

THE RESPONSIBILITY TO PROTECT AS APPLIED TO ASYLUM SEEKERS IN THE UNITED STATES

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I. INTRODUCTION

As a result of heinous human rights violations, including genocide, war crimes, and crimes against humanity, committed by government and military forces throughout the twentieth century, the United Nations has

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implemented a broad legal norm in order to protect the citizens of countries suffering from such atrocities, whose governments are unwilling or unable to do so. The result of these lengthy efforts is the Responsibility to Protect doctrine. The Responsibility to Protect rests on three foundational pillars which allow external states to intervene for humanitarian protection, and potentially utilize military force against a state's sovereignty, when a state is unable to do so on their own.¹ Within the doctrine's more black and white applications on the world stage of atrocity crimes within humanitarian crises, there exists a far more realistic and unilateral application to the current immigration crisis between the United States and the gang-corrupted states of Central America. This note will identify the United States' responsibility under the concept of "Responsibility to Protect", demonstrating that the United States has a "responsibility to accept" immigrants fleeing from humanitarian crises in Central America – crises which their state governments are unwilling or unable to prevent.

II. THE RESPONSIBILITY TO PROTECT

A. The Millennium Report

In March 2000, then Secretary General of the United Nations, Kofi Annan, released a report entitled "We the Peoples: The Role of the United Nations in the 21st Century," now widely known as "The Millennium Report."² The Millennium Report addressed the difficulty of balancing state sovereignty with necessary lifesaving humanitarian intervention.³ The report stated that,

Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community.⁴

¹ See *An Introduction to the Responsibility to Protect*, INT'L COAL. FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop> (last visited Mar. 14, 2019).

² U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century* (Apr. 3, 2000), http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf [hereinafter *Millennium Report*].

³ See *id.*

⁴ *Id.* at 48.

Mr. Annan's commentary led to the creation of the International Commission on Intervention and State Sovereignty ("ICISS") by the Canadian Government.⁵

B. The International Commission on Intervention and State Sovereignty

Announced first by Canadian Prime Minister Jean Chrétien and composed of prominent international human rights advocates, the ICISS was established in order to respond to Secretary General Annan's challenge to the community of states to create a consensus on how to respond to "massive violations of human rights and humanitarian law."⁶ The ICISS subsequently responded to Mr. Annan's evaluation of the need for intervention and the conflict with state sovereignty by penning "The Responsibility to Protect" – a lengthy report identifying the difficulties of balancing state sovereignty with the need for humanitarian intervention.⁷ The responsibility to protect, per the ICISS, was emblematic of two basic principles: (1) a state's sovereignty "implies responsibility" and this responsibility, for the protection of a state's people, lies inherently with the state itself; and (2) when the state in question is "unwilling or unable" to protect its people or significantly avert the threat, the principle of sovereignty and non-intervention "yields to the international responsibility to protect."⁸ Failure to protect one's own nation under this theory would then shift the responsibility to the international community.⁹

The ICISS report identified three essential elements within the Responsibility to Protect as: (1) "the responsibility to prevent"; (2) "the responsibility to react"; and (3) "the responsibility to rebuild."¹⁰ The "responsibility to prevent" directs the international community to "address both the root causes and direct causes of internal conflict and

⁵ Sara Heitler Bamberger & Joanna Shulman, *Getting the Message Out: R2P Advocacy, in THE RESPONSIBILITY TO PROTECT (R2P): MOVING THE CAMPAIGN FORWARD 2, 2* (Sara Heitler Bamberger, Jamie O'Connell, Rachel Shigekane & Camille Crittenden eds., 2007), <http://law.berkeley.edu/wp-content/uploads/2015/04/The-Responsibility-to-Protect-R2P-October-2007.pdf>.

⁶ INT'L COMM'N ON INTERVENTION AND ST. SOVEREIGNTY [ICISS], *THE RESPONSIBILITY TO PROTECT* 81 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

⁷ *Id.*

⁸ *Id.* at xi.

⁹ Jonah Eaton, *Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. J. INT'L L. 765, 774 (2011).

¹⁰ ICISS, *supra* note 6, at xi.

other man-made crises putting populations at risk.”¹¹ The “responsibility to react” entails responding to situations of human need with appropriate measures, including coercive measures such as sanctions and prosecution, and in extreme situations, military intervention.¹² Finally, the “responsibility to rebuild” dictates providing full assistance with recovery from the crises, particularly following military action, addressing the causes of the harm that the intervention was designed to halt or avert.¹³ This note analyzes primarily the “responsibility to react.”

C. 2005 World Summit

Following the penning of the ICISS “Responsibility to Protect,” the doctrine was put to the 2005 World Summit for their consideration.¹⁴ In March 2005, U.N. Secretary-General Kofi Annan released a report titled “In Larger Freedom: Towards Development, Security and Human Rights for All.”¹⁵ The report acknowledged that threats to human security are solvable only through collective world action.¹⁶ The report noted that,

Human rights protection results when, through specific actions, individuals who otherwise would be at risk or subject to deprivation of their rights, are able to fully exercise them. It is based on international law, and necessarily focuses on both immediate responses where people are threatened, and on longer-term work to build and strengthen laws and institutions that protect rights — within States and at the global level.¹⁷

These comments by Secretary-General Annan embraced and solidified the idea that the Responsibility to Protect is one based in international law, and domestic laws need to be better ratified in order to allow for further protection of minority groups and human rights.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See *About Responsibility to Protect*, U.N. OFF. ON GENOCIDE PREVENTION & RESP. TO PROTECT, <http://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> (last visited Mar. 4, 2019).

¹⁵ U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. DOC. A/59/2005/Add.3 (May 26, 2005).

¹⁶ See *id.* ¶ 33.

¹⁷ *Id.* ¶ 34.

¹⁸ See *id.* The report references the need to strengthen laws and institutions both within States and at a global level, showing the need for ratification of domestic laws to protect minority populations. *Id.*

Following the World Summit, there were attempts to begin the process of the codification of the Responsibility to Protect by the U.N. General Assembly.¹⁹ The United Nations' Outcome Document stated that "the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."²⁰ Among other things, this statement clearly demonstrates that the international community as a whole is responsible for the use of non-military measures to protect civilians who are under persecution in their home country.²¹

D. 2009 General Assembly

Secretary-General Annan's report was subject to large-scale debate and criticism from several U.N. member states.²² In 2009, following the 63rd Session of the General Assembly, the Secretary-General at the time, Ban Ki-Moon, issued his report titled "Implementing the Responsibility to Protect."²³ Mr. Moon outlined three crucial pillars for the advancement of the agenda of the Responsibility to Protect.²⁴ Pillar one discusses the protection responsibilities of the state.²⁵ The state must "protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing, and crimes against humanity."²⁶ This pillar noted that "[t]he declaration by the Heads of State and Government in paragraph 138 of the Summit Outcome that 'we accept that responsibility and will act in accordance with it' is the bedrock of the responsibility to protect."²⁷ As such, should a state's population be adequately protected by the state itself, there would be no need for outside state intervention.²⁸

¹⁹ G.A. Res. 60/1 (Sept. 16, 2005).

²⁰ *Id.* ¶ 139.

²¹ *See id.*

²² Press Release, General Assembly, More Than 40 Delegates Express Strong Scepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect, U.N. Press Release GA/10849 (July 24, 2009).

²³ U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 11, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect: Report of the Secretary-General*].

²⁴ *See id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.*

Pillar two encompasses a state's obligations for "international assistance and capacity building."²⁹ This pillar holds international bodies to "commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."³⁰ These responsibilities are said to "take one of four forms": (a) "encouraging States to meet their responsibilities under pillar one"; (b) assisting States to meet their obligations; (c) helping states "build their capacity to protect"; and (d) providing assistance to States "under stress before crises and conflicts break out."³¹ Should this assistance and capacity building prove successful, again there would be no need for intervention.³²

Finally, pillar three, "timely and decisive response," provides guidance for once a humanitarian conflict has already begun.³³ It embodies the concept that "the United Nations, regional, sub-regional and national decision makers must remain focused on saving lives through 'timely and decisive' action not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results."³⁴ This obligation, that focuses on saving lives, versus following policies "that prize procedure over substance and process over results,"³⁵ is a driving force of the analysis of this note.

III. IMMIGRATION POLICY IN THE UNITED STATES

A. Department of Homeland Security Asylum and Refugee Policies

The most critical engagement of the United States regarding the responsibility to protect via non-military action is seen regarding the current immigration influx and typical deportation. The Refugee Act of 1980 was established "to revise the procedures for the admission of refugees" and "establish a uniform basis for the provision of assistance to refugees."³⁶ The purpose of the Act was "to provide a permanent and systematic procedure for the admission to this country of refugees of

²⁹ *Id.*

³⁰ *See id.* ¶ 28.

³¹ *Id.*

³² *See id.*

³³ *Id.* ¶ 11.

³⁴ *Id.* ¶ 50.

³⁵ *Id.*

³⁶ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.”³⁷

Under current U.S. law, any foreign national physically present in the United States, or who arrives at the United States border, irrespective of status, may apply for asylum.³⁸ To establish eligibility for asylum under the United States Code, a foreign national must “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”³⁹ The broad definition of the term “refugee” has been narrowed to

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 opinion⁴⁰

In the adjudication of claims under this standard, there have been lengthy discussions surrounding the use of the claim of unwilling or unable on behalf of the government. Notably, in *Baghdasaryan v. Holder*, the United States Court of Appeals for the Ninth Circuit stated that:

[a]n applicant alleging past persecution has the burden of establishing that (1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control.⁴¹

In *Baghdasaryan*, the Ninth Circuit determined that the level of mistreatment he received as a result of either government involvement or acquiescence rose to the standard of “forces that the government was

³⁷ *Id.*

³⁸ See 8 U.S.C. §1158(a)(1) (2012).

³⁹ § 1158(b)(1)(B).

⁴⁰ §1101(a)(42).

⁴¹ *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010) (citing *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000)).

unable or unwilling to control,” and thereby remanded the case to the Board of Immigration Appeals.⁴² This evolved standard of “unwilling or unable on the part of the government” ultimately gave rise to the United States’ need for implementation of the “responsibility to accept” under the UN Security Council’s 2009 acceptance of “Responsibility to Protect.”⁴³

B. Current United States Immigration Policy

The Trump Administration’s recent treatment of immigrants, including those seeking asylum, directly contradicts the Responsibility to Protect. This is reflected in the recent decision by former Attorney General Jeff Sessions in *Matter of A-B-*.⁴⁴ Former Attorney General Sessions stated that “the mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.”⁴⁵ The decision further stated that, “an applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government’s difficulty controlling private behavior.”⁴⁶ This broad declaration by former Attorney General Sessions was backed by the ambiguity of the term “membership in a particular social group.”⁴⁷ As explained in the decision, this is a result of a lack of legislative intent, and that the reading of the phrase is predominantly open ended and up to the determinations of the Attorney General.⁴⁸

Another contradiction of the Responsibility to Protect by the Trump Administration is demonstrated by the aforementioned court decision related to gang violence.⁴⁹ This decision has stated that gang violence does not meet the asylum requirement of a “particular social group” because the gang could have had several different motives for targeting the population, and the members of the group were not targeted for harm more frequently than the rest of the population.⁵⁰ Regardless of the reasons for targeting, once it is clear that there are atrocities taking place,

42 *See id.* at 1026.

43 ICISS, *supra* note 6, at xi.

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

45 *Id.* at 316.

46 *Id.* at 317.

47 *Id.* at 326.

48 *Id.* at 326.

49 *Id.* at 316.

50 *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008).

a greater responsibility to protect, and within that a Responsibility to Accept refugees, become implemented.

C. Country Conditions in Common United States Asylum Seekers

In focusing on the direct implications of the Responsibility to Protect regarding the situations faced routinely by United States asylum seekers in Central America, the country conditions for each case become immensely important. Most Central American asylum-seekers in the United States come from Nicaragua, Guatemala, Honduras, and El Salvador.⁵¹ The conditions of each of these countries are increasingly gruesome, with evidence that the government is unwilling or unable to protect their citizens being persecuted. Individuals in Nicaragua are routinely subject to arbitrary unlawful killings, torture and more.⁵² This includes arbitrary or unlawful killings, torture in detention, arbitrary arrest and detention, as well as politically motivated killings, with the government or its agents behind them.⁵³ Guatemalan citizens similarly experience arbitrary arrest, corruption of judicial officials, “widespread government corruption,” gender-based killings, and police and gang violence.⁵⁴ Honduras has high rates of unlawful and arbitrary killings committed by law enforcement and security forces, with corruption continuing to be a pervasive problem amongst its governmental forces.⁵⁵ Furthermore, Honduras has the highest murder rate in the world as a result of the inability of government forces to combat gang activity.⁵⁶ Lastly, El Salvador experiences widespread atrocities, including government corruption leading to gang violence against women and children, without such actions being subject to prosecution.⁵⁷

These conditions may not rise instantly to the level of mass atrocities which are mentioned within the Responsibility to Protect proposal

51 NADWA MOSSAAD & RYAN BAUGH, DEP’T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2016, at 7 (2018), https://www.dhs.gov/sites/default/files/publications/Refugees_Asyees_2016.pdf.

52 See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Nicaragua 1 (2017), <https://www.state.gov/documents/organization/277591.pdf>.

53 *Id.* at 1-2.

54 U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Guatemala 1 (2017), <https://www.state.gov/documents/organization/277579.pdf>.

55 See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Honduras 1 (2017), <https://www.state.gov/documents/organization/277585.pdf> [hereinafter Honduras 2017 Human Rights Report].

56 See *Honduras 2018 Crime & Safety Report*, U.S. DEP’T OF STATE (Apr. 3, 2018), <https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=23798>.

57 See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: El Salvador 1, <https://www.state.gov/documents/organization/277575.pdf>.

because they are not. However, the systematic persecution and the inability of government forces to react or punish will allow these conditions to worsen steadily. As these acts are allowed to be committed without redress from the government, the worst incidents can be forecast to rise to the level of mass atrocities, and persecution of specific groups, with the government unwilling or unable to act, as a result of lack of resources, or direct involvement with the incidents. As result of these conditions, there has been an increase in immigrants making the long journey to the United States border through Mexico, only to be turned away as a result of their claims being too general.⁵⁸

D. United States' Responsibility to Central American Countries

While the current conditions in Central American countries have been influenced by a multitude of factors, they have also been influenced by largely U.S. policy. This influence is most easily identified through the Central American Free Trade Agreement (“CAFTA-DR”), which has been described as a “tool of American geopolitical strategy.”⁵⁹ CAFTA-DR is the “first free trade agreement between the United States and a group of smaller developing economies: our Central American neighbors Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, as well as the Dominican Republic.”⁶⁰ CAFTA-DR was designed to promote trade, investment, and stability in the aforementioned region of Latin America.⁶¹

The results of the treaty must have been far from what was envisioned by the Office of the United States Trade Representative. In his report for the Congressional Research Service, Mr. Hornbeck stated that as a result of different country conditions for trade and manufacturing, the aforementioned countries, with the exception of Costa Rica, have “seen their exports stagnate or decline for multiple reasons, including dependence on the highly competitive apparel trade, lower levels of investment, public security problems, and broader governance and policy

⁵⁸ See Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WASH. OFF. ON LATIN AM. (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers> (Stating that “Central Americans who cite fear of generalized violence in their asylum applications are not making a baseless claim.”).

⁵⁹ Michael Ardovino & Sarah Lane, *The Impact of CAFTA-DR*, USAID KNOWLEDGE SERVS. CTR. 1 (2008), https://pdf.usaid.gov/pdf_docs/PA00HPN8.pdf.

⁶⁰ *CAFTA-DR (Dominican Republic-Central America FTA)*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Feb. 4, 2019).

⁶¹ *Id.*

concerns.”⁶² The confounding effect of the trade agreement, notably only beneficial to the large export companies of each participating country, has been highly detrimental to the working class, assembly, and agricultural industries.⁶³

A notable effect of the CAFTA-DR in causing the current immigration and political crises in Central American countries has been with regard to the textile and agriculture industries. Since CAFTA’s introduction in 2005, and as a result of the low tariffs and wages, a typical textile worker in Guatemala earns only \$4,500 annually, while Honduran textile workers make only \$2,490.⁶⁴ The issue of such disproportionately low wages has not been improved by the influence of Free Trade Agreements, and as Larry Cohen, President of Communication Workers of America (“CWA”) stated, “Hondurans, ranging from peasant farmer, factory worker, unemployed, searching for a job, unionist, elected official or an immigration leader, the ‘total breakdown of this trade regime’ is evident and the lack of any progress . . . cannot be measured.”⁶⁵

The breakdown of these working conditions within the Central American countries has the propensity to lead displaced workers in the almost “failed states” to turn to gang violence.⁶⁶ Therefore, the United States, by virtue of largely one-sided trade agreements, has contributed to the current country conditions under which the governments of the respective states are unable or unwilling to stop the atrocity crimes, including systematic murders and disappearances, that are occurring.

E. Crossroads of U.S. Policy and Responsibility to Protect

There are several crossroads between the Responsibility to Protect, and United States’ immigration policy. However, there have been several

⁶² J. F. HORNBECK, CONG. RESEARCH SERV., R42468, THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR): DEVELOPMENTS IN TRADE AND INVESTMENT 1 (2012).

⁶³ See *CAFTA-DR (Dominican Republic-Central America FTA)*, *supra* note 60, at 19.

⁶⁴ See Francis Calpotura, *Apparel Industry Profiteers Must Fund Relief for Free Trade Refugees*, HUFFPOST (Sept. 4, 2014, 3:34 PM), https://www.huffingtonpost.com/francis-calpotura/apparel-industry-profitee_b_5737474.html.

⁶⁵ Michael Oleaga, *Immigration News Today: Honduras Near ‘Failed State’ Status Due to Free Trade Agreement, Says Labor and Latino Leaders*, LATIN POST (Oct. 21, 2014, 8:49 AM), <https://www.latinpost.com/articles/24068/20141021/immigration-news-today-honduras-near-failed-state-status-due-free.htm>.

⁶⁶ Christopher Cramer, *Unemployment and Participation in Violence 10* (Nov. 16, 2010) (unpublished background paper), https://openknowledge.worldbank.org/bitstream/handle/10986/9247/WDR2011_0022.pdf (“Joining drug gangs . . . offers what the formal labour market apparently cannot: income prospects, a source of respect and social ties of belonging.”).

disparities between the United Nations definition of the Responsibility to Protect and the actual implementation of it within immigration proceedings in the United States.

First, it must be noted that the “mass atrocities” referred to in “Implementing the Responsibility to Protect” by the United Nations include war crimes and crimes against humanity.⁶⁷ War crimes are defined to include

any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (1) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (2) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (3) Taking of hostages;
- (4) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.⁶⁸

Crimes against humanity, in comparison, include:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (1) Murder;
- (2) Extermination;
- (3) Enslavement;
- (4) Deportation or forcible transfer of population;
- (5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (6) Torture;
- (7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

⁶⁷ *Implementing the Responsibility to Protect: Report of the Secretary-General*, *supra* note 23, ¶ 68.

⁶⁸ Rome Statute of the International Criminal Court art. 8, July 17, 1988, 2187 U.N.T.S. 90.

(8) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.⁶⁹

Based on the above definitions, when, at a minimum, there is evidence of either widespread violence to people and life; outrages upon personal dignity; torture; rape; or persecution, the Responsibility to Protect creates a responsibility of countries to intervene for the protection of individuals when the government is unwilling or unable to protect their own people.⁷⁰

The language here is interestingly similar to that of the United States Code surrounding applications by foreign nationals for asylum, allowing for the idea of a crossroads between the two concepts, and applicability of the Responsibility to Protect in asylum law.⁷¹ This standard, elaborated by the Ninth Circuit in *Baghdasaryan*, states that an individual may apply for asylum when: “(1) his treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control.”⁷² As is evident from the similarity of language used both internationally and domestically, once this persecution (which the government is unwilling or unable to control) has been established, there is a Responsibility to Protect the citizens of the foreign sovereign. This responsibility entails taking timely and decisive action, and not merely “following arbitrary . . . policy ladders that prize procedure over substance and process over results.”⁷³

It has been argued that the Responsibility to Protect doctrine is “fundamentally forward looking—it aims as far as possible to prevent Responsibility to Protect crimes, and where that fails, it aims to halt the

⁶⁹ *Id.* art. 7(1)(a)-(k).

⁷⁰ When the state in question is “unwilling or unable” to protect its people or significantly avert the threat, the principle of sovereignty and non-intervention “yields to the international responsibility to protect.” Millennium Report, *supra* note 2, at 38. Pillar Three of the Responsibility to protect includes a call to take timely and decisive action not on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results. *See Implementing the Responsibility to Protect: Report of the Secretary-General*, *supra* note 23, ¶ 11.

⁷¹ *See* 8 U.S.C. § 1158 (2012).

⁷² *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010) (citing *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000)).

⁷³ *Implementing the Responsibility to Protect: Report of the Secretary-General*, *supra* note 23, ¶ 50.

commission of these crimes.”⁷⁴ This furthers the idea that when the international community as a whole has been given reasons to believe that instability in a country has the potential of escalating to full blown mass atrocities, they are required to take action. Embodied in the ideas elaborated above is a large call to action for an atrocity which has not yet been committed. However, I agree that “there is an urgent need for experimentation with existing ‘tools’ such as R[esponsibility] to P[rotect], to mitigate the devastation and human suffering.”⁷⁵ This argument, provided by E. Tendayi Achiume, provides parallels to the level of violence and government inability to act that is currently being experienced by so many Central Americans, and the further need to mitigate their suffering.⁷⁶ While Mr. Achiume is making the argument in relation to Syria, and that the escalation of violence seen in recent years is beyond what is expected in Central America, the foundational elements remain the same. Government corruption; indiscriminate killings on the part of government officials and outside forces (in this case often organized gangs); and persecution on the basis of race, sex, ethnicity, or gender, all remain commonplace in both conflicts and provide for a preemptive need for action.

The rapid escalation that could potentially take place within these Central American regimes, coupled with frequent gang violence and government killings of opposition movements, support the argument that the United States has a responsibility to preemptively accept refugees fleeing atrocities in Guatemala, Honduras, El Salvador, and Nicaragua.

This note argues that the current United States immigration policy be overhauled in order to align with the Responsibility to Protect; to preemptively protect individuals facing atrocities in their home countries; and to adapt better immigration policies for those individuals whose governments are unwilling or unable to protect them. If the United States can take these preemptive steps in the prevention of human rights violations, then the United States can prevent the loss of countless innocent lives.

⁷⁴ E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 722 (2015).

⁷⁵ *Id.* at 761.

⁷⁶ *See id.*

IV. CRITIQUES

This section addresses the apparent criticisms to the proposed broad, preemptive Responsibility to Protect-based approach to the current refugee and asylee crisis at the United States' southern border.

A. Incidents Not Atrocity Crimes

The predominant critique of a preemptive Responsibility to Protect doctrine with regards to Central America is that the conditions in the aforementioned countries don't fit the Rome Statute definitions of these "atrocity crimes," which include genocide, war crimes, or crimes against humanity.⁷⁷ While the level of political turmoil may not have risen to the degree of an atrocity crime, these countries are in fact bordering on such a degree.⁷⁸ Per the United Nations report, "Framework of Analysis for Atrocity Crimes," and former Secretary General Ban Ki Moon, "The first the we can do is to be more alert and pay attention to the warning signs. Atrocity crimes take place on a large scale, and are not spontaneous or isolated events; they are processes, with histories, precursors and triggering factors which, combined, enable their commission."⁷⁹ This thematic development of atrocity crimes speaks to the argument, that in order to prevent further actions and the development of crimes into atrocity crimes, it is important to preemptively implement the Responsibility to Protect.⁸⁰

In the United Nations Report, there are eight common risk factors proposed for the identification of development of atrocity crimes.⁸¹ These factors are: (1) "[s]ituations of armed conflict or other forms of instability"; (2) "[r]ecord of serious violations of international human rights and humanitarian law"; (3) "[w]eakness of State structures"; (4) "[m]otives or incentives"; (5) "[c]apacity to commit atrocity crimes"; (6) "[a]bsence of mitigating factors"; (7) "[e]nabling circumstances or preparatory action"; and (8) "[t]riggering factors."⁸² Of these eight

⁷⁷ Rome Statute, *supra* note 68, art. 6, 7, 8.

⁷⁸ See generally U.N. Secretary-General, Framework of Analysis for Atrocity Crimes: A Tool for Prevention (July 2014), http://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf [hereinafter Framework of Analysis for Atrocity Crimes].

⁷⁹ *Id.* at iii.

⁸⁰ *Id.* ("With the help of the Framework, we can better sound the alarm, promote action, improve monitoring or early warning by different actors, and help Member States to identify gaps in their atrocity prevention capacities and strategies.")

⁸¹ *Id.* at 9.

⁸² *Id.*

factors, several are clearly present amidst the current situations in Nicaragua, Guatemala, Honduras and El Salvador.⁸³

With regard to factor one, the political instability in each of the regions is seen in the country reports, which detail government-motivated killings and disappearances, as well as clashes with militant groups and gangs.⁸⁴ The United Nations Report outlines that, “crimes against humanity can also occur during times of peace. This is most likely when there are serious levels of political instability, threats to the security of the country or even volatility in economic or social affairs.”⁸⁵ With such negative implications of trade agreements, there is sufficient economic volatility and government corruption to satisfy factor one of the United Nations Report.⁸⁶ Factor two is widely prevalent in the aforementioned countries.⁸⁷ Based on previous incidents which have been marginally prosecuted in International Tribunals, there is a clear record of international human rights and humanitarian law violations in the target countries. Factor three is structurally similar to the facts surrounding factor one, the dehumanizing effects of trade agreements, economic instability, and the unwillingness of the government to both protect from armed gangs and militias, as well as inability to provide basic human needs for their civilians, demonstrates a risk under factor three.⁸⁸ Factor five, the capacity to commit atrocity crimes, is clear based on the past practices and lack of true governmental overhaul in the aftermath of persecutions such as forced disappearances and politically motivated killings.⁸⁹ Finally, factor seven could be a direct result of the United States’ failure to accept asylum seekers based on real fear of persecution as it relates to gang violence, and, as a result, enabling that violence to continue.⁹⁰ To return asylum seekers whose claims are based on either political opinion or gang violence to their country of origin, enables the

⁸³ See *supra* notes 52, 54, 55, 57 and accompanying text.

⁸⁴ *Id.*

⁸⁵ Framework of Analysis for Atrocity Crimes, *supra* note 78, at 10.

⁸⁶ See Honduras 2017 Human Rights Report, *supra* note 55; see also Framework of Analysis for Atrocity Crimes, *supra* note 78, at 10.

⁸⁷ See *Extrajudicial Killings and Enforced Disappearances in Latin America: ICJ Commissioners Urge Continued and Expanded Engagement by the ICJ*, INT’L COMM’N OF JURISTS (June 28, 2018), <https://www.icj.org/extrajudicial-killings-and-enforced-disappearances-in-latin-america-icj-commissioners-urge-continued-and-expanded-engagement-by-the-icj> (“[T]hese challenges are particularly evident in Latin America, where there has been a resurgence in recourse to enforced disappearances and extrajudicial killings in countries throughout the region and where violations of the past have in very many cases been inadequately addressed.”).

⁸⁸ See Honduras 2017 Human Rights Report, *supra* note 55; Calpotura, *supra* note 64.

⁸⁹ Framework of Analysis for Atrocity Crimes, *supra* note 78, at 14.

⁹⁰ See *id.* at 16.

groups the asylum seekers are facing persecution from to commit the potential atrocity crimes that the United Nations report was designed to prevent.⁹¹

B. Domestic Security

With the proposed theory of refugee acceptance based on a forward-thinking theory of the Responsibility to Protect, there may come criticism that this will allow for too many refugees being accepted into the United States. While there have been staggering numbers representing immigration to the United States in recent years, the crime and violence statistics that are often associated with the influx of a large immigrant population are often misguided with studies showing that immigrants are less likely to be incarcerated than United States nationals.⁹² Therefore, the frequently cited increase in crime and violent tendencies associated with an increase in immigrant numbers, which can be expected as a result of the above proposed policy, is fallacy and not fact.⁹³

C. Employment

A final argument against a presumption for acceptance asylum policy may be that immigrants take jobs away from United States' citizens.⁹⁴ This assertion too, however, has been largely disproven as immigrant populations typically occupy jobs that the appropriate working-aged American citizen is not willing to do, including many agricultural jobs, which are at the heart of our largest exports as a country.⁹⁵ While the rhetoric can be powerful when used by United States politicians, immigrants in fact do contribute to the growth of our economy, occupying jobs that Americans are unwilling to take, and are necessary.⁹⁶

⁹¹ Calpotura, *supra* note 64.

⁹² See Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants Their Numbers, Demographics, and Countries of Origin*, CATO INST. 1 (Mar. 15, 2017), https://object.cato.org/sites/cato.org/files/pubs/pdf/immigration_brief-1.pdf. Illegal immigrants are far less likely to be incarcerated based on percentage of their entire population than native United States Citizens, with a rate of almost half of native citizens. *See id.* at 1-2.

⁹³ *See id.*

⁹⁴ *See generally Illegal Aliens Taking U.S. Jobs*, FED'N FOR AM. IMMIGR. REFORM (Mar. 2013), <http://www.fairus.org/issue/workforce-economy/illegal-aliens-taking-us-jobs>.

⁹⁵ *See*, Mary Jo Dudley, *These U.S. Industries Can't Work Without Illegal Immigrants*, CBS NEWS (Jan. 10, 2019, 3:55 PM), <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes>.

⁹⁶ Foreign-born workers are more likely to be employed in service level positions in production, transportation, material moving, construction and maintenance positions, as opposed to managerial

Evidenced by fact over merely political rhetoric, the allowance of additional refugee and asylum-seeking immigrants under a Responsibility to Protect framework will not detract from positions currently available to United States citizens.

V. CONCLUSION

While there are several troubles typically associated with immigration to the United States, including the aforementioned domestic security and employment concerns, the pervasive threat of indiscriminate violence faced by individuals in Central American countries has given rise to the need for the United States to accept responsibility for the protection of foreign nationals in countries whose governments are unwilling or unable to protect them. Seen through the lens of the United Nations emerging theory of “Responsibility to Protect,” the United States is obligated to grant asylum to individuals in fear of persecution by gangs, their government, or other forces. This responsibility is embodied in the phrase “responsibility to accept,” as regarded towards refugees and asylum seekers who are being turned away for not having specific grievances. To better align with the United Nations and the domestic policies on asylum and refugee status, the United States needs to focus on timely action with regards to those seeking violence and atrocities in their home countries.

and professional roles which were held by a majority of native United States citizens. Furthermore, the unemployment rate has steadily declined, evidence of no shortage of work. *See* Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Foreign-Born Workers: Labor Force Characteristics – 2017 (May 17, 2018), https://www.bls.gov/news.release/archives/forbrn_05172018.pdf.