁰ Further, there is nothing stopping a country from sending an asylum seeker to a third country that is willing to accept them.⁸¹ This concept naturally led to the emergence of STC agreements.⁸²

Incorporating these precepts into bilateral agreements, the United States and Canada signed their first STC agreement in 2002, and North America is not the only region to make use of this form of diplomacy.⁸³ In the European Union (EU), the Dublin Regulation mandates that the first EU nation that an asylum seeker “irregular[ly]” crosses into is responsible for assessing the asylum claim.⁸⁴ Most recently, the EU, to much criticism, entered into an STC agreement with Turkey in response to the Syrian Civil War.⁸⁵ One reason nations sign STC agreements is to prevent against “forum-shopping,” the idea that an asylum seeker will go around choosing their favorite among several safe countries to file a claim for asylum.⁸⁶ The UNHCR even encourages the use of STC agreements, understanding “[t]he refugee problem is international in scope and character.

customary international law); Emma V. Broomfield, *A Failed Attempt to Circumvent the International Law on Torture: The Insignificance of Presidential Signing Statements Under The Paquete Habana*, 75 GEO. WASH. L. REV. 105, 107 (2006) (“[I]n 1900, the [U.S.] Supreme Court declared in *The Paquete Habana* that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice.” (second alteration in original)). In 1967, the international community drafted the Protocol Relating to The Status of Refugees (Protocol), which formally recognized that the definition of “refugee” needed to evolve beyond the events of WWII. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol] (“[E]qual status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951.”). A majority of the world’s nations have agreed to be parties to either the Convention or Protocol. See Javaherian, *supra* note 75, at 427. As a party to the Protocol, the country also agrees to the provisions of the Convention. *Id.* The United States is a party to the Protocol. *Id.*

⁸⁰ See Convention Relating to the Status of Refugees, *supra* note 69, art. 1.

⁸¹ *Id.*

⁸² See *id.*

⁸³ United States and Canada Safe Third Country Agreement, *supra* note 50; Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829, 33840 (July, 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) (stating that “[i]n 1990, European states adopted the Dublin Regulation in response to an asylum crisis as refugees and economic migrants fled communism at the end of the Cold War”).

⁸⁴ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33840 (“Generally, when a third-country national seeks asylum in a member state other than the state of first entry into the EU, that state may transfer the asylum-seeker back to the state of first safe entry.”).

⁸⁵ Melvyn Ingleby, *Europe’s Complicity in Turkey’s Syrian-Refugee Crackdown*, ATLANTIC (Aug. 29, 2019), <https://www.theatlantic.com/international/archive/2019/08/europe-turkey-syria-refugee-crackdown/597013/> [https://perma.cc/BX3M-E25C].

⁸⁶ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33840.

International problems require an international solution.”⁸⁷ STC agreements enable nations to delegate the responsibility of taking in refugees, rather than just leaving one nation to bear the brunt of the burden.⁸⁸ Thus, these agreements and concepts play an important role in domestic immigration law and policy.

B. Implementation of the Refugee Protocols in U.S. Law

Though the United States is subject to the terms of the Convention, the auspices of the treaty are non-self-executing.⁸⁹ This means that “while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”⁹⁰ In the 1980s, when the Vietnam War left a new wave of refugees, the U.S. had the perfect opportunity to amend the INA with the implementation of the Refugee Act of 1980 (The Act).⁹¹ The Act brought U.S. domestic legislation “into compliance with the *Convention*, thereby incorporating the treaty into domestic law.”⁹²

The Act adopts the Convention’s language for determining who is a refugee, but goes further in recognizing that in some cases, one does not have to cross an international border to be considered a refugee, and a person may be awarded refugee status solely based on past persecution alone, even if a “well-founded fear of persecution” no longer exists.⁹³ Regardless of whether the

⁸⁷ See *Background Note*, *supra* note 49.

⁸⁸ *Id.*

⁸⁹ See *Javaherian*, *supra* note 75. Through the 1967 Refugee Protocol, the United States is bound by the terms of the Convention. *Id.* at 427. For more information on the relationship between 1967 Refugee Protocol and the Convention, see *supra* note 79.

⁹⁰ *Medellin v. Texas*, 552 U.S. 491, 505 (2007).

⁹¹ *Refugee Act of 1980*, NAT’L ARCHIVES FOUND., <https://www.archivesfo undation.org/documents/refugee-act-1980/> [<https://perma.cc/7B59-7ZWJ>] (“In the aftermath of the Vietnam War, the need for a change in American policy concerning refugees became apparent as hundreds of thousands of Vietnamese and Cambodians fled political chaos and physical danger in their homelands.”).

⁹² Jon Bauer, *Multiple Nationality and Refugees*, 47 VAND. J. TRANSNAT’L L. 905, 910 (2014) (emphasis added).

⁹³ 8 U.S.C. § 1101 (a)(42) (“The term ‘refugee’ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of *persecution* or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is *within the country* of such person’s nationality or, in the case of a person having no nationality, *within the country* in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” (emphasis added)).

person has crossed an international border, the Act requires that a refugee's "persecution or well-founded fear of persecution" be based on one of the five protected grounds.⁹⁴ This has come to be known as the "nexus requirement."⁹⁵ This means that demonstrating past persecution alone, for an unenumerated reason, will not suffice. Past persecution must be based on one of the five protected grounds.⁹⁶

Though an alien may meet the definition of refugee, the decision to award an alien asylum is still discretionary.⁹⁷ While an alien may not be granted asylum despite meeting the refugee definition, the INA prohibits the AG from removing "an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of [one of the five protected grounds.]"⁹⁸ This provision is known as withholding of removal.⁹⁹ If an asylum seeker meets the threshold for withholding of removal, it is granted to them.¹⁰⁰ It is not a discretionary

⁹⁴ *Id.*; see Gupta, *supra* note 41, at 17.

⁹⁵ See Gupta, *supra* note 41, at 2–3.

⁹⁶ *Id.* at 17; Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Aboard: United States' Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 75 (2004).

⁹⁷ 8 U.S.C. § 1158 (b)(1)(A) ("[T]he Attorney General *may* grant asylum to an alien who has applied for asylum . . . if the Secretary of Homeland Security or the Attorney General determines that such an alien is a refugee" (emphasis added)); Barry Sautman, *The Meaning of "Well-Founded Fear of Persecution" in United States Asylum Law and in International Law*, 9 FORDHAM INT'L L.J. 483, 489 (1986) ("[A]liens with a 'well-founded fear' of persecution in their home countries are eligible for a discretionary grant of asylum in the United States.").

⁹⁸ 8 U.S.C. § 1231 (b)(3)(A) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."); see Gupta, *supra* note 41, at 17.

⁹⁹ See Churgin, *supra* note 56, at 215.

¹⁰⁰ *Id.* To understand U.S. immigration law, it is important to understand the difference between withholding of removal and asylum. "A person granted asylum is protected from being returned to [their] home country, is eligible to apply for authorization to work in the United States, may apply for a Social Security card, may request permission to travel overseas, and can petition to bring family members to the United States." *The Difference Between Asylum and Withholding of Removal*, AM. IMMIGR. COUNCIL (Oct. 6, 2020), <https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal> [https://perma.cc/66MM-3TK5]. Further, "[a]sylees may also be eligible for certain government programs, such as Medicaid." *Id.* "Asylum is technically a discretionary benefit." *Id.* Those "barred for applying for asylum" are usually able to apply for "withholding of removal." *Id.* Similar to asylum, "a person who is granted withholding of removal is protected from being returned to [their] home country and receives the right to remain in the United States and work legally." *Id.* It is essentially the Immigration Judge ordering a deportation but stating the government cannot carry out the order. This is withholding of removal. The government could still deport that person to a third country if that country decides to open their doors to that person. *Id.* Those "granted withholding of removal may never leave the United States without executing that removal order, cannot petition to bring family members . . . and do[] not gain a path to citizenship." *Id.* Lastly, "[w]ithholding of removal [] does not offer permanent protection or a path to permanent residence." *Id.* "If conditions improve in [the origin country], the government can revoke withholding of removal and again seek the person's deportation." *Id.*

measure.¹⁰¹ Withholding of removal represents the U.S. legislature's attempt to comply with the principle of non-refoulement,¹⁰² departure from which would violate international law.¹⁰³

Understanding the threshold required to meet “well-founded fear” for a refugee,¹⁰⁴ versus “life or freedom would be threatened” for withholding of removal,¹⁰⁵ is important because the STC exception also makes use of the language “life or freedom would [] be threatened.”¹⁰⁶ “Life or freedom [would be] threatened” requires a “clear probability,” meaning “it is more likely than not that the alien would be subject to persecution” if returned to their country of origin,¹⁰⁷ whereas “well-founded fear” only requires a “reasonable possibility” of facing persecution.¹⁰⁸ This is a much easier standard to meet.¹⁰⁹ Under a STC agreement with Mexico and the Northern Triangle countries, many asylum seekers who would have had a much lower burden of proof for asylum eligibility in the United States could have found themselves contesting removal to a foreign country under a much higher standard.¹¹⁰ Even though STC agreements are a widely accepted form of diplomacy used to tackle the world's refugee crisis, if the United States chooses to embrace STC agreements in the future, clear guidelines must be woven into the STC exception in order to prevent disastrous consequences for asylum seekers.¹¹¹

II. THE DISASTROUS IMPACT OF RELYING ON THE “STATUS-QUO” FOR THE STC EXCEPTION

Though STC agreements may be an effective and humane method to evenly distribute asylum claims, the ambiguous language of the STC exception enables the AG to remove asylum seekers to dangerous countries if an STC agreement is in place.¹¹² The UNHCR defines a “safe country” as a country that does not itself produce refugees, or a country

¹⁰¹ See Churgin, *supra* note 56, at 215.

¹⁰² See 8 U.S.C. § 1231 (b)(3)(A).

¹⁰³ See 1951 *Refugee Convention*, *supra* note 74.

¹⁰⁴ 8 U.S.C. § 1101 (a)(42).

¹⁰⁵ 8 U.S.C. § 1231 (b)(3)(A).

¹⁰⁶ 8 U.S.C. § 1158 (a)(2)(A).

¹⁰⁷ See Sautman, *supra* note 97, at 488.

¹⁰⁸ Zachary Slapsys, *The Chinese Dilemma: Practical Solutions to Irresponsible Immigration Reform and the Ensuing Circuit Court Traffic Jam*, 9 N.Y.C. L. REV. 183, 187–88 (2005).

¹⁰⁹ *Id.* at 198 (“[E]ven a 10% chance of an event occurring can constitute a well-founded fear.”).

¹¹⁰ See *supra* notes 104–109 and accompanying text.

¹¹¹ See generally Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

¹¹² See 8 U.S.C. § 1158 (a)(2)(A); see also discussion *supra* Part I.

where “refugees can enjoy asylum without any danger.”¹¹³ The Trump administration signed STC agreements with Guatemala, Honduras, and El Salvador, and aggressively pursued an agreement with Mexico, all of which are arguably dangerous countries.¹¹⁴ This had a detrimental impact for asylum seekers coming to the United States.¹¹⁵ Therefore, clear guidelines must be woven into the STC exception to help the AG determine if a country is in fact safe for an asylum seeker to make their claim. This would prevent future presidential administrations from removing asylum seekers to Mexico, the Northern Triangle Countries, and countries with similar perils.

A. *The Failure of Mexico and the Northern Triangle Countries to Protect Refugees*

Though Mexico does have an asylum system to process refugees (COMAR), the high number of migrants that are arriving in Mexico is overwhelming that system.¹¹⁶ As of November 2019, COMAR had only forty-eight employees, and Mexico does not grant asylum often.¹¹⁷ According to UNHCR, “[t]he abandonment rate of asylum procedures, especially in Southern Mexico is a key protection concern.”¹¹⁸ Many are “faced [with] overcrowded shelters, slim employment prospects, and difficulty finding lawyers, without which their asylum cases are almost surely doomed to fail.”¹¹⁹ With respect to the Triangle Countries, El Salvador has only one asylum officer for the entire country and Guatemala’s agency, the Guatemala Migration Institute (IGM), does not have the ability to process asylum claims in bulk.¹²⁰

¹¹³ See *Background Note, supra* note 49.

¹¹⁴ See Narea, *supra* note 18.

¹¹⁵ *Id.*

¹¹⁶ *Id.*; Susan Gzesh, “Safe Third Country” Agreements With Mexico and Guatemala Would Be Unlawful, JUST SECURITY, (July 15, 2019), <https://www.justsecurity.org/64918/safe-third-country-agreements-with-mexico-and-guatemala-would-be-unlawful/> [<https://perma.cc/WT99-HTN8>].

¹¹⁷ See Narea, *supra* note 18.

¹¹⁸ UNHCR, MEXICO: FACT SHEET 2 (Apr. 2019), <https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf> [<https://perma.cc/GG7B-5MAF>].

¹¹⁹ See Narea, *supra* note 18.

¹²⁰ *Id.*; Gzesh, *supra* note 116 (“UNHCR reports that in 2018 its office in Guatemala provided information to approximately 24,000 persons in transit, principally Hondurans, a number which would completely swamp the IGM were Guatemala be compelled to adjudicate claims. The UNHCR reports that there are fewer than 400 refugees officially recognized in Guatemala, with under 300 who requested asylum in 2018. A vocational training program for refugees, established by UNHCR and the Guatemalan government, provided services to 8 refugees in 2018.”).

“None of [these countries] have anything that you could seriously call a ‘full and fair procedure’ for asylum seekers.”¹²¹ By failing to provide an adequate mechanism for migrants to seek asylum, migrants like Jorge are left in a transient state and are unable to begin the process of starting a life in a new country, nor do they have the resources they need to succeed.¹²² Falling through the cracks, migrants like Jorge are left particularly susceptible to the extremely harsh reality plaguing these supposedly “safe” STCs.¹²³

B. The Impact of Returning Migrants to Mexico and the Northern Triangle Under the STC Agreements

A common sentiment is that Mexico and the Northern Triangle Countries, which are commonly viewed by migrants as transit countries, are as dangerous as their home countries, but the lack of social connections within the transit country makes each migrant’s situation far more dangerous.¹²⁴ In Northern Mexico, the Zeta cartel has been known to target Central American migrants heading to the U.S.¹²⁵ The cartel often kidnaps migrants on buses and kill them if they refuse to work for the cartel.¹²⁶ This led to the 2010 mass murder of seventy-two migrants from Central and South America in a ranch in San Fernando, Mexico, and the 2011 discovery of the remains of 193 migrants from Central America in graves throughout that very same Mexican city.¹²⁷ The gangs MS-13 and Barrio 18 have terrorized scores of people in the Northern Triangle.¹²⁸ Further, due to the COVID-19 pandemic, shelters for migrants in Mexico are either shutting out migrants entirely or limiting the amount

¹²¹ See Narea, *supra* note 18.

¹²² See Acacia Coronado, *Conditions Deteriorating at Makeshift Camp on the Rio Grande Where Thousands Await U.S. Asylum*, TEX. TRIBUNE (Oct. 25, 2019, 11:00 AM), <https://www.texastribune.org/2019/10/25/conditions-deteriorating-migrant-camp-thousands-await-asylum/> [<https://perma.cc/XF54-3Z9Q>].

¹²³ *Id.*

¹²⁴ Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*, UNITED NATIONS UNIV., (May 2, 2016) <https://unu.edu/publications/articles/fleeing-to-mexico-for-safety-the-perilous-journey-for-migrant-women.html> [<https://perma.cc/6Y3W-P8TU>] (quoting an asylum seeker from El Salvador in the United States speaking to UNHCR, “Mexico [is] almost as bad as El Salvador. Why would I go there? That would be no escape. In fact, it could be worse, because I don’t know anyone there.”(alteration in original)).

¹²⁵ *Mexican Police Helped Cartel Massacre 193 Migrants, Documents Show*, ASSOCIATED PRESS (Dec. 22, 2014, 11:08 PM), <https://www.npr.org/2014/12/22/372579429/mexican-police-helped-cartel-massacre-193-migrants-documents-show> [<https://perma.cc/T9Q4-594W>].

¹²⁶ *Id.*

¹²⁷ *Id.*; *Mexico Massacre Survivor Describes Grisly Scene*, CBS NEWS (Aug. 26, 2010, 9:48 AM), <https://www.cbsnews.com/news/mexico-massacre-survivor-describes-grisly-scene/> [<https://perma.cc/73XP-AVNR>].

¹²⁸ Seth Robbins, *3 Crime Factors Driving Northern Triangle Migrants Out*, INSIGHT CRIME (Oct. 30, 2018), <https://www.insightcrime.org/news/analysis/crime-factors-pushing-northern-triangle-migrants-out/> [<https://perma.cc/8S7V-5J6C>].

of migrants they take in, leaving many migrants exposed to the elements and susceptible to gang violence.¹²⁹

For marginalized populations, the social conditions in these countries are particularly violent and perilous. Children like Jorge who make the arduous voyage to the United States by themselves often are easy targets.¹³⁰ To put in perspective how grave the danger is to children in these countries, “Central American children are [ten] times more likely to be murdered than children in the United States.”¹³¹ For women, the violence in these countries is especially dire, as they are murdered in both Guatemala and El Salvador at exceedingly high levels.¹³² To make matters worse, COVID-19 lockdowns greatly increased reports of violence against women.¹³³ The LGBTQ community also faces unprecedented levels of violence in Mexico and the North Triangle Countries.¹³⁴ Gangs often target LGBTQ people because they are easily identifiable and are easy victims since they are often shunned from their family and have nowhere to turn for help.¹³⁵ This violence also can come from the police, due to a strong anti-LGBTQ sentiment in these countries.¹³⁶ Statistics from 2019 show “El Salvador ha[d] the

¹²⁹ Reuters, *As Mexico Closes Migrant Shelters Due to Coronavirus, Those Seeking Refuge Face More Dangers*, NBC NEWS (Jan. 4, 2021, 9:58 AM), <https://www.nbcnews.com/news/latino/mexico-closes-migrant-shelters-due-coronavirus-those-seeking-refuge-face-n1252733> [<https://perma.cc/8MXZ-SXH7>] (“When the main shelter in the northern city of Saltillo, a busy staging post on the road to Texas, shut before Christmas due to a COVID-19 outbreak that killed its founder, dozens of migrants were left to camp on the sidewalk outside. Alarmed by the prospect of gangsters who often prey on migrants in the city, an important transit point for violent drug gangs, they organized their own night patrol.”).

¹³⁰ See Green, *supra* note 7 (noting that children traveling by themselves have greater chances of falling victim, “especially [to] sexual slavery”).

¹³¹ Julio Ernesto Acuna Garcia, *Central American Kids Come to the US Fleeing Record-High Youth Murder Rates at Home*, CONVERSATION (July, 13, 2018, 6:25 AM), <https://theconversation.com/central-american-kids-come-to-the-us-fleeing-record-high-youth-murder-rates-at-home-99132> [<https://perma.cc/AG5B-ZDDZ>].

¹³² Azam Ahmed, *Women Are Fleeing Death at Home. The U.S. Wants to Keep Them Out.*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html> [<https://perma.cc/PF2V-TLM2>] (“[I]n Guatemala, the homicide rate for women is more than three times the global average. In El Salvador, it is nearly six times.”).

¹³³ Christine Murray, *Rising Violence Against Women in Latin America Confirms Fears of Abuses in Lockdowns*, REUTERS (June 9, 2020, 4:12 PM), <https://www.reuters.com/article/us-health-coronavirus-latam-violence-tr/rising-violence-against-women-in-latin-america-confirms-fears-of-abuses-in-lockdowns-idUSKBN23G2X6> [<https://perma.cc/Z2WK-LSHC>] (“[O]nline searches for protection gender-based violence increased 30-fold in El Salvador and Honduras . . . [and] [i]n Mexico, emergency calls reporting attacks on women in Mexico jumped more than [fifty percent].”).

¹³⁴ See Narea, *supra* note 18.

¹³⁵ Philippa H Stewart & Neela Ghoshal, *Interview: LGBT People Flee Violence in El Salvador, Guatemala, Honduras*, HUM. RTS. WATCH (Oct. 7, 2020, 12:01 AM), <https://www.hrw.org/news/2020/10/07/interview-lgbt-people-flee-violence-el-salvador-guatemala-honduras> [<https://perma.cc/278X-WQFV>].

¹³⁶ *Id.* (“The Northern Triangle of Central America has among the highest reported rates of murder against LGBT people in the world . . . One trans woman,

highest homicide rate in the world while Honduras . . . [ranked] fifth, Guatemala . . . [ranked] 16th, and Mexico . . . [ranked] 19th.”¹³⁷ These statistics demonstrate that STC agreements can potentially send migrants back to countries that are as life-threatening as the countries they originally sought to escape.

Even when the government attempts to combat gangs and protect marginalized populations, civilians often become casualties.¹³⁸ In 2014, “Mexican human rights groups . . . filed a complaint with the office of the prosecutor of the International Criminal Court” asking for an investigation of the Mexican military and police force, alleging “‘systematic and widespread’ abuse of thousands of civilians by the army and the police in their fight against organized crime.”¹³⁹ El Salvadoran security forces allegedly resort to “extrajudicial killings” when combatting gangs, and this abuse of power is ongoing.¹⁴⁰ Extortion is a common tactic used against citizens within these countries.¹⁴¹ Further, crimes in Mexico and the Northern Triangle often go unpunished and corruption is rampant.¹⁴² In a

Camila Diaz, was deported from the US in late 2018 and murdered by Salvadoran police in early 2019.”).

¹³⁷ Nicole Narea, *Trump Has Finalized a Controversial Agreement to Deport Asylum Seekers to El Salvador*, VOX (Dec. 16, 2020, 11:30 AM), <https://www.vox.com/2020/12/16/2178099/trump-asylum-seeker-el-salvador-agreement> (“Central America remains a hotspot for gang violence. MS-13 and M-18 . . . [equate to] 85,000 members in the area, are gangs that formed in Los Angeles and were transplanted to Central America after mass deportations of unauthorized immigrants with criminal history in the 1990s.”).

¹³⁸ See Marlise Simons, *Mexican Rights Groups File Suit for ‘Systematic and Widespread’ Abuse by Army and Police*, N.Y. TIMES (Sept. 12, 2014), https://www.nytimes.com/2014/09/13/world/americas/mexican-rights-groups-file-suit-for-systematic-and-widespread-abuse-by-army-and-police.html?_r=1=12 [<https://perma.cc/X8ZP-MYGL>].

¹³⁹ *Id.*

¹⁴⁰ Geoff Thale and Kevin Amaya, *Amid Rising Violence, El Salvador Fails to Address Reports of Extrajudicial Killings*, WOLA (Nov. 3, 2017), <https://www.wola.org/analysis/amid-rising-violence-el-salvador-fails-address-reports-extrajudicial-killings/> [<https://perma.cc/2Q3B-5T43>] (noting that El Salvador “has continued to display a preference for an ‘iron fist’ strategy to combat gang violence.”). “Extrajudicial executions . . . designat[e] the deliberate killing of an individual by a State agent (or with his consent) without a previous judgment affording all judicial guarantees, such as a fair and unbiased procedure.” “*What are Extrajudicial Executions?*,” TRIAL INT’L, <https://trialinternational.org/topics-post/extrajudicial-executions/> [<https://perma.cc/F7SP-H7E5>].

¹⁴¹ See Robbins, *supra* note 128 (“[Extortion] costs Salvadorans \$756 million a year . . . In Honduras . . . locals pay an estimated \$200 million in extortion fees annually. Most of the victims are poor and small businesses.”).

¹⁴² See *id.*; Jorge Valencia, *Crimes Go Unpunished In Mexico Every Day –How Do You Get More People To Care?*, FRONTERAS (Dec. 6, 2019, 5:05 AM), <https://fronterasdesk.org/content/1338436/crimes-go-unpunished-mexico-every-day-how-do-you-get-more-people-carec> [<https://perma.cc/RK72-P9NK>]. Corruption is important to evaluate, even without the apparent connection to asylum seekers because it can be used to evaluate a country as a STC by looking at the country’s practices under the “laws, practices, and human rights record.” *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 8 (Can. Ont.).

2019 survey, 34 percent of people in Mexico paid a bribe so that they could be allotted public resources.¹⁴³

These countries seem to be the antithesis of what a safe country should look like.¹⁴⁴ The question remains how the STC exception can be reimagined to prevent the removal of asylum seekers to these countries, or countries suffering from similar conditions in the future.

III. REDEFINING THE SAFE THIRD COUNTRY EXCEPTION

A. Hungary, Canada, and UNHCR's Notion of a STC

Since the INA does not allow for judicial review, in order to come up with a workable application for the AG to determine if a country is safe, a clear list of guidelines must be implemented.¹⁴⁵ This note advocates for the use of guidelines pulled from a wide range of sources that should be woven into the statute, rather than simply pulling from a single source. These guidelines include a number of factors: (1) looking at a “safe” country’s “laws, practices, and human rights record;”¹⁴⁶ (2) taking into account the UNHCR country reports and guidelines;¹⁴⁷ (3) looking at whether the country recognizes the vulnerability of certain population groups such as minors;¹⁴⁸ (4) determining whether the country’s asylum system is “overburdened;”¹⁴⁹ (5) whether the country would afford the asylum seeker the ability to “enter and remain” there;¹⁵⁰ (6) whether the asylum seeker will be “protected there against refoulement and is treated in accordance with basic human standards;”¹⁵¹ (7) whether the asylum seeker will “be subject there to persecution threats to safety and liberty;”¹⁵² and (8) whether the country provides the asylum seeker with “access to a durable solution.”¹⁵³

¹⁴³ Reuter’s Staff, *Mexicans Say Corruption is Falling, Even as a Third Still Paid Bribes*, REUTERS (Sept. 23, 2019, 5:24 PM), <https://www.reuters.com/article/us-mexico-corruption/mexicans-say-corruption-is-falling-even-as-a-third-still-paid-bribes-idUSKBN1W82KL> [<https://perma.cc/7K9K-RB56>].

¹⁴⁴ See *Background Note*, *supra* note 49.

¹⁴⁵ 8 U.S.C. § 1158 (a)(3).

¹⁴⁶ *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 8 (Can. Ont.).

¹⁴⁷ See *Background Note*, *supra* note 49.

¹⁴⁸ See *United States and Canada Safe Third Country Agreement*, *supra* note 50.

¹⁴⁹ *Kúria* [Curia of Hungary] [On Certain Questions Related To The Application Of The Safe Third Country Concept], Dec. 10, 2012, 2/2012 (XII.10) KMK (Hung.).

¹⁵⁰ See *Background Note*, *supra* note 49.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

To develop these factors, both Canadian and Hungarian law were consulted. Canadian law was selected because the country has developed a wealth of case law on what defines a safe country, owing to a STC agreement the nation signed with the United States.¹⁵⁴ Hungarian law also greatly contributed to constructing these proposed STC guidelines, not only because of Hungary's past surge in immigration but also because of Hungary's hardline stance on immigration under Prime Minister Viktor Orban, leaving the country's courts and the legislature to soften the blow of these policies, likely out of fear of ostracization from the European Union.¹⁵⁵ Additionally, the UNHCR guidelines and country reports serve as an obvious source for the creation of factors for a working statute because of its preeminent expertise in the realm of refugee law, and because the UNHCR provides its own assessment on the current conditions of a country and whether it can be considered a safe country.¹⁵⁶

A great place to start is by looking to Canadian law, where there has been litigation regarding the Canadian government's designation of the United States as a STC.¹⁵⁷ In 2002, the Canadian Parliament's Immigration and Refugee Protection Act (IRPA) became law and allowed for the Governor-in-Council (GIC) to make the determination that a country is "safe."¹⁵⁸ The standard used to

¹⁵⁴ See Craig Damian Smith & Stephanie Hofmann, *Will Canada Suspend Its Safe Third Country Agreement With the United States?*, FOREIGN POL'Y (Nov. 6, 2019, 7:55 PM), <https://foreignpolicy.com/2019/11/06/canada-suspend-safe-third-country-immigration-united-states/> [<https://perma.cc/G8G4-E8R2>] ("Human rights groups originally challenged the Safe Third Country Agreement in 2005 on the grounds that it abrogated the rights of an anonymous asylum-seeker in the United States who feared removal to Colombia, where the person faced persecution The challenge was eventually denied by an appeals court.")

¹⁵⁵ See *Ilias and Ahmed v. Hungary*, 47287/15, Eur. Ct. H.R. (Nov. 21, 2019); Kúria [Curia of Hungary] [On Certain Questions Related To The Application Of The Safe Third Country Concept], Dec. 10, 2012, 2/2012 (XII.10) KMK (Hung.); Orla Barry, *In Orbán's Hungary, Refugees Are Unwelcome—So Are Those Who Try to Help*, WORLD (Feb. 11, 2019, 1:45 PM), <https://www.pri.org/stories/2019-02-11/orban-s-hungary-refugees-are-unwelcome-so-are-those-who-try-help> [<https://perma.cc/RW3H-967R>]; see also *EU Court Censures Hungary Over Migrant Detentions*, BBC (May 14, 2020), <https://www.bbc.com/news/world-europe-52663910> [<https://perma.cc/F9F5-HQKY>].

¹⁵⁶ See United Nations High Comm'n for Refugees (UNHCR), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, at 6, U.N. Doc. HCR/EG/HND/16/03 (July 27, 2016) [hereinafter *International Protection Needs of Asylum-Seekers from Honduras*] ("The contemporary exodus of Hondurans in search of international protection is rooted in the human rights, social, political and economic impact of the increasing reach, power and violence of gangs and other organized criminal groups in Honduras.")

¹⁵⁷ See *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 4–8 (Can. Ont.).

¹⁵⁸ See, e.g., *id.* "Whenever a piece of Canadian legislation, such as the [Canadian] Constitution, mentions the 'Governor in Council' this refers to the Governor General acting by and with the advice of the Queen's Privy Council for Canada. In practice, this means the Governor General acting on advice given by federal Cabinet—the Privy Council's operative branch." *Governor in Council*, CTR. FOR CONST. STUD., <https://www.constitutionalstudies.ca/2019/07/governor-in-council/> [<https://perma.cc/N87M-RZ2R>].

make this determination is “based on [the country’s] laws, practices and human rights record, [and whether the country] complies with Article 33 of the *Refugee Convention* and Article 3 of the *Convention against Torture* [CAT].”¹⁵⁹ The Canadian legislature first and foremost understood “the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted.”¹⁶⁰ This provision can be directly adopted into the revised STC exception as factors that can be used to assess whether the country is safe. IRPA recognizes that a safe country must abide by the international norms of non-refoulement and the prohibition of torture, but it does not stop there, as the IRPA requires government officials to look to a country’s “laws, practices and human rights records.”¹⁶¹ This is absolutely crucial because many countries may be signatories to international treaties, yet fail to adhere to them, including the United States.¹⁶²

In contrast to Canadian law, Hungarian law has a more rigid criteria for STC exceptions. In December 2012, the Supreme Court of Hungary issued an opinion in an attempt to unify the application of the STC designation.¹⁶³ The pertinent part of the decree is that the Hungarian courts should take into account UNHCR country reports and “[t]he fact that the asylum system of a third country is overburdened may render this country incapable to respect the rights of asylum-seekers. Such a third country shall not be regarded as safe for asylum-seekers.”¹⁶⁴ This provision is important to adopt into the revised STC exception because it recognizes the difference between a country merely operating a potentially dysfunctional asylum system, and a country that is actually committed to managing a functioning and efficient asylum system.¹⁶⁵

¹⁵⁹ See *Canadian Council for Refugees*, [2008] F.C.A., para. 8.

¹⁶⁰ Dana R. Green, *Navigating North: How the Canadian Approach to Firm Resettlement Should Guide U.S. Implementation of the Refugee Conventions*, 40 COLUM. HUM. RTS. L. REV. 701, 727 (2009).

¹⁶¹ See *Canadian Council for Refugees*, [2008] F.C.A., para. 8.

¹⁶² See Jessica Schulberg, *The U.S. Is Still Violating the Anti-Torture Treaty It Signed 20 Years Ago*, NEW REPUBLIC (Oct. 21, 2014), <https://newrepublic.com/article/119928/us-violates-un-convention-against-torture-signed-20-years-ago> [<https://perma.cc/SLM6-36HX>].

¹⁶³ Kúria [Curia of Hungary] [On Certain Questions Related To The Application Of The Safe Third Country Concept], Dec. 10, 2012, 2/2012 (XII.10) KMK (Hung.).

¹⁶⁴ *Id.* (“The fact that a certain country ratified the relevant international treaties is per se irrelevant when assessing ‘safety’ of a country, since the application of these treaties in practice also be examined . . . Several circumstances shall be examined and evaluated according to their importance in this respect (for example whether the submission of an asylum claim is subject to any pre-condition, and if yes to what extent it may be impossible to fulfill this obligation in a reasonable time, whether the thorough assessment of an asylum claim is ensured, whether there are sufficient procedural safeguards and guarantees for judicial review, etc.).”).

¹⁶⁵ See *id.*

The Hungarian Asylum Act (HAA) lays out clear guidelines for what constitutes a STC.¹⁶⁶ The HAA states that a STC must abide by nonrefoulement, has a system in place for the asylum seeker to apply for refugee status, and recognizes that certain groups of people warrant “special treatment.”¹⁶⁷ This “special treatment” provision is important to incorporate into the revised STC exception because it recognizes the dignity of vulnerable groups and ensures their protection.¹⁶⁸

Though Hungary seemed to be taking steps toward granting asylum seekers certain avenues of protection against being returned to a country that is not in fact safe, in practice, Hungarian lawmakers have been restricting Hungary’s immigration policy in the midst of Europe’s growing refugee crisis.¹⁶⁹ This includes actions such as creating a border fence with Serbia and shortening time restrictions for challenging asylum denials.¹⁷⁰ Further, Hungarian lawmakers broadened the list of places where asylum seekers can be detained.¹⁷¹ This has allowed Hungary to place asylum seekers in shipping containers while they await a determination on their refugee status.¹⁷² Hungary has also applied the standard of STC to Serbia, a designation that experts often disagree with, and is a country that “is reluctant to readmit third country nationals, [so] most of them linger in detention until finally freed.”¹⁷³ While this note does not advocate for adoption of Hungary’s draconian

¹⁶⁶ Ilias and Ahmed v. Hungary, 47287/15, ¶ 41, Eur. Ct. H.R. (Nov. 21, 2019) (quoting a provision of the Hungarian Asylum Act that a “safe third country” means a country in respect of which the asylum authority is satisfied that the applicant is treated according to the following principles:[] persons deserving special treatment: unaccompanied minors or vulnerable persons—in particular minors, elderly or disabled persons, pregnant women, single parents raising minors and persons who were subjected to torture, rape, or any other grave form of psychological, physical or sexual violence—who have been found, after an individual assessment, to have special needs.”).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* *See generally* Boldizsár Nagy, *Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation*, 17 GERMAN L.J. 1033 (2016) (documenting Hungary’s increasingly restrictive stance on immigration).

¹⁷⁰ *See* Nagy, *supra* note 169, at 1046–47 (“[Hungarian] legislators chose the options least favorable to asylum seekers.”).

¹⁷¹ *Id.* at 1045–46.

¹⁷² Lizzie Dearden, *Hungarian Parliament Approves Law Allowing Asylum Seekers to be Detained*, INDEPENDENT (Mar. 7, 2017), <https://www.independent.co.uk/news/world/europe/hungary-parliament-asylum-seekers-detain-law-approve-refugees-immigration-crisis-arrests-border-serbia-orban-a7615486.html> [<https://perma.cc/ZC45-6YL6>].

¹⁷³ *Id.* at 1066; *id.* at 1063 (“Authoritative commentators on this matter agree that Serbia does not meet the criteria.”); *id.* at 1077 (“Serbia is not a safe third country. Moreover, people returned are not provided ‘with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.’ The return is not in conformity with the applicable Serbia-EU return agreement as, instead of the formalities envisaged in the agreement, it simply forces persons to illegally re-enter Serbia, for which they may be punished there.”).

asylum laws, the country's evaluation of the burden on another nation's immigration system and its emphasis on the protection of vulnerable population groups are factors that can and should be worked into the STC exception of the INA.¹⁷⁴

Finally, the UNHCR's jurisprudence provides a major source of support for the solution this note advocates for. Countries that belong to the Convention and/or Protocol must work with the UNHCR in applying the Convention to the refugee context.¹⁷⁵ "The UNHCR may provide advice and guidelines on the proper interpretation of the [C]onvention's terms," though the UNHCR lacks the ability to enforce these guidelines.¹⁷⁶ This makes it extremely important for some UNHCR guidelines to be worked into the statute so that the UNHCR can be enforced on the domestic level.¹⁷⁷ One set of factors that the UNHCR States should look to when determining if an asylum seeker should be returned to a STC is if the person "can enter and remain [in the STC], is protected there against refoulement and is treated in accordance with basic human standards, will not be subject there to persecution or threats to safety and liberty . . . [and] has access to a durable solution."¹⁷⁸ These are important provisions to include in a revised STC exception because it recognizes that a safe country must have long-term solutions for the asylum seeker.¹⁷⁹ Further, the UNHCR guidelines do not utilize the nexus requirement for persecution, creating a much easier standard for asylum seekers to meet.¹⁸⁰ UNHCR guidelines have played important roles in shaping STC agreements and international court determinations on STCs.¹⁸¹ When the negotiations for the 2002 U.S.-Canada STC agreement were ongoing, the UNHCR provided oversight to ensure asylum seekers were afforded "full and fair procedure to assess their claims."¹⁸²

¹⁷⁴ Ilias and Ahmed v. Hungary, 47287/15, ¶ 41, Eur. Ct. H.R. (Nov. 21, 2019). Kúria [Curia of Hungary] [On Certain Questions Related To The Application Of The Safe Third Country Concept], Dec. 10, 2012, 2/2012 (XII.10) KMK (Hung.).

¹⁷⁵ Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claim a Reason to Allow Pirates to Escape Justice?*, 34 *FORDHAM INT'L L.J.* 236, 258 (2011).

¹⁷⁶ *Id.* (emphasis added).

¹⁷⁷ *Id.*

¹⁷⁸ See *Background Note*, *supra* note 49.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; 8 U.S.C. § 1158 (a)(2)(A).

¹⁸¹ See United States and Canada Safe Third Country Agreement, *supra* note 50; see also Ilias and Ahmed v. Hungary, 47287/15, ¶ 47, Eur. Ct. H.R. (Nov. 21, 2019). It is important to state that though countries may look to UNHCR guidelines in forming STC agreements, as the Trump administration showed, they can be disregarded. See Narea, *supra* note 18. Including UNHCR guidelines as factors in a revised statute will push the AG to strongly consider UNHCR guidelines when designating a country "safe" pursuant to a STC agreement. It can serve as a fail-safe if a presidential administration chooses to disregard UNHCR guidelines completely when signing a STC agreement.

¹⁸² See *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 13 (Can. Ont.). Article 8 of the United States and Canada Safe Third Country

The ECtHR has also recognized the value of UNHCR input in determining whether a country is in fact “safe.”¹⁸³ For instance in *Ilias and Ahmed v. Hungary*, where applicants, who were Bangladesh nationals, contested their removal to Serbia.¹⁸⁴ In determining that Serbia was not a STC, the ECtHR looked at the CPT’s report, which stated, “according to UNHCR, Serbia cannot be considered a safe country of asylum due to the shortcoming in its asylum system, notably its inability to cope with the increasing numbers of asylum applications.”¹⁸⁵ The UNHCR’s recommendation was based upon Serbia’s inability to handle a great number of asylum claims, and because it often fined asylum seekers that were returned for crossing the border illegally and barred them from reapplying for asylum within its borders.¹⁸⁶ The UNCHR also found that Serbia was not able to “provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure” and that Serbia “presently lacks the resources and performance necessary to provide sufficient protection against refoulement.”¹⁸⁷ Thus, international tribunals draw upon the UNHCR’s recommendations, helping to generate precedent that enforces these well-advised standards.

B. Proposed Guidelines

Since there are a multitude of factors drawn from a wide array of sources, an overview of how the reformed statute will look is crucial. In looking at the revised statute, like the original statute, a country is safe for removal if the alien’s life or freedom will “not be threatened on account of” one of the “five protected grounds.”¹⁸⁸ However, the revised statute goes further: In

Agreement states the importance the UNHCR has in reviewing the agreement. United States and Canada Safe Third Country Agreement, *supra* note 50 (“The Parties shall invite the UNHCR . . . to participate in this review. The Parties shall cooperate with the UNHCR . . . in the monitoring of this Agreement and seek input from non-governmental organizations.”).

¹⁸³ See, e.g., *Ilias and Ahmed v. Hungary*, 47287/15, ¶ 47 (“Where Member States apply safe country concepts on a case-by-case basis or designate countries as safe . . . they should take into account . . . relevant UNHCR guidelines.”).

¹⁸⁴ *Id.* ¶ 1.

¹⁸⁵ *Id.* ¶ 36 (quoting the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT)). The CPT visited Hungary and prepared a report for the Hungarian Government on their findings. *Id.* ¶ 65.

¹⁸⁶ *Id.* ¶¶ 40, 65–69.

¹⁸⁷ *Id.* ¶ 40 (“UNHCR received reports in November 2011 and again in February 2012 that migrants transferred from Hungary to Serbia were being put in buses and taken directly to the former Yugoslav Republic of Macedonia . . . There have been other reports that the Serbian police have rounded up irregular migrants in Serbia and were similarly sent back to the former Yugoslav Republic of Macedonia . . . The current system is manifestly not capable of processing the increasing number of asylum-seekers in a manner consistent with international and EU norms.”).

¹⁸⁸ 8 U.S.C. § 1158 (a)(2)(A); Gupta, *supra* note 41, at 17.

determining whether a country is safe, the AG would look at whether the refugee can “enter and remain [in that country],” whether there is protection from refoulement, whether the asylum seeker “is treated in accordance with basic human standards, [the asylum seeker] will not be subject there to persecution threats to safety and liberty . . . [and] has access to a durable solution.”¹⁸⁹ These were inspired by the recommendations made by the UNHCR.¹⁹⁰ Further, the UNHCR country reports must be consulted in making a determination that a country is safe, as the ECtHR and the Hungarian Supreme Court have done.¹⁹¹ The provision from the IRPA in Canada that should be included—“based on its laws, practices and human rights record”—can serve as a potential catchall phrase.¹⁹² In other words, even if a country has an adequate asylum system and the refugee will not face persecution there, the country still may not be considered safe for an asylee’s removal. For example, a country may not be considered safe if it has a long practice of stigmatizing and discriminating against individuals suffering from mental illness. The designated country must also recognize that certain groups, such as unaccompanied minors, the elderly, victims of abuse, pregnant women, and the disabled are in need of special treatment; this language in the reformed statute has been pulled from the Hungarian Asylum Act.¹⁹³ By reforming the STC exception, if an asylum seeker is removed to a third country, it will be to a country that prioritizes human rights and has an infrastructure in place for the asylum seeker to thrive, assuring that the asylum seeker will not be sent to a country that is plagued by the exact same strife as their country of origin.

In defining what is “full and fair procedure,” the UNHCR guidelines and country reports once again must be consulted.¹⁹⁴ Additionally, the STC must have a system in place to grant refugee status to an asylum seeker. Further, if a system is so overburdened with asylum seekers, that country cannot be deemed safe, or be considered able to offer “full and fair procedure[s]” for asylum seekers.¹⁹⁵ This requirement was taken from both the Hungarian

¹⁸⁹ See *Background Note*, *supra* note 49.

¹⁹⁰ See *id.*

¹⁹¹ See *supra* notes 163–187 and accompanying text.

¹⁹² See *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 8 (Can. Ont.).

¹⁹³ *Ilias and Ahmed v. Hungary*, 47287/15, ¶ 41, Eur. Ct. H.R. (Nov. 21, 2019).

¹⁹⁴ 8 U.S.C. § 1158 (a)(2)(A); *Ilias and Ahmed v. Hungary*, 47287/15, ¶¶ 41, 48, 52–53.

¹⁹⁵ 8 U.S.C. § 1158 (a)(2)(A); *Kúria [Curia of Hungary] [On Certain Questions Related To The Application Of The Safe Third Country Concept]*, Dec. 10, 2012, 2/2012 (XII.10) KMK (Hung.).

Asylum Act and the opinion issued by the Supreme Court of Hungary.¹⁹⁶ Ultimately, this would allow the United States to have precise guidelines to recognize what is a “full and fair procedure,” allowing the United States to adapt to surges in migration.¹⁹⁷

While a country has the right to attempt to mitigate the number of migrants applying for asylum and STC agreements are an effective and diplomatic solution to the refugee crisis, the rights of asylum seekers when seeking protection should not be undervalued. What these guidelines do is enable the AG to make a fairer assessment of when a country is safe for an asylum seeker’s removal, and they prevent the AG from abusing their discretion, which the current ambiguously-worded statute permits.¹⁹⁸ These are merely proposed guidelines, and the language of the proposed revisions—such as looking to the country’s human rights record or looking at whether the STC provides a “durable solution”—are still inherently discretionary in nature.¹⁹⁹ What the proposed guidelines are meant to do is to help the AG in making a more accurate assessment of whether a country is safe and not allow them to merely dictate which country is safe and which is not. They serve to provide a more accurate picture of what a STC is in the eyes of the international community.

Implementing these factors into the STC exception would prevent the removal of asylum seekers to Mexico and the Northern Triangle countries by any presidential administration, and would act as a safeguard for any administration looking to pervert the meaning of the STC exception to make it more difficult for people to receive asylum in the United States.²⁰⁰ First, in looking at the UNHCR country reports as a guide, these reports all document in excruciating detail the violence that plagues El Salvador, Honduras, and Guatemala.²⁰¹ In El Salvador, for example, the UNHCR report states that a “five-fold rise in ‘femicides’ (murders of women because of their gender) was reported during the 2000s,

¹⁹⁶ See *supra* notes 163–174 and accompanying text.

¹⁹⁷ See 8 U.S.C. § 1158 (a)(2)(A).

¹⁹⁸ See *id.*

¹⁹⁹ See *Background Note, supra* note 49; *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 8 (Can. Ont.).

²⁰⁰ This section understands that the STC agreements with El Salvador, Guatemala, and Honduras, as well as a potential STC agreement with Mexico, will likely have no consequence under a Biden administration. This section solely uses these countries to demonstrate the effectiveness of the redefined STC exception.

²⁰¹ See generally *International Protection Needs of Asylum-Seekers from Honduras, supra* note 156; United Nations High Comm’n for Refugees (UNHCR), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018); United Nations High Comm’n for Refugees (UNHCR), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 2016) [hereinafter *International Protection Needs of Asylum-Seekers from El Salvador*].

coinciding with the spread of gangs.”²⁰² If the AG wants to designate the aforementioned countries as safe pursuant to the STC agreements, he or she would have a hard time justifying that these countries are safe for asylum seekers if the current UNHCR reports clearly state the opposite.

Another factor to look at is whether the STC discriminates against members of vulnerable groups. In applying this factor, returning asylum seekers to these alleged STCs is not possible. In Guatemala, for example, it is few and far between for children that have disabilities to be enrolled in schools.²⁰³ Likewise, for adults that have disabilities, the statistics are equally grim, with only 2 percent participating in the workforce.²⁰⁴ Disabled women in Guatemala potentially face forced sterilization, and children with disabilities can often wind up institutionalized in conditions that do not give justice to the word appalling.²⁰⁵ In Honduras and El Salvador, it is illegal for women to obtain abortions, including in extreme circumstances such as pregnancy from rape, or when the pregnancy threatens the mother’s life.²⁰⁶ This puts pregnant women in an extremely unsafe situation.²⁰⁷ These considerations can also prevent removal under the catchall provision mentioned above, since it would call into question the country’s “laws, practices, and human rights record.”²⁰⁸ The extrajudicial killings and government corruption that has besieged these countries would also fall into the assessment under the catchall.²⁰⁹

In applying the recommended UNHCR guidelines, it is clear Mexico and the Northern Triangle countries cannot pass muster.²¹⁰ Migrants, both adults and children, are often singled

²⁰² See *International Protection Needs of Asylum-Seekers from El Salvador*, *supra* note 201, at 8.

²⁰³ Natalie Duffy, *Being Disabled in Guatemala and the Story of Paula Garcia*, 4 TAC J. 1, 1 (2011).

²⁰⁴ *Id.*

²⁰⁵ *Committee on the Rights of Persons and Disabilities Considers Initial Report of Guatemala*, UNITED NATIONS HUM. RTS OFF. HIGH COMMISSIONER, (Aug. 23, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20406&LangID=E> [<https://perma.cc/NL42-D7TA>] (“[C]hildren with disabilities were kept in cage beds. Over 900 abandoned children with disabilities lived in deplorable conditions and without any care in houses for abandoned children.”).

²⁰⁶ Amy Braunschweiger & Margaret Wurth, *Life or Death Choices for Women Living Under Honduras’ Abortion Ban*, HUM. RTS. WATCH (June 6, 2019, 6:00 AM), <https://www.hrw.org/news/2019/06/06/life-or-death-choices-women-living-under-honduras-abortion-ban#> [<https://perma.cc/END2-R5QR>].

²⁰⁷ *Id.*

²⁰⁸ *Her Majesty the Queen v. Canadian Council for Refugees*, [2008] F.C.A. 229 para. 8 (Can. Ont.).

²⁰⁹ See discussion *supra* Sections II.A–B.

²¹⁰ See *Background Note*, *supra* note 49. The UNHCR guidelines include the “protection against refoulement,” that asylum seekers are “treated in accordance with basic

out because of their perceived vulnerability and easiness to exploit, highlighting that these countries have failed to protect asylum seekers from threats to their safety and liberty.²¹¹ In dealing with Mexico and the Northern Triangle nations, there is always a risk of chain refoulement.²¹² According to Amnesty International, in Mexico, “75% of [] people detained by [the National Institute of Migration] were not informed of their right to seek asylum.”²¹³ Many have been sent back to their home country without the hearing they have a right to, and in some circumstances, the “refoulement” has led to death.²¹⁴ This also goes to the proposed guidelines that would mandate an asylum seeker receive a “full and fair procedure,” in addition to the fact that these countries are so overburdened that procedural safeguards are falling by the wayside.²¹⁵ These countries do not have the proper systems in place to absorb asylum seekers and offer them a “full and fair procedure,” and these systems will continue to be tested as more asylum seekers are sent to these countries under STC agreements.²¹⁶

The treatment of migrants in Guatemala does not meet “basic human standards,” a factor which has been pulled from the UNHCR guidelines.²¹⁷ In Mexico, many migrants lie in wait near the U.S. border.²¹⁸ They do so in refugee camps, where asylum seeker’s tents are made from “trash bags and held together with sticks.”²¹⁹ It is often the case that the food supply is quickly depleted

human standards,” that “[they] will not be subject there to persecution or threats to safety and liberty,” and that they will be able to “enter and remain [in that country].” *Id.*

²¹¹ See discussion *supra* Section II.B.

²¹² See *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum*, AMNESTY INT’L (Jan. 23, 2018), <https://www.amnestyusa.org/reports/overlooked-under-protected-mexicos-deadly-refoulement-of-central-americans-seeking-asylum/> [<https://perma.cc/2XWM-74XW>] [hereinafter *Overlooked, Under-Protected*]. Chain refoulement is “when one country returns an asylum-seeker to an allegedly ‘safe’ third country, which then returns the asylum-seeker to an unsafe country.” Susan Saliba, *Non-Refoulement, Push-Backs and the EU Response to Irregular Migration*, EUROPEAN PARLIAMENTARY RES. SERV. (May 13, 2015), <https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/> [<https://perma.cc/6AM4-HAP3>].

²¹³ See *Overlooked, Under-Protected*, *supra* note 212.

²¹⁴ *Id.*

²¹⁵ 8 U.S.C. § 1158 (a)(2)(A); see discussion *supra* Section II.A.

²¹⁶ 8 U.S.C. § 1158 (a)(2)(A); see discussion *supra* Section II.A.

²¹⁷ See *Background Note*, *supra* note 49; see *Deportation with a Layover*, HUM. RTS. WATCH (May 19, 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative#> [<https://perma.cc/LWS2-DHCK>] (noting that asylum seekers transferred to Guatemala under the STC agreement stated “that their registration and processing at the Guatemalan airport was inadequate, lacking in both humanitarian reception care and access to information. Transferees, including small children, waited hours on the tarmac with no food, water, or adequate medical attention”).

²¹⁸ See Coronado, *supra* note 122.

²¹⁹ *Id.*

and water becomes scarce, and the bathrooms and showers cannot adapt to all the migrants these camps are receiving.²²⁰

When putting the redefined STC exception to the test, it is undeniable that Mexico and the Northern Triangle Countries fail to meet any of the standards set by the proposed guidelines. This is important because with the original STC provision, a presidential administration could use the “full and fair procedure” language to defend an asylum seeker’s removal on the grounds that there are technically infrastructures in place to process asylum claims, ignoring the reality that these systems are not well-funded and are overwhelmed.²²¹ Further, under the original provision, an asylum seeker can be removed to a designated safe country if their life or freedom would not be threatened on account of one of the five protected grounds.²²² This is a very difficult standard to meet for most asylum seekers from the region, because even if an asylum seeker can demonstrate persecution from a gang, for example, it is unlikely they would be able to tie that persecution to one of the five protected grounds.²²³ This disregards the fact that these so-called STCs are plagued by the same conditions refugees sought to escape. The revised STC exception takes this into account and prevents refugees from returning to the same conditions they previously escaped.

IV. WHY OTHER SOLUTIONS ARE DOOMED TO FAIL

The solution outlined above is one of the multiple ways of protecting refugees and reforming the STC exception. One popular solution is incorporating Article III of the European Convention on Human Rights (ECHR) into the INA.²²⁴ Another is to prohibit the removal of asylum seekers to countries that do not abide by nonrefoulement and the Convention Against Torture (CAT). While both of these solutions have their merits, ultimately the solution above is superior because it allows for the AG to delve beyond the laws that a country claims to abide by, and look at the country’s actual practices. Further, it removes any ambiguity by providing clearly proscribed guidelines on what a STC should look like.

²²⁰ *Id.*

²²¹ 8 U.S.C. § 1158 (a)(2)(A); *see* Diaz & Schrank, *supra* note 37.

²²² 8 U.S.C. § 1158 (a)(2)(A).

²²³ *See* Gupta, *supra* note 41, at 20.

²²⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

A. *Adoption of Article III of the European Convention on Human Rights*

Article III of the ECHR states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”²²⁵ Countries that abide by the ECHR are not only prohibited from engaging in this kind of conduct but are also prohibited from knowingly sending someone to a country that would engage in conduct prohibited by Article III.²²⁶ Article III has often been invoked to prevent the removal of an asylum seeker from a member state to a country that would engage in “inhuman or degrading treatment.”²²⁷ The European Court of Human Rights (ECtHR) is tasked with interpreting the ECHR.²²⁸ Therefore, a great deal of case law in the ECtHR has been dedicated to interpreting what is “inhuman or degrading treatment.”²²⁹

The reasons that incorporation of Article III into the INA would not make any headway in ensuring asylum seeker safety are threefold. First, using the ECtHR as persuasive authority is presumably not what the U.S. legislature had in mind.²³⁰ Second, the ECtHR has consistently said that “to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity.”²³¹ The ECtHR has never actually articulated how to determine what is the threshold minimum level of severity, and decisions are often made on a case-by-case basis.²³² Lastly, Congress intended that the AG’s decision to deny asylum be free from judicial review, so complying with Article III would be impossible.²³³ Ultimately, the adoption of Article III would only perpetuate the ambiguous language of the STC provision that allows it to be exploited in the first place and could leave the explanation of a provision of a major U.S. statute in the hands of European case law.

²²⁵ See *id.* art. 3.

²²⁶ See *e.g.*, *Soering v. United Kingdom*, 14038/88, ¶¶ 121, 126–28, Eur. Ct. H.R. (July 7, 1989) (refusing to permit the United Kingdom to send applicant to the United States if he were to be placed on death row, which according to the court, constituted “inhuman and degrading treatment”).

²²⁷ See, *e.g.*, *M.S.S. v. Belgium and Greece*, 30696/09, ¶ 365, Eur. Ct. H.R. (Jan. 21, 2011) deciding if Afghani applicant can be removed from Belgium to Greece, where applicant claimed he would face “inhuman and degrading treatment”).

²²⁸ Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20, 49 (2004).

²²⁹ See, *e.g.*, *N. v. Sweden*, 23505/09, ¶¶ 47–58, Eur. Ct. H.R. (July 20, 2010) (discussing if removing Afghani applicant from Sweden back to Afghanistan would constitute “inhuman and degrading treatment”).

²³⁰ See generally 8 U.S.C. § 1158.

²³¹ See *M.S.S. v. Belgium and Greece*, 30696/09, ¶ 219.

²³² See *id.*

²³³ See 8 U.S.C. § 1158(a)(3).

B. Prohibiting Removal of Asylum Seekers to Countries that Do Not Abide by Nonrefoulement and the Convention Against Torture

CAT is another treaty promulgated by the U.N. that is binding on the United States. Article 3 states that “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²³⁴ Prohibiting removal of asylum seekers to countries that do not abide by the principle of *nonrefoulement* under Article 33 of the Convention and CAT will not protect asylum seekers from being removed to Mexico and the Northern Triangle Countries. This is because Mexico and the Northern Triangle Countries are all parties to these international treaties.²³⁵ Therefore, a more comprehensive protection must be implemented to protect asylum seekers.

CONCLUSION

Major global shifts such as violence, war, regime changes, climate change, poverty increase, and environmental disasters will continue to perpetuate the refugee crisis. As of mid-January 2021, thousands of migrants from Honduras had pushed toward the U.S. Border.²³⁶ The catalyst for this movement of people has been food scarcity, drought, a suffering economy, and two hurricanes that devastated the country.²³⁷ The Biden administration has been so concerned that the border will not be able to handle the influx that only a few days before taking office, the Biden administration issued a message for the migrants—“[d]on’t come now.”²³⁸ Situations like this will not be going away anytime soon and the United States must adapt to the refugee crisis and the mass migration that comes with it. The United States has the right to determine who may enter the country and who is allowed to stay, and STC agreements are effective diplomatic tools to minimize

²³⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

²³⁵ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-9&chapter=4&clang=en [<https://perma.cc/N27R-CCDG>]; UNITED NATIONS HIGH COMM’R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 1–4.

²³⁶ See Ainsley, *supra* note 26.

²³⁷ *Id.*

²³⁸ *Id.* (“A senior Biden transition team official said the perception that the Biden administration will be able to allow all arriving asylum seekers to enter the [United States] to make their claim on day one is false. “The situation at the border isn’t going to be transformed overnight.”).

asylum claims. However, as the STC exception currently stands, there are no clear guidelines to enable the AG to determine if a country is in fact “safe.”²³⁹ By adopting the proposed guidelines to be woven into the statute, it enables the AG to make a more guided determination when deciding if a country is safe for the removal of an asylum seeker. This would have the effect of preventing the removal of asylum seekers to Mexico and Northern Triangle Countries, and any other potentially dangerous countries this administration or future administrations reach agreements with. Asylum seekers like Jorge set out to the United States in search of a better life. While the United States has the right to control its borders through STC agreements, if the United States truly wants to be a country of humane immigration policy, it must ensure that designated STCs have the infrastructure in place for asylum seekers to thrive. We owe that to asylum seekers like Jorge.

Daniel E. Rabbani[†]

²³⁹ 8 U.S.C. § 1158 (a)(2)(A).

[†] University at Albany, SUNY, May 2015; Juris Doctor, Brooklyn Law School, 2021. Thank you to my parents for giving me a lifelong love of learning. A special thank you to my grandmother for instilling in me a strong sense of confidence. Thank you to my brother for creating a healthy dose of sibling rivalry. Lastly, thank you to this great country, that has given me all the opportunities I could ever ask for, but still has a long way to go to live up to its ideals.