

## **MATTER OF A-B-: A DECISION THAT ABSOLVES THE UNITED STATES OF ITS ROLE IN CREATING AND PROMOTING VIOLENCE IN EL SALVADOR**

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### I. INTRODUCTION

In June 2018, then-Attorney General Jefferson Sessions (hereinafter “AG”) released *Matter of A-B-*, a precedential opinion that has a substantial effect on asylum cases of people fleeing harm from non-state actors, particularly victims of domestic and gang violence.<sup>1</sup> The AG employed an infrequently used “refer-and-review” provision of the Immigration and Nationality Act (hereinafter “INA”) that allowed him to certify immigration cases from the highest administrative tribunal to himself for review.<sup>2</sup> After doing so with *A-B-*, the AG reversed the Immigration Board of Appeals’ (hereinafter “Board” or “BIA”) decision and replaced it with his own, which is binding on the BIA and immigration courts.<sup>3</sup> The opinion narrows the path available for victims fleeing domestic and gang violence to seek asylum in the United States by placing a high level of doubt on whether they can meet the statutory requirements.<sup>4</sup> *A-B-* focuses on “private violence” and to what extent people fleeing this type of cruelty, particularly domestic and gang violence, can take refuge in the United States.<sup>5</sup>

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<sup>1</sup> *Matter of A-B-*, 27 I. & N. Dec. 316, 337 (A.G. 2018).

<sup>2</sup> See 8 C.F.R. § 1003.1(h)(1)(i).

<sup>3</sup> See 8 U.S.C. § 1103(g)(2) (2018) (“The attorney general shall . . . review such administrative determinations in immigration proceedings.”); 8 C.F.R. § 1003.1(d)(1)(i) (“The Board shall be governed . . . by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).”).

<sup>4</sup> See *Matter of A-B-*, 27 I. & N. Dec at 332–40.

<sup>5</sup> *Id.* at 317 (“Specifically, I sought briefing on whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”).

The AG engages in this legal analysis without recognizing the United States' influence in forming and sponsoring this type of violence in El Salvador. Viewed out of that context, the AG is quick to state that victims of private violence are generally unable to satisfy the statutory requirements.<sup>6</sup>

This Comment posits that the United States has a long, extensive history of interfering with and promoting violence in El Salvador. Viewed through this lens, *Matter of A-B-* must be seen as another decision that fails to account for the United States' role in El Salvador's violent past and present. The second section of this Comment will navigate through the United States' extensive intervention during El Salvador's Civil War as well as its response to Salvadoran asylum-seekers at that time. The third section will delve into U.S. foreign policies in El Salvador after the Civil War. The fourth section will analyze *Matter of A-B-*. In that section, this Comment will also compare *A-B-* and the nature of the opinion with asylum policies towards Salvadorans during the Civil War. The last section will propose several solutions the United States can adopt to address the crisis it has created.

## II. UNITED STATES FOREIGN AND ASYLUM POLICIES TOWARD EL SALVADOR DURING THE SALVADORAN CIVIL WAR

This Section will focus on the United States' intervention during the Civil War. Before exploring that time, it is important to understand the lead-up to the Civil War, which, unsurprisingly, also involved much participation from the United States.

### A. *Why did the Salvadoran Civil War Happen?*

The divisions and inequalities regarding human rights and living standards in El Salvador began with the Spanish conquest, which placed all the land in El Salvador with people of European descent and gave next to nothing to *mestizos* or indigenous people.<sup>7</sup> The land-owning class continued its power through military dictatorships.<sup>8</sup> Maximiliano Hernández Martínez became the leader of El Salvador through a *coup d'état* in 1931.<sup>9</sup> Hernández Martínez's reign proved bloody immediately after it was established: he quashed and instilled fear in the Salvadoran people during the massacre

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<sup>6</sup> *Id.* at 320.

<sup>7</sup> See *History of El Salvador*, TEACHING CENTL. AM., <https://www.teachingcentral.org/history-of-el-salvador> (last visited Apr. 20, 2019).

<sup>8</sup> See *id.*

<sup>9</sup> Stewart W. Fisher, *Human Rights in El Salvador and U.S. Foreign Policy*, 4 HUM. RTS. Q. 1, 4 (1982).

known as *La Matanza*.<sup>10</sup> In 1932, El Salvador's government refused to seat elected communists in government.<sup>11</sup> The government's refusal inspired a peasant uprising, led by Agustín Farabundo Martí, which prompted a swift and brutal response from Hernández Martínez's regime that killed tens of thousands, mostly indigenous Nahuat, of people over the course of several weeks.<sup>12</sup> The animosity between the military dictators and the peasant class of the Salvadoran government did not subside after *La Matanza* in 1932. Approximately 30,000 Salvadorans were killed.<sup>13</sup> Although the United States initially opposed his regime because of the 1923 Washington Treaties,<sup>14</sup> the United States later recognized his government in 1934, about two years after *La Matanza*.<sup>15</sup> Since the military takeover of Maximiliano Hernández Martínez, the "military continued to exercise almost uninterrupted control in Salvadoran politics," and the United States continued to provide military and economic aid from the 1940s through the Military Assistance Program and then increased the military training through the Public Safety Program.<sup>16</sup>

The military government of El Salvador maintained its power from December 1931 through the Civil War beginning in 1980 using sheer force and political dishonesty,<sup>17</sup> and the presence of the United States "was not only inattentive to the need for social reform . . . but also was a major obstacle to such reform."<sup>18</sup> In the 1960's, the United States began fearing Communist uprising in the Americas, so, beginning with President Kennedy, it encouraged Latin American countries to pass reforms to maintain the peace but, like the presidential administrations before it, maintained a direct line of military supply to El Salvador.<sup>19</sup> It was important for the United States to maintain a stronghold over the Salvadoran government in case there were Communist uprisings or any other threats to the region that could negatively

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<sup>10</sup> See *id.* at 5.

<sup>11</sup> See *id.*

<sup>12</sup> RM DeLugan, *Commemorating from the Margins of the Nation: El Salvador 1932, Indigeneity, and Transnational Belonging*, 86 ANTHROPOLOGICAL Q. 965, 966 (2013).

<sup>13</sup> Carl W. Levander, *En El Nombre De Dios—The Sanctuary Movement: Development and Potential for First Amendment Protection*, 89 W. VA. L. REV. 191, 193 (1986).

<sup>14</sup> Kenneth J. Grieb, *The United States and the Rise of General Maximiliano Hernandez Martinez*, 3 J. LATIN AM. STUD. 151, 151 (1971), <http://www.jstor.org/stable/156558> (explaining that the treaty was signed by several Central American countries agreeing to not recognize leaders or regimes that were brought into existence through violence or a *coup d'état* in the region and that the United States would base its recognition of the governments on this principle).

<sup>15</sup> See *id.* at 169–70.

<sup>16</sup> Levander, *supra* note 13, at 193.

<sup>17</sup> Fisher, *supra* note 9, at 4.

<sup>18</sup> Fisher, *supra* note 9, at 26 (citation omitted).

<sup>19</sup> Fisher, *supra* note 9, at 26.

impact United States' interests. During the Nixon and Ford administrations, the United States' encouragement of social reform was largely wishful thinking. Henry Kissinger, who was mostly in charge of foreign policy during the Nixon and Ford administrations, consistently found no evidence of human rights violations in El Salvador.<sup>20</sup> The United States ambassador to El Salvador during the Ford administration, Ignacio Lozano, stated "he had received little to no help in implementing human rights initiatives."<sup>21</sup> Throughout his presidency, President Carter attempted to place human rights at the forefront of the United States' policy in El Salvador, but, simultaneously, his administration fought to stop social reform before El Salvador became another socialist country in Latin America. The United States began to implement policies and laws that could force El Salvador to tackle its human rights abuses in the country.<sup>22</sup> El Salvador quickly rejected military aid from the United States, following an example set by several other countries that would be impacted by these laws.<sup>23</sup> The United States, however, did not yield.<sup>24</sup> Shortly thereafter, the repressive government of El Salvador began to take steps to reduce the human rights violations occurring in the country, but those measures only lasted until the United States approved a bank loan.<sup>25</sup> In the last year of Carter's administration, the United States abandoned its façade that human rights were at the forefront of its foreign policy in El Salvador and, in the process, turned its back on a country that was on the brink of a brutal Civil War. Carter's administration showed that the United States valued stopping the threat of communism over human rights.<sup>26</sup>

Domestically, El Salvador was a ticking time bomb. Throughout the mid-twentieth century, left-wing guerrillas and the military-controlled government continued carrying out death squads to intimidate the other side.<sup>27</sup> As the clashes between the two groups intensified, violence was increasingly aimed at civilians.<sup>28</sup> Salvadoran rebels launched a final

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<sup>20</sup> *Id.*

<sup>21</sup> Fisher, *supra* note 9, at 27.

<sup>22</sup> Two sections of the Foreign Assistance Act of 1961: section 502B, which would prohibit military aid to governments that consistently indulge in patterns of gross violations of international human rights, and section 116, which would prohibit economic aid to governments guilty of repeated human rights violations; and several 1977 amendments to the International Financial Act forcing US lending institutions to vote against loans provided to repressive governments.

<sup>23</sup> Fisher, *supra* note 9, at 28.

<sup>24</sup> *Id.*

<sup>25</sup> Fisher, *supra* note 9, at 28–29.

<sup>26</sup> Fisher, *supra* note 9, at 33.

<sup>27</sup> *El Salvador*, CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/where-we-work/el-salvador/> (last visited Nov. 3, 2018).

<sup>28</sup> Levander, *supra* note 13, at 194.

offensive to topple the US-supported forces days before Reagan's administration.<sup>29</sup> The Carter administration began delivering deadly aid to El Salvador in early 1981 to combat the guerrilla's final offensive.<sup>30</sup>

B. *Foreign Policy During the Salvadoran Civil War (1979–1992)*

Reagan viewed the insurgency and uprising in El Salvador as “the place to draw the line in the sand against communism.”<sup>31</sup> During his presidency, the United States held firm that El Salvador should stand as a barrier to communist expansion in Latin America<sup>32</sup> since it viewed the insurgency in El Salvador as part of a larger global network to expand communism.<sup>33</sup> The United States, and President Reagan directly, believed the country's problems could be solved only through military intervention, completely disregarding the basis and background of the rebellion. Under Reagan, the United States supplied massive amounts of money to the Salvadoran government to terminate the communist threat in the Americas. Of the total military aid received by El Salvador from the United States during the 1980s, roughly sixty percent was financed through the president's discretionary funds, not through congressionally-approved aid.<sup>34</sup> Roughly six billion dollars in aid went “to defeat a popular-backed insurgency and establish a moderate democracy” in Latin America during the war.<sup>35</sup> The United States armed and trained Salvadoran soldiers, some on United States soil.<sup>36</sup>

Both the Salvadoran and United States governments, throughout the war, claimed that most of the human rights abuses were being perpetrated by the guerrillas, but, although guerrillas were heavily perpetrators of violence towards government officials and their families, the rebels did not kill with impunity like the Salvadoran government.<sup>37</sup> Evidence existed that military

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<sup>29</sup> Brian D'Haeseleer, *'Drawing the line' in El Salvador: Washington Confronts Insurgency in El Salvador, 1979–92*, 18 COLD WAR HIST. 131, 131 (2018).

<sup>30</sup> Levander, *supra* note 13, at 193.

<sup>31</sup> Raymond Bonner, *America's Role in El Salvador's Deterioration*, THE ATLANTIC (Jan. 20, 2018), <https://www.theatlantic.com/international/archive/2018/01/trump-and-el-salvador/550955/>.

<sup>32</sup> D'Haeseleer, *supra* note 29, at 143.

<sup>33</sup> Norma Roumie, *Gangs and the Culture of Violence in El Salvador (What role did the US play?)*, 5 THE GREAT LAKES J. OF UNDERGRADUATE HIST. 24, 30 (2017).

<sup>34</sup> Cara E. McKinney, *Twelve Years a Terror: U.S. Impact in the 12-Year Civil War in El Salvador*, 2 INT'L RESEARCHSCAPE J. Art. 5 (2015).

<sup>35</sup> D'Haeseleer, *supra* note 29, at 131. Some estimates put the total amount at \$4.5 billion. *See id.*

<sup>36</sup> Roumie, *supra* note 33, at 30; McKinney, *supra* note 34.

<sup>37</sup> Christine Caldera, *The State of El Salvador: Human Rights and Violence in the Post War Era* (2015) (unpublished A.B. thesis, University of Dayton) (on file with the University of Dayton e-Commons multimedia archives). (The Salvadoran government utilized “death squads to carry out grave human rights abuses . . . against innocent individuals for denouncing

aid was ending up in the hands of corrupt members of the Salvadoran military, who participated in terror tactics, yet the United States did not stop military funding.<sup>38</sup> The United Nations Truth Commission Report confirmed “at least 85% of human rights atrocities committed during the war are attributable to the Salvadoran military and its security forces.”<sup>39</sup> From 1980 to 1992, over 70,000 people died in the Civil War,<sup>40</sup> over 500,000 sought asylum in other countries, and tens of thousands were wounded or disappeared.<sup>41</sup>

### 1. The Executive’s Response to Salvadoran Refugees and Asylum Seekers During the War

Not only were we supporting these human rights abusers in El Salvador, then we were in a way perpetuating a further terror on that same population in the United States by depriving them of their rights under the law—and trying to send them back to the very human rights violators that the United States government was supporting. And so that whole systematic violation of the law and of human rights was just so profoundly offensive.<sup>42</sup>

#### i. The Carter and Reagan Administrations’ Hard-Pressed Line Against Salvadorans Seeking Asylum

President Carter signed the Refugee Act of 1980 (hereinafter “Refugee Act”) on March 17, 1980.<sup>43</sup> The Refugee Act adopted the definition of a “refugee” from the 1967 Convention and Protocol Relating to the Status of Refugees:

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

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the government or suspicion of aligning with the left. Members of death squads in El Salvador were members of the military . . . In retaliation, [guerrillas] perpetuated violence against the government and army in order to protect innocent rural community members.”).

<sup>38</sup> Roumie, *supra* note 33, at 30.

<sup>39</sup> D’Haeseleer, *supra* note 29, at 140 (quoting Comm. on the Truth for El Salvador, *From Madness to Hope: the 12-year war in El Salvador, Report of the Commission on the Truth for El Salvador*, U.N. Doc. S/25500 (1993)).

<sup>40</sup> McKinney, *supra* note 34.

<sup>41</sup> Joaquín M. Chávez, *An Anatomy of Violence in El Salvador*, NACLA (Sept. 25, 2007), <https://nacla.org/article/anatomy-violence-el-salvador>.

<sup>42</sup> SUSAN BIBLER COUTIN, *NATIONS OF EMIGRANTS: SHIFTING BOUNDARIES OF CITIZENSHIP IN EL SALVADOR AND THE UNITED STATES* 51 (2007).

<sup>43</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

group, or political opinion.<sup>44</sup>

The Refugee Act requires an individualized, case-by-case analysis of all asylum claims, which differs from pre-Act United States immigration law. Before 1980, federal law was mostly concerned with protecting those individuals fleeing communist governments.<sup>45</sup> In the Refugee Relief Act of 1953, Congress specified that “refugees must come from communist or communist-dominated countries.”<sup>46</sup> The United States viewed refugee policy as a means to adopt foreign policy.<sup>47</sup> After signing the 1967 Protocol, however, the United States was faced with the fact that the Protocol’s definition of “refugee” differed from its domestic definition.<sup>48</sup> In 1978, Congress endeavored for United States law to be in accordance with the 1967 Protocol, resulting in the Refugee Act.<sup>49</sup> The Refugee Act was also enacted to end the anti-communist bias in adjudicating asylum claims.<sup>50</sup> The Refugee Act eliminates nationality, alone, as a qualification for refugee status.<sup>51</sup> President Carter hailed the Act as “a new admissions policy that will permit fair and equitable treatment of refugees in the United States, regardless of their country of origin.”<sup>52</sup> The Refugee Act was signed and implemented as the violence in El Salvador rapidly increased.

One of the biggest challenges Central Americans faced while seeking asylum in the 1980s was the requirement to establish that the violence they had experienced in their home land constituted persecution.<sup>53</sup> The Reagan Administration argued Salvadorans were “economic migrants”—people leaving El Salvador for personal gain, not political safe-haven.<sup>54</sup> These economic migrants, it was argued, were “beyond the legal bounds for federal

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<sup>44</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42).

<sup>45</sup> Kenneth D. Brill, *The Endless Debate: Refugees Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117, 122 (1983) (“Refugee policy was an ideological weapon in the Communist-Free World competition.”).

<sup>46</sup> *Id.*; Refugee Relief Act of 1953, Pub. L. No. 83-203 § 2(a)-(c), 67 Stat. 174 (expired 1956).

<sup>47</sup> Brill, *supra* note 45, at 123.

<sup>48</sup> Brill, *supra* note 45, at 124.

<sup>49</sup> *Id.*

<sup>50</sup> Deborah Anker, *U.S. Immigration and Asylum Policy: A Brief Historical Perspective*, 13 IN DEF. OF THE ALIEN 74, 74 (1990).

<sup>51</sup> Stephen Macekura, “*For Fear of Persecution*”: *Displaced Salvadorans and U.S. Refugee Policy in the 1980s*, 23 J. POL’Y HIST. 357, 358 (2011). The Refugee Act still provides that someone can base an asylum claim on persecution on account of nationality. The difference is that a person must now show there *is* persecution or a well-founded fear of persecution because of that nationality.

<sup>52</sup> Statement on Signing S. 643 Into Law, 1 PUB. PAPERS 503 (Mar. 18, 1980).

<sup>53</sup> Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569, 574 (2011).

<sup>54</sup> Macekura, *supra* note 51, at 358.

protection”<sup>55</sup> because they did not have a viable fear of persecution in their native country. Economic migrants were ineligible for special treatment under United States immigration law.<sup>56</sup> This classification as “economic immigrants” stemmed from the fact that the Reagan Administration supported the Salvadoran government.<sup>57</sup> As discussed earlier, the Reagan Administration maintained its stance that the rebels, not the government of El Salvador, were responsible for human rights violations—a position that would be undermined if the United States accepted refugees and asylum seekers.<sup>58</sup> The legal consequences of the Refugee Act allowed foreign policy concerns to dictate an exclusionary refugee policy.<sup>59</sup>

The Refugee Act’s goal to end anti-communist bias fell short, which is particularly seen in its adjudication of asylum claims from Central America. About “90 percent of the refugee admissions from abroad have been from communist or communist-dominated countries” and “Central Americans . . . [were] ineligible to apply for refugee status outside the United States.”<sup>60</sup> Additionally, between July 1983 and September 1989, the approval rate for asylum applications for people from El Salvador was about two percent.<sup>61</sup> The approval rates for people from the U.S.S.R., Romania, and Iran were 72.6 percent, 70.3 percent, and 61.5 percent, respectively.<sup>62</sup>

Another way to receive asylum was through Extended Voluntary Departure (hereinafter “EVD”),<sup>63</sup> which President Carter first denied in 1980. Instead, the Carter Administration deported 12,000 Salvadorans back to El Salvador in 1980 alone.<sup>64</sup> In 1981, Senator Kennedy implored the State Department to consider the violence in El Salvador when adjudicating Salvadoran’s asylum claims, including a “blanket voluntary departure,”<sup>65</sup> which had been offered to Ethiopians from May 1977 to November 1981; Iranians from April 1979 to November 1980; and Nicaraguans from June

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<sup>55</sup> Macekura, *supra* note 51, at 365.

<sup>56</sup> William Deane Stanley, *Economic Migrants or Refugees from Violence? A Time-Series Analysis of Salvadoran Migration to the United States*, 22 *LATIN AM. RES. REV.* 132, 132 (1987).

<sup>57</sup> Coutin, *supra* note 53, at 576.

<sup>58</sup> See *supra* Part II.B.

<sup>59</sup> Macekura, *supra* note 51, at 358.

<sup>60</sup> Anker, *supra* note 50, at 80.

<sup>61</sup> Anker, *supra* note 50, at 81.

<sup>62</sup> Anker, *supra* note 50, at 80–81.

<sup>63</sup> EVD, now known as Deferred Enforced Departure, refers to an administrative grant allowing individuals from certain countries to stay temporarily in the United States until the conditions in their home country change. United States Citizenship and Immigration Services (USCIS), *Adjudicators Field Manual* § 38.2, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html> (last visited Feb. 12, 2019).

<sup>64</sup> Macekura, *supra* note 51, at 361.

<sup>65</sup> Brill, *supra* note 45, at 128.



1979 to September 1980.<sup>66</sup> The State Department denied the request, claiming that the violence in El Salvador had not yet reached the levels of violence of other countries and Salvadorans in the United States were not solely seeking haven in the United States.<sup>67</sup> It is striking that during the time EVD was denied, the Reagan Administration sought “congressional approval for military assistance to the government of El Salvador by showing a fair record on human rights.”<sup>68</sup> President Reagan consistently refused to extend EVD protection to Salvadorans.<sup>69</sup> By 1984, 1.2 million Salvadorans, about 25 percent of the Salvadoran population, were displaced from their home: 480,000 within the country; 244,000 in Mexico or other countries in Central America; and 500,000 in the United States.<sup>70</sup>

#### ii. The Sanctuary Movement

When the Salvadoran Civil War began, many religious groups and human rights organizations mobilized to provide aid to displaced Salvadorans.<sup>71</sup> In the mid-1980s, congregations were openly defying the government by “publicly sponsoring and supporting undocumented Salvadoran and Guatemalan refugee families.”<sup>72</sup> Participants in the movement transported Central Americans “over the border and across the country” and aided by providing legal representation, food, medical care, and employment.<sup>73</sup> The US government responded by prosecuting eighteen activists resulting in mixed verdicts, a conviction, and an acquittal.<sup>74</sup>

In 1985, several religious and refugee service organizations and two undocumented immigrants sued various government officials, including then-Attorney General Richard Thornburgh. The suit “challenged systemic discrimination against Salvadoran and Guatemalan asylum-seekers” by the United States government.<sup>75</sup> Specifically, the plaintiffs argued that Salvadorans and Guatemalans were wholly denied asylum.<sup>76</sup> About two to three percent of asylum cases regarding Salvadoran nationals succeeded

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<sup>66</sup> Brill, *supra* note 45, at 128–29 n.60.

<sup>67</sup> Brill, *supra* note 45, at 129–30.

<sup>68</sup> Brill, *supra* note 45, at 130.

<sup>69</sup> Macekura, *supra* note 51, at 371–72.

<sup>70</sup> Coutin, *supra* note 53, at 575–76.

<sup>71</sup> Macekura *supra*, note 51, at 369.

<sup>72</sup> Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 347 (1991).

<sup>76</sup> *Id.*

during the eighties.<sup>77</sup> Comparatively, the asylum grant for all nationalities was about twenty-four percent.<sup>78</sup> In 1989, the case was certified as a class-action that included Salvadorans and Guatemalans that were denied asylum, withholding of removal, and EVD.<sup>79</sup> Eventually, the case settled.<sup>80</sup> Importantly, the settlement agreement acknowledged that foreign policy and nationality are irrelevant in determining “whether an applicant for asylum has a well-founded fear of persecution.”<sup>81</sup> Counter to Reagan’s entire refugee policy, the settlement also stated that it is irrelevant to an individual’s asylum claim whether the United States government has “favorable relations” with the asylum-seeker’s home country.<sup>82</sup> Provided certain requirements were met, the settlement provided a *de novo* asylum adjudication for all Salvadorans and Guatemalans that were previously denied asylum or those that did not file for asylum.<sup>83</sup>

## 2. Congress Responds to the Refugee Crisis in Late 1980s and Early 1990s

Beginning with the 1986 Immigration Reform and Control Act (hereinafter “IRCA”), many of the reforms regarding Salvadoran asylum-seekers were handled through several Congressional acts. Since the focus of this Comment is refugee policy toward Salvadorans, these acts will be evaluated briefly in this section insofar as the acts pertain to Salvadoran asylum-seekers.

### i. 1986 Immigration Reform and Control Act

IRCA legalized undocumented immigrants that entered the United States before 1982 as long as they (1) proved continuous residence in the United States; (2) paid a fine and back taxes; (3) proved they were not guilty of any crimes; and (4) had some knowledge of the United States history and government and the English language.<sup>84</sup> IRCA also imposed sanctions against employers that hired immigrants without work authorizations.<sup>85</sup> Due to the employment requirements after IRCA was passed, asylum applications

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<sup>77</sup> *Id.* at 349; *See* Anker, *supra* note 50, at 81.

<sup>78</sup> Blum, *supra* 75, at 350 n.18.

<sup>79</sup> Blum, *supra* 75, at 352.

<sup>80</sup> United States Citizenship and Immigration Services, *American Baptist Churches v. Thornburgh (ABC) Settlement Agreement*, USCIS, <https://www.uscis.gov/laws/legal-settlement-notice/american-baptist-churches-v-thornburgh-abc-settlement-agreement>.

<sup>81</sup> *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

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

<sup>83</sup> *Id.*

<sup>84</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 245A(a)(2)–(4), 100 Stat. 3359, 3394–95 (1986).

<sup>85</sup> *Id.* § 274A(a) at 3360.

quadrupled to over 100,000.<sup>86</sup> Since the Salvadoran economy depended on remittances from nationals in the United States, immigrants facing unemployment and possible deportation alarmed President José Napoleón Duarte, the Salvadoran president from 1984 to 1989. President Duarte urged “President Reagan to give temporary refuge to Salvadorans living illegally in [the] country.”<sup>87</sup> In a striking turn of events, the United States’ foreign policy in El Salvador now benefitted Salvadorans living in the United States. President Reagan voiced support for displaced Salvadorans following President Duarte’s stance against deportations.<sup>88</sup>

ii. The 1990 Immigration Act and Temporary Protected Status

Congress passed the 1990 Immigration Act (hereinafter “1990 Act”) “to respond to humanitarian crises throughout the world.”<sup>89</sup> The 1990 Act created Temporary Protected Status (hereinafter “TPS”), which allows certain noncitizens from designated countries to remain in the United States legally with work authorization.<sup>90</sup> The 1990 Act designated Salvadorans as beneficiaries of TPS.<sup>91</sup> As the name states, TPS designation was temporary—protection lasted eighteen months, beginning on January 1, 1991.<sup>92</sup> After the eighteen-month period ended, President George H. W. Bush granted those Salvadoran beneficiaries with Deferred Enforced Departure (DED), “another form of non-statutory blanket relief from deportation.”<sup>93</sup> DED expired on December 31, 1994, but Salvadorans’ work authorization continued as beneficiaries were given the option to apply for asylum.<sup>94</sup>

TPS was significant in that it “codifie[d], for the first time, criteria and procedures for granting entire classes” of noncitizens relief from deportation until conditions in their country of origin stabilize.<sup>95</sup> TPS also stands in contrast to the United States’ asylum policies: TPS was granted to Salvadorans *because* of their nationality. Asylum protection is granted only to individuals, on a case-by-case evaluation, that meet the statutory

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<sup>86</sup> Coutin, *supra* note 53, at 580.

<sup>87</sup> Robert Pear, *Duarte Appeals to Reagan to Let Salvadorans Stay*, N.Y. TIMES (Apr. 26, 1987), <https://www.nytimes.com/1987/04/26/world/durate-appeals-to-reagan-to-let-salvadorans-stay.html>.

<sup>88</sup> Macekura, *supra* note 51, at 374.

<sup>89</sup> Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339, 339 (1995).

<sup>90</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 244A, 104 Stat. 4978, 5030 (1990).

<sup>91</sup> *Id.* § 303(a)(1) at 5036.

<sup>92</sup> *Id.* § 303(a)(2) at 5036.

<sup>93</sup> Frelick & Kohnen, *supra* note 89, at 342.

<sup>94</sup> Frelick & Kohnen, *supra* note 89, at 342.

<sup>95</sup> Peter C. Diamond, *Temporary Protected Status Under the Immigration Act of 1990*, 14 IMMIGR. & NAT’LITY L. REV. 205, 206 (1992).

requirements in the Refugee Act.

### III. UNITED STATES FOREIGN AND ASYLUM POLICIES TOWARD EL SALVADOR AFTER THE SALVADORAN CIVIL WAR

The Salvadoran government and guerrillas entered negotiations to end the Civil War in early 1990.<sup>96</sup> On January 16, 1992, the two parties signed a peace accord, the Chapultepec Peace Agreement, in Mexico City.<sup>97</sup> The Civil War was officially over.

Gangs have been one of the biggest sources of violence in El Salvador.<sup>98</sup> These gangs—and the violence they inevitably create—is what drives most Salvadorans to flee their homes.<sup>99</sup>

#### A. Gangs

Mara Salvatrucha (hereinafter “MS-13”) and Calle 18 (hereinafter “18th Street”) are the two most prominent gangs in El Salvador today.<sup>100</sup> These two gangs are associations of networks that, largely, control parts of El Salvador and have a vast web of criminal activities.<sup>101</sup>

These two gangs were formed in Los Angeles, California: 18th Street in the 1960s and MS-13 in the 1980s.<sup>102</sup> As Salvadorans migrated to the

<sup>96</sup> Margarita S. Studemeister, *El Salvador: Implementation of the Peace Accords*, U.S. INST. OF PEACE (2001).

<sup>97</sup> United Nations, General Assembly, *The Situation in Central America: Threats to International Peace and Security and Peace Initiatives*, A/46/864 (Jan. 30, 1992), [https://peaceaccords.nd.edu/sites/default/files/accords/Chapultepec\\_Peace\\_Agreement\\_16\\_January\\_1992.pdf](https://peaceaccords.nd.edu/sites/default/files/accords/Chapultepec_Peace_Agreement_16_January_1992.pdf); Diana Villiers Negroponte, *Remembering El Salvador’s Peace Accord: Why Was That Peace Elusive?*, BROOKINGS INST. (Jan. 19, 2012), <https://www.brookings.edu/blog/up-front/2012/01/19/remembering-el-salvadors-peace-agreement-why-was-that-peace-elusive/>.

<sup>98</sup> *Life Under Gang Rule in El Salvador*, INT’L CRISIS GROUP (Nov. 26, 2018), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador> (“The culprit [for the murder rate of 103 per 100,000 inhabitants in 2017] in most of these murders is the *maras* (gangs).”) [hereinafter *Gang Rule*]; Anastasia Moloney, *Factbook: Six Reasons Why El Salvador Became One of the World’s Murder Capitals*, REUTERS (May 11, 2016, 12:16 PM), <https://www.reuters.com/article/us-el-salvador-violence/factbox-six-reasons-why-el-salvador-became-one-of-the-worlds-murder-capitals-idUSKCN0Y221K> (“Gang violence has plagued El Salvador for decades, making the Central American country of 6.4 million people, one of the most dangerous outside a war zone.”).

<sup>99</sup> Anna-Catherine Brigida & Heather Giesin, *‘Our country is not a safe place’: why Salvadorans will still head for the US*, THE GUARDIAN (June 4, 2018, 12:59 AM), <https://www.theguardian.com/world/2018/jun/24/salvadorans-deported-from-us-facing-violence-fleeing-poverty>.

<sup>100</sup> *Gang Rule*, supra note 98.

<sup>101</sup> See *id.*

<sup>102</sup> Dara Lind, *MS-13, explained*, VOX (Feb. 5, 2019, 9:45 AM), <https://www.vox.com/policy-and-politics/2018/2/26/16955936/ms-13-trump-immigrants-crime>; Don Winslow, *MS-13 Was Born in the USA*, DAILY BEAST (Feb. 2, 2019), <https://www.thedailybeast.com/ms>

United States beginning in the mid-twentieth century and during the Civil War, immigrants were met with xenophobic rhetoric and labeled as “self-interested economic migrants.”<sup>103</sup> Life in the United States was not easy for both documented and undocumented Salvadoran immigrants because the group faced “symbolic and structural violence” stemming from the “fear of deportation; the exploitation of their work and rights; [ ] and their exclusion from socioeconomic resources” that could have provided opportunities of upward mobility and incorporation into American society.<sup>104</sup> Salvadoran immigrants were “accountable” in the eyes of the law, but were not protected by it.<sup>105</sup> They worked low-paying jobs and held deep feelings of isolation from mainstream society.<sup>106</sup> For many there was uncertainty as to their legal status<sup>107</sup> and whether their stay in the United States would end in deportation. These conditions laid the foundation for the formation of the gangs, a direct response to the United States’ failure to address the needs of the Salvadoran immigrants living on its lands. Gangs originated to fill the void left by the lack of an identity, as well as to fit in, in a new and unknown country.

The government’s response to gangs in the United States was swift. In Los Angeles, gangs were seen as part of the force that fueled the decay of urban life and laws were enacted to deport migrants that formed the gangs.<sup>108</sup> Since there was no genuine definition of what gang membership was, law enforcement was given substantial discretion, which led to the criminalization of innocent and non-gang-affiliated individuals.<sup>109</sup> The increase in deportations and general criminalization further destabilized El Salvador. Many people who were deported in the 1990s faced difficulty reintegrating in El Salvador because the country was devastated by a terrible Civil War and many did not have family left in El Salvador.<sup>110</sup> The country, dealing with a weak infrastructure and a feeble institutional framework,

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-13-was-born-in-the-usa; *Barrio 18*, INSIGHT CRIME, <https://www.insightcrime.org/el-salvador-organized-crime-news/barrio-18-profile-2/> (last updated Feb. 13, 2018).

<sup>103</sup> Roumie, *supra* note 33, at 33.

<sup>104</sup> *Id.*

<sup>105</sup> Roumie, *supra* note 33, at 33–34.

<sup>106</sup> Roumie, *supra* note 33, at 34. See generally Manuel Vasquez, *Saving Souls Transnationally: Pentecostalism and Gangs in El Salvador and the United States*, CHRISTIANITY, SOC. CHANGE, & GLOBALIZATION IN THE AMS. 1 (2003). Many Salvadorans were unable to receive state or federal welfare benefits because of their status.

<sup>107</sup> Mary Kathleen Dingeman-Cerda, *¿Bienvenidos a Casa? Deportation and the Making of Home in the U.S.-El Salvador Transnation* (2014) (Ph.D. dissertation, University of California, Irvine). 1980 Refugee Act removed nationality as a criterion to grant asylum and since the United States supported the government in El Salvador, it continuously rejected claims by refugees escaping the war and those seeking political asylum. Roumie, *supra* note 33, at 32.

<sup>108</sup> Roumie, *supra* note 33, at 36.

<sup>109</sup> Roumie, *supra* note 33, at 36–37.

<sup>110</sup> Roumie, *supra* note 33, at 37–38.

could not offer support for deportees.<sup>111</sup> Furthermore, deportees were deemed threats to Salvadoran national security, which increased stigmatization and oppression of deportees.<sup>112</sup> Gangs did not build their identity in El Salvador around their cultural background; instead, gangs built their identity around the opposition of rival gangs.<sup>113</sup> The United States effectively exported what it saw as a problem to a weakened country.

El Salvador entered its own war on drugs (*Mano Dura* and *Super Mano Dura*), largely adopting tactics from the United States, which further worsened gang culture in El Salvador.<sup>114</sup> Zero tolerance policies in El Salvador had the opposite effect of their purported purpose: they fostered institutionalized gangs instead of combating them, continued to marginalize youth, created distrust in the government, and increased the inmate population in prisons.<sup>115</sup> The use of violence to defeat gangs actually supported their efforts to recruit other youth; gangs occupied the safe-space that the government could not by consoling youth that felt demonized and persecuted by the state.<sup>116</sup> In fact, criminal organizations spread quickly in response to unsuccessful “U.S. anti-crime policies in the 1980s that were later adopted in Central America.”<sup>117</sup> The United States’ involvement in combatting gangs in El Salvador was not passive, but instead encompassed “a large degree [of involvement] prompted by police building efforts sponsored by US organizations as well as through interrelated activities of American embassies.”<sup>118</sup>

More recently, a CNN report accused the United States of “quietly fund[ing] and equip[ing] elite paramilitary police officers in El Salvador” accused of extrajudicial killings of alleged gang members.<sup>119</sup> The police unit Special Reaction Forces (FES) killed 43 suspected gang members.<sup>120</sup> This

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<sup>111</sup> Roumie, *supra* note 33, at 38.

<sup>112</sup> *Id.*

<sup>113</sup> Roumie, *supra* note 33, at 40.

<sup>114</sup> Danielle Mackey & Cora Currier, *El Salvador Is Trying to Stop Gang Violence. But the Trump Administration Keeps Pushing Failed “Iron Fist” Policing*, THE INTERCEPT (Oct. 2, 2018), <https://theintercept.com/2018/10/02/el-salvador-gang-violence-prevention/> (“As the gangs grew in size and power, successive Salvadoran governments reacted with *mano dura*, doing so with the full backing of the United States.”).

<sup>115</sup> Roumie, *supra* note 33, at 41–42.

<sup>116</sup> *Id.*

<sup>117</sup> Jose Miguel Cruz, *Central American Gangs Like MS-13 Were Born Out of Failed Anti-Crime Policies*, THE CONVERSATION (May 8, 2017), <https://theconversation.com/central-american-gangs-like-ms-13-were-born-out-of-failed-anti-crime-policies-76554>.

<sup>118</sup> Roumie, *supra* note 33, at 43.

<sup>119</sup> Nick Paton Walsh et al., *US-Funded Police Linked to Illegal Executions in El Salvador*, CNN, <https://www.cnn.com/interactive/2018/05/world/el-salvador-police-intl/> (last visited Feb. 8, 2019).

<sup>120</sup> *Id.*

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unit received significant funding from the United States.<sup>121</sup> Although FES has been disbanded, many of its officers joined a new unit that continues to receive funding from the United States.<sup>122</sup> Similar to the United States' past actions regarding Salvadoran gang members, the United States funded money to FES officers—who were shooting people dead in the streets of El Salvador—and deported thousands of MS-13 recruits.<sup>123</sup> The report categorized this level of violence as a “culture of lawlessness in El Salvador,” in which police officers actively engage in conversations to discuss how to hide extrajudicial killings.<sup>124</sup> The United States claims it takes “allegations of extrajudicial killings extremely seriously,”<sup>125</sup> and units receiving United States aid must show there is a fundamental respect for human rights.<sup>126</sup> These extrajudicial killings have prompted comparisons to the Civil War in El Salvador when government soldiers killed civilians with impunity.<sup>127</sup> A woman whose son was murdered by the police claims life now is “like during the [civil] war, they’re killing young people but talking about it can get you killed as well.”<sup>128</sup> The United States' commitment to human rights and vetting of units falls short, a common trend in its affairs with El Salvador. The Salvadoran police is receiving attention for its treatment of gang members, but one should not overlook the United States' role.

#### B. *Trade Deals and Other Salvadoran Policies*

The United States' interference leading to El Salvador's destabilization also includes influence in trade deals. Although this Comment focuses on domestic and gang violence, economic destabilization is important to understand the extent to which the United States continues to weaken El Salvador.

After the Salvadoran Civil War, the United States “endorsed a neoliberal economic reconstructionist plan in El Salvador,” which led to “increased foreign investment, privatization of public infrastructure[,] and

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* In one of these instances, an officer disparages other officers for beating someone before killing him. In his opinion, this would undermine their story that the gang member was killed in a shootout.

<sup>125</sup> Paton Walsh, *supra* note 119 (quoting a spokesperson for the United States embassy).

<sup>126</sup> *Id.*

<sup>127</sup> Nina Lakhani, ‘*We Fear Soldiers More Than Gangsters*’: *El Salvador’s ‘Iron Fist’ Policy Turns Deadly*, THE GUARDIAN (Feb. 6, 2017, 6:00 AM), <https://www.theguardian.com/world/2017/feb/06/el-salvador-gangs-police-violence-distrito-italia>.

<sup>128</sup> *Id.* (alteration in original).

lack of investment in public programs.”<sup>129</sup> This neoliberal policy failed to consider the issues that led to the Civil War in the first place and instead adopted methods that would benefit the United States.

The Dominican Republic-Central America Free Trade Agreement (hereinafter “CAFTA-DR”) is a trade agreement between the United States and several Central American countries<sup>130</sup> and the Dominican Republic.<sup>131</sup> The CAFTA-DR “promotes stronger trade and investment ties, prosperity, and stability throughout”<sup>132</sup> Central America and the Dominican Republic as well as along the southern border of the United States. Before El Salvador entered the agreement, many Salvadorans protested the deal, claiming it was an “unfair, anti-democratic agreement that will only serve the interests of U.S.-based multinational corporations.”<sup>133</sup> CAFTA-DR ensures Central American countries and the Dominican Republic are dependent on the United States because of “massive trade imbalances and the influx of American agricultural and industrial goods that weaken domestic industries.”<sup>134</sup> The tariff reduction model in CAFTA-DR creates impossible conditions for domestically grown/produced products to compete with imports. Critics of free-trade deals, including CAFTA-DR, claim these type of agreements undermine democracy in Latin America and that the United States continues its control over these countries “through commercial exploitation and political coercion.”<sup>135</sup> CAFTA-DR was hailed as a way to curb violence and poverty in Central America.<sup>136</sup> Since it was enacted in 2004, it has done close to nothing to deter violence and decrease poverty, but it does allow employers to exploit workers and avoid providing fair working

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<sup>129</sup> Roumie, *supra* note 33, at 30.

<sup>130</sup> These countries include Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

<sup>131</sup> Office of the U.S. Trade Representative, *CAFTA-DR (Dominican Republic-Central America FTA)*, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last accessed Nov. 3, 2018).

<sup>132</sup> *Id.*

<sup>133</sup> Committee in Solidarity with the People of El Salvador (CISPES), *Major Mobilizations in El Salvador to Protest CAFTA and Honor Schafik Handal*, (Feb. 1, 2006), <http://cispes.org/blog/major-mobilizations-in-el-salvador-to-protest-cafta-and-honor-schafik-handal?language=es>.

<sup>134</sup> Mark Tseng-Putterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM (June 20, 2018), <https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148>.

<sup>135</sup> Michelle Chen, *How US ‘Free Trade’ Policies Created the Central American Migration Crisis*, THE NATION (Feb. 6, 2015), <https://www.thenation.com/article/how-us-free-trade-policies-created-central-american-migration-crisis/>.

<sup>136</sup> Héctor Perla Jr., *The Impact of CAFTA: Drugs, Gangs, and Immigration*, TELESUR (Mar. 1, 2016), <https://www.telesurtv.net/english/opinion/The-Impact-of-CAFTA-Drugs-Gangs-and-Immigration-20160301-0008.html>.



practices.<sup>137</sup>

#### IV. *MATTER OF A-B-*: REVERTING TO THE 1980S UNITED STATES REFUGEE POLICY TOWARDS SALVADORANS

The Refugee Act defines a refugee as a person who is “unable or unwilling to return to” her home 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.”<sup>138</sup> An applicant seeking asylum must meet all the requirements in the statute to be eligible for asylum. The INA does not define “membership in a particular social group.”<sup>139</sup> The BIA first defined a particular social group (hereinafter “PSG”) in *Matter of Acosta* as “a group of persons all of whom share a common, immutable characteristic.”<sup>140</sup> Such characteristic must be one that the individuals in the group cannot change or should not have to change because it would violate their fundamental identities or consciences.<sup>141</sup> The BIA gave several examples of traits that constitute immutable characteristics, including “sex, color, kinship ties, . . . former military leadership or land ownership.”<sup>142</sup>

In *Matter of M-E-V-G-* and *Matter of W-G-R-*, the Board defined two additional elements, three in total, to establish membership in a PSG: (1) the group is composed of members that share a common, immutable characteristic; (2) the group must be defined with particularity; and (3) the group must be socially distinct from the society the refugee is trying to escape.<sup>143</sup> In determining whether a PSG meets those requirements, the applicants must submit “evidence that the proposed group exists in the society in question.”<sup>144</sup> This evidence can include “country conditions reports, expert witness testimony, press accounts of discriminatory laws and policies, historical animosities,” and other evidence that may show the group is distinct.<sup>145</sup>

The BIA thereafter decided *Matter of A-R-C-G-*. Ms. ARCG was a woman fleeing domestic violence in Guatemala.<sup>146</sup> Her husband repeatedly

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<sup>137</sup> *Id.*

<sup>138</sup> 8 U.S.C.S. § 1101(A)(42)(A) (2018).

<sup>139</sup> *Matter of A-B-*, 27 I. & N. Dec. 316, 318 (A.G. 2018).

<sup>140</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

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

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

<sup>143</sup> *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014).

<sup>144</sup> *M-E-V-G-*, 26 I. & N. Dec. at 244.

<sup>145</sup> *Id.*

<sup>146</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

beat her.<sup>147</sup> Ms. ARCG sought help from the police multiple times, but they told her they would not interfere in her marriage or domestic disputes.<sup>148</sup> Ms. ARCG fled Guatemala to escape her abuser.<sup>149</sup> In her asylum claim, Ms. ARCG sought to establish that she was persecuted on account of her membership to the PSG “composed of ‘married women in Guatemala who are unable to leave their relationship.’”<sup>150</sup> The Immigration Judge found that Ms. ARCG did not meet the requirements for asylum on the basis that she did not prove “she had suffered past persecution or [had] a well-founded fear of future persecution” due to her membership in the PSG “married women in Guatemala who are unable to leave their relationship.”<sup>151</sup> After an immigration judge denied her asylum, Ms. ARCG successfully appealed to the BIA.<sup>152</sup> The BIA made clear that PSG’s must be considered in light of the evidence and context presented regarding those circumstances in the case.<sup>153</sup> It recognized that the immutable characteristic of Ms. ARCG was her gender and that marital status can also be an immutable characteristic if the asylum-seeker could not leave the relationship.<sup>154</sup>

A. *Matter of A-B-: Case Law Analysis*

*Matter of A-B-* is a decision in response to *A-R-C-G*. As in *A-R-C-G*-, the respondent in *A-B-* fled her country to escape her partner, who abused her for years.

1. Factual Background

Ms. AB fled El Salvador after enduring approximately fifteen years of “relentless physical, sexual, and emotional abuse” at the hands of her husband.<sup>155</sup> Ms. AB was beaten repeatedly, even while she was pregnant.<sup>156</sup> The extent of Ms. AB’s abuse included her partner bashing her head against the wall and/or kicking her.<sup>157</sup> Her husband frequently raped her.<sup>158</sup> Ms. AB’s partner would sometimes hold a knife to her neck or threaten “to hang

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

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

<sup>150</sup> *Id.* at 389.

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

<sup>152</sup> *A-R-C-G-*, 26 I. & N. at 388–89.

<sup>153</sup> *Id.* at 392.

<sup>154</sup> *Id.* at 392–93.

<sup>155</sup> Respondent’s Opening Brief at 3, In The Matter of: [Redacted], *Matter of A-B-*, 27 I. & N. Dec. 316, 321 (A.G. 2018) [hereinafter AB Brief], <https://uchastings.app.box.com/s/tt1ydlq5ttm1i2zx1z4rname4bk29s7/file/291241595459>.

<sup>156</sup> She has three children with her husband. AB Brief, *supra* note 155, at 2–3.

<sup>157</sup> AB Brief, *supra* note 155, at 3.

<sup>158</sup> *Id.*

her from the ceiling by a rope.”<sup>159</sup> Her husband constantly insulted, isolated, and humiliated her.<sup>160</sup> Her children were not shielded from her husband’s abuse, as he would “also beat their children in front of her.”<sup>161</sup>

The Salvadoran government did close to nothing to protect Ms. AB. She was granted two restraining orders, but the police did not enforce them.<sup>162</sup> Although the police arrested Ms. AB’s husband for threatening her with a gun, he was released a few days later.<sup>163</sup> After she was threatened with a knife, the police explicitly told Ms. AB they could not help her, but encouraged her to “get out of here.”<sup>164</sup>

## 2. Procedural Background

Ms. AB arrived in the United States and requested asylum on the grounds that she suffered persecution on account of her membership in a particular social group: “El Salvadoran women who are unable to leave their domestic relationships where they [the two partners] have children in common.”<sup>165</sup> The immigration judge<sup>166</sup> denied asylum to Ms. AB because he concluded she (1) was not credible; (2) did not belong to a qualifying particular social group; (3) did not establish that membership to that particular social group, if the group were acceptable under the INA, was central in her persecution; and (4) did not “show that the Salvadoran government was unable or unwilling to help her.”<sup>167</sup> On appeal, the BIA overruled the immigration judge’s decision, relying on *Matter of A-R-C-G*, and ordered the immigration judge grant Ms. AB asylum.<sup>168</sup> The BIA found Ms. AB (1) credible; (2) was member of a particular social group substantially similar to *Matter of A-R-C-G*- (“married women in Guatemala who are unable to leave their relationship”); (3) could not leave her husband; and (4) the Salvadoran government was unable and unwilling to protect her.<sup>169</sup> Following Ms. AB’s completion of background checks, as the BIA directed in order to proceed with the asylum claim, Judge Couch “refused to

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<sup>159</sup> *Id.*

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

<sup>161</sup> *Id.*

<sup>162</sup> AB Brief, *supra* note 155, at 4.

<sup>163</sup> *Id.*

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

<sup>165</sup> *Matter of A-B-*, 27 I. & N. Dec. 316, 326 (A.G. 2018).

<sup>166</sup> Immigration Judge V. Stuart Couch has a “long history . . . of denying asylum to domestic violence survivors.” *Backgrounder and Briefing on Matter of A-B-*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b> (last updated August 2018).

<sup>167</sup> *A-B-*, 27 I. & N. Dec. at 321.

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

<sup>169</sup> *Id.*

issue a new decision in the case.”<sup>170</sup> The AG then certified the case to himself for disposition.<sup>171</sup> The issue was “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”<sup>172</sup>

### 3. The Attorney General’s Decision

The decision in *A-B-* formally overrules *A-R-C-G-*. As described above, *A-R-C-G-* held that, “[d]epending on the facts and evidence of an individual case, ‘married women in Guatemala who are unable to leave their relationship’ can constitute a cognizable particular social group.”<sup>173</sup> The case gave women fleeing domestic violence greater hope in receiving asylum based on the abuse suffered in their home. Ms. ARCG’s case had many similar elements to Ms. AB’s case: her husband beat and raped her, her husband repeatedly threatened to kill her, and the police refused to help or intervene in Ms. AB’s marriage.<sup>174</sup> In the decision, the AG affirms asylum-seekers hoping to establish persecution because of a membership to a PSG must show (1) membership to a group, in which members share an immutable characteristic, the group is defined with particularity, and the group is socially distinct from society; (2) membership to the group is central to the asylum-seeker’s persecution; and (3) if the perpetrator is not affiliated to the government, the home government is unable or unwilling to protect the asylum-seeker.<sup>175</sup> In overruling *A-R-C-G-*, the AG criticized the Board for incorrectly applying its own precedents and “because it recognized an expansive new category of particular social groups based on private violence.”<sup>176</sup> Furthermore, *A-B-* stated that for a PSG to be cognizable, it “*must* ‘exist independently’ of the harm asserted in an application for asylum.”<sup>177</sup> In contrast, the AG believed, *A-R-C-G-* recognized a group that was defined circularly by its harm.<sup>178</sup>

Most of the AG’s damaging remarks were dicta. He made broad generalizations of claims by domestic violence victims and those that were victims of private action in stating they would normally not qualify for

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<sup>170</sup> *Backgrounder & Briefing on Matter of A-B-*, *supra* note 166.

<sup>171</sup> *A-B-*, 27 I. & N. Dec. at 323.

<sup>172</sup> *Id.*

<sup>173</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

<sup>174</sup> *Id.* at 389.

<sup>175</sup> *A-B-*, 27 I. & N. Dec. at 320.

<sup>176</sup> *Id.* at 319.

<sup>177</sup> *Id.* at 334 (emphasis in original) (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 236 n.11 (B.I.A. 2014)).

<sup>178</sup> *Id.* at 334–35.

asylum.<sup>179</sup> He further claimed that there may be “exceptional circumstances” when victims of private actions could meet the requirements to be granted asylum.<sup>180</sup> Additionally, the AG was unclear about the role the government had to play to establish it failed to protect the asylum seeker. He made remarks that the asylum-seeker must establish the perpetrator’s actions “can be attributed to the government,”<sup>181</sup> which has not been a standard applicable in the past or even in the Refugee Act itself: government must be “unable or unwilling” to provide protection to the asylum seeker.<sup>182</sup> The AG stated: the government’s protection must be “so lacking” that the harm *itself* may be attributed to the government.<sup>183</sup> The American Immigration Lawyers Association has categorized this decision as a clear statement by the AG to close asylum claims on domestic violence victims as well as people fleeing gang violence.<sup>184</sup> One thing is clear: this decision creates another burden for people fleeing violence and seeking to take refuge in the United States.

B. *Coming Full Circle: Matter of A-B- as Another Attempt to Wholly Deny Asylum to Salvadorans*

Salvadorans fleeing violence during the Civil War had the burden of overcoming the label of “economic migrants.”<sup>185</sup> Their motives were questioned and the violence they fled was almost an afterthought in adjudicating asylum claims. *A-B-* has a similar rationale except the reason for exclusion is that the alleged persecution is not perpetrated by the right actors. Although the AG’s arguments are largely dicta, his words are carefully selected to ensure that victims fleeing domestic and gang violence, which are two of the central reasons people flee El Salvador, have significant roadblocks in obtaining asylum. The result is the same as it was in the 1980s: these specific people, because of the violence they flee, are not eligible for asylum. The AG’s generalizations and overbroad statements deny asylum-seekers the right to individualized claim adjudication, which were staples of the Reagan administration’s adjudication of asylum claims.

The United States turned a blind eye to victims of atrocious violence during the Salvadoran Civil War. The United States not only minimized its own effects but also rationalized it by creating the idea that asylum-seekers were economic migrants. Today, the United States remains a significant

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<sup>179</sup> *Id.* at 320.

<sup>180</sup> *Id.* at 317.

<sup>181</sup> *A-B-*, 27 I. & N. Dec. at 317.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> American Immigration Lawyers Association, *Practice Alert: AG Sessions Issues Matter of A-B-, Overruling Matter of A-R-C-G-* (July 10, 2018), <https://www.aila.org/infonet/call-feedback-impact-matter-of-a-b—decision>.

<sup>185</sup> *See supra* Part II.B.1.

factor in the conditions that have led Salvadorans to flee their homeland, including creating and exporting gangs and engaging in trade deals that greatly disfavor El Salvador.<sup>186</sup> In adjudicating asylum claims, adjudicators need to consider the conditions of the asylum-seeker's native country. *A-B* overlooks the systemic and rampant violence that women experience in El Salvador. By framing the issue as one of private action and actors, the AG discards the role the United States had in creating a society of violence in El Salvador. As described above, the United States has been complicit or actively engaged in the violent present and past of El Salvador. *A-B* isolated the issue of domestic violence as one of private action and failed to account for a society that accepts violence due to the United States influence. As one commentator has put it, “[i]f I were one of these [domestic violence] victims or if I had to face the Salvadoran system and society, I would have most likely left the country.”<sup>187</sup> The AG also dismissed Ms. AB's claims that the government would not help her overcome the violence she faced in the hands of her husband. Police officers in El Salvador are ambivalent to violence even though they are tasked with protecting people.<sup>188</sup> As explained above, many officers are even accused of extrajudicial killings.<sup>189</sup>

#### V. ACTING ON THE CURRENT REFUGEE CRISIS: HOW THE UNITED STATES SHOULD RESPOND

People in El Salvador, Guatemala, and Honduras (the three countries are usually called the “Northern Triangle”) are leaving their homelands in droves due to the unprecedented level of crime and violence in the Northern Triangle, “raising parallels with the exodus of Guatemalans and Salvadorans fleeing the civil wars of their respective countries during the 1980s.”<sup>190</sup> The United States can use several avenues to take responsibility for its role in causing this wave of violence, which began before the Salvadoran Civil War and continues to this day. This Comment highlights two different possibilities: (1) a formal apology and (2) overruling *Matter of A-B*- and recognizing gender and gang-related asylum claims.

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<sup>186</sup> See *supra* Part III.C.

<sup>187</sup> Catalina Lobo-Guerrero, *In El Salvador, 'Girls Are a Problem'*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/2017/09/02/opinion/sunday/el-salvador-girls-homicides.html>.

<sup>188</sup> See Azam Ahmed, “*They Will Have to Answer to Us*”, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/magazine/el-salvador-police-battle-gangs.html> (“[T]he police have become more like military occupiers.”).

<sup>189</sup> Paton Walsh, *supra* note 119.

<sup>190</sup> Jonathan T. Hiskey, et al., *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 LATIN AMERICA RES. REV. 429, 430 (2018).

*A. A Formal Apology*

National apologies represent a great deal: apologies accept the blame for a certain wrong and recognize the suffering of its victims.<sup>191</sup> One poignant example of a formal apology comes from President Reagan. The Civil Liberties Act of 1988 recognized that “a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.”<sup>192</sup> This Act also “[apologized] on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens.”<sup>193</sup> Before President Reagan signed the Act, he said, “We gather here today to right a grave wrong . . . for here, we admit a wrong; here, we reaffirm our commitment as a nation to equal justice under the law.”<sup>194</sup>

The first step in apologizing is accepting there is a reason to apologize. Importantly, an apology condemns past behavior. The United States played a significant role in destabilizing El Salvador during much of the twentieth and twenty-first centuries.<sup>195</sup> An apology would formally condemn this behavior. Secondly, an apology commits to better actions in the future. In this case, the United States would commit to engage in better relations with El Salvador and its people, specifically those Salvadorans that have been directly affected by its policies. This includes persons fleeing generalized and institutionalized violence because that is exactly the violence the United States created. Instead of waiting years, decades, or even centuries to apologize for this wrong, the United States should do so now because it is at this point in time that United States’ interference is drastically affecting Salvadoran nationals.<sup>196</sup>

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<sup>191</sup> Edwin Battistella, *When Nations Apologize*, AEON (Mar. 27, 2017), <https://aeon.co/essays/a-national-apology-has-the-power-to-change-the-future>.

<sup>192</sup> Civil Liberties Act of 1988, 50 U.S.C. § 4202.

<sup>193</sup> *Id.* § 4201(2).

<sup>194</sup> Richard Hansen, *Recalling President Ronald Reagan’s Remarks on Signing the Civil Liberties Act of 1988*, PACIFIC CITIZEN (Apr. 21, 2017), <https://www.pacificcitizen.org/recalling-president-ronald-reagans-remarks-on-signing-the-civil-liberties-act-of-1988/>.

<sup>195</sup> *See supra* Part II.

<sup>196</sup> *Cf. Congress Apologizes for Slavery*, Jim Crow, NPR (July 30, 2008), <https://www.npr.org/templates/story/story.php?storyId=93059465> (discussing how the United States House of Representatives formally apologized for slavery a century and a half after it was abolished).

B. *Overruling Matter of A-B- and Recognizing Gender and Gang-Related Asylum Claims*

*Matter of A-B-* contains damaging dicta that places the success of domestic and gang violence related claims in a high-level of doubt.<sup>197</sup> *A-B-* should be formally overruled. First, asylum law should recognize that the primary motives for domestic and gang violence are not personal disputes. The underlying reason of domestic violence in El Salvador is gender and subordination.<sup>198</sup> The underlying reason of gang-based violence in El Salvador is a system allowing gangs to act as the *de facto* government.<sup>199</sup> Countless country conditions reports show the Salvadoran government is unable or unwilling to protect persons persecuted on account of their gender or lack of gang affiliation.<sup>200</sup> Perpetrators of violence toward women in domestic relationships or those that refuse to join gangs are doing it *because* of their identities and opinions.

In the broadest terms, *A-B* states that those fleeing domestic and gang violence are unlikely to meet the statutory requirements because private actors are the persecutors. This is flawed reasoning because it views domestic and gang-based violence in a vacuum. Domestic violence flows from a national belief that women are lesser than, and therefore subject to the whims of, men. In fact, gender-based violence in El Salvador is so common that it is tolerated and considered normal.<sup>201</sup> During the Salvadoran Civil War, government forces engaged in extreme sexual brutality, including mass rapes.<sup>202</sup> This trend continues today as women in El Salvador are

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<sup>197</sup> See *supra* Part IV.A.3.

<sup>198</sup> See Amnesty International, *Report 2017/18: The State of the World's Human Rights* (2018) ("El Salvador's high rate of gender-based violence continued to make it one of the most dangerous countries to be a woman. A total ban on abortion persisted, and women were convicted of aggravated homicide after suffering miscarriages or other obstetric emergencies.") (emphasis added).

<sup>199</sup> See Paker Asmann, *El Salvador Citizens Say Gangs, Not Government 'Rule' the Country*, INSIGHT CRIME (Nov. 8, 2017), <https://www.insightcrime.org/news/brief/el-salvador-citizens-say-gangs-not-government-rules-country/> ("A survey of 1,000 Salvadorans . . . showed that 42 percent of respondents believe gangs rule the country . . . [and] just 12 percent believe the government is in control.").

<sup>200</sup> See, e.g., Executive Office of Immigration Review, *El Salvador 2018 Human Rights Report*, U.S. Dep't of Justice (2019) [hereinafter 2018 Human Rights Report] ("Laws against rape were not effectively enforced . . . Laws against domestic violence remained poorly enforced, and violence against women, including domestic violence, remained a widespread and serious problem.") ("[G]angs and narcotics traffickers, were significant perpetrators of violent crimes and committed acts of murder, extortion, kidnapping, human trafficking, intimidation, and other threats and violence . . .").

<sup>201</sup> Karen Musalo, *El Salvador—A Peace Worse Than War: Violence, Gender and A Failed Legal Response*, 30 YALE J.L. & FEMINISM 3, 6 (2016).

<sup>202</sup> *Id.*



murdered and subject to other types of brutality at alarming rates.<sup>203</sup> Women are not being attacked because of a private dispute between them and their persecutors, instead they are being persecuted because they are women, used as political pawns between warring gangs, and seen as a class of individuals to be dominated by men. By the very nature of their persecution, gender alone should satisfy the requirements of a cognizable particular social group.

On the other hand, gang-based violence, specifically the resistance of young Salvadoran men to join these criminal organizations or those that have renounced their membership, should serve as basis for asylum. The basic premise for this proposal is that these groups inherently meet the “particular social group” requirements, but gangs are also the *de facto* government in most, if not all, of El Salvador.

These two groups meet the common, immutable characteristic requirement<sup>204</sup> because its members are joined by nationality, often age, and past experiences,<sup>205</sup> namely resistance to and denouncement of gangs. The two proposed groups also meet the particularity requirement because its boundaries are defined to include only those that explicitly and with evidentiary proof have resisted gangs or denounced their membership. The simple fact that there may be a large population that falls into this group should not be a factor in determining whether it is in fact particular. Lastly, the social distinction requirement is met because El Salvador is highly premised on rumors and word-of-mouth, where individuals that resist gang violence are known and continuously punished in public. As much as many would not like for this to be true, gang members form a part of Salvadoran society and are aware of individuals that resist their recruiting or general efforts. Therefore, gangs perceive these young men as a group to terrorize because of their innate characteristics.

As mentioned earlier, gangs are the rulers of the streets and lives of individuals living in their territories. Gangs are active in 94% of El

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<sup>203</sup> Rebecca Dennis, *El Salvador: One of the Most Dangerous Places in the Western Hemisphere for Women and Girls*, PAI, <https://pai.org/blog/el-salvador-one-dangerous-places-western-hemisphere-women-girls/> (last visited Apr. 20, 2019) (“Young women and girls are regularly targeted by gangs, raped in disputes between warring gang factions or forced into relationships where they often face further sexual exploitation and . . . violence against women is not only a gang issue. *More than a quarter of women in the country have reported experiencing physical or sexual violence at the hands of an intimate partner*—a number that would surely increase if violence inflicted by other male family members or acquaintances was taken into account.”) (emphasis added).

<sup>204</sup> Although this Comment will not explore the extent of academic support, common and immutable characteristics should be the only requirement in evaluating particular social groups.

<sup>205</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (identifying past experiences as an example of an immutable characteristic); *See Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir. 2007).

Salvador's 262 municipalities.<sup>206</sup> In these municipalities, "gangs are . . . a standing danger to public safety [and the] de facto authority that exerts tremendous control over residents' daily lives."<sup>207</sup> Gangs strictly limit the freedom of intra-country movement.<sup>208</sup> They do not permit individuals living in another gang's areas to enter their territory.<sup>209</sup> The outskirts of a gang's territory contains check points, and those seeking entry must present "government-issued identification cards (containing their addresses) to determine their residence."<sup>210</sup> Living in a rival gang's territory can have drastic consequences at these checkpoints because Salvadorans risk "being killed, beaten, or not allowed to enter the territory."<sup>211</sup>

In sum, domestic and gang-violence should not be characterized as private disputes between two individuals but instead need to be seen in the background of El Salvador's current state of politics.

## VI. CONCLUSION

Statistics show that El Salvador is one of the most violent countries in the world—the most violent country not currently at war.<sup>212</sup> Regardless of this horrific label, asylum policies have not adequately responded to this humanitarian crisis. *A-B-* is one more brick in the wall of exclusion that is attempting to keep out these individuals. More importantly, the country creating this wall has contributed significantly to the circumstances causing people in El Salvador to flee their homes. In torts, law students are taught that if someone, call him A, puts another, call her B, in a perilous situation, A has an affirmative duty to come to help B.<sup>213</sup> This affirmative duty is a legal obligation because of the nature of the harm: B would not be in that situation but for A's act. Salvadoran asylum-seekers should not pay the price for the dangerous consequences of the United States' continuous intervention and promotion of violence. Although El Salvador's violence has many roots, the United States' role cannot be denied or undermined. For the reasons set out in this Comment, the United States must act to protect these individuals because the United States is inextricably linked to reason

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<sup>206</sup> Gang Rule, *supra* note 98.

<sup>207</sup> *Id.*

<sup>208</sup> See 2018 Human Rights Report, *supra* note 200.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> The Associated Press, *El Salvador Murder Rate Falls, Though Still Among Deadliest*, THE SEATTLE TIMES (Jan. 2, 2019), <https://www.seattletimes.com/nation-world/nation/el-salvador-murder-rate-falls-though-still-among-deadliest/>; *El Salvador Gang Violence Pushes Murder Rate to Postwar Record*, THE GUARDIAN (Sept. 2, 2015), <https://www.theguardian.com/world/2015/sep/02/el-salvador-gang-violence-murder-rate-record>.

<sup>213</sup> Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 248 (1980).

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Salvadorans are fleeing. And just as in torts, the United States should have an affirmative duty to help those, in whatever means necessary, it has put in a perilous situation. For Salvadorans, refugee and asylum policies are the place to start.