

NOTES & COMMENTS

RIGHTS AS REMEDIES: USING LATIN AMERICAN LEGAL CHANNELS TO HALT U.S. BORDER EXTERNALIZATION

by
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The first Trump Administration saw intense border crackdowns and a ramping up of restrictions on asylum. While some of these policies shifted under President Biden, many were recreated under new names. The second Trump Administration has functionally closed the border and deported asylum seekers to third countries such as Costa Rica and Panama, leaning heavily on Latin American countries to accept expelled migrants. As U.S. courts fail to preserve asylum law domestically, international law, as integrated into the constitutions of Latin American countries, can provide a valuable litigation tool to block those countries from participating in the U.S. border externalization regime. This Note examines this concept through case studies as applied to the 2023 Circumvention of Lawful Pathways Rule and to U.S. support for migrant pushbacks in Guatemala and Colombia, with the hope that this approach carries forward into the second Trump era and beyond.

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INTRODUCTION: THE VIOLENCE OF THE FAR-REACHING BORDER

“En Arriaga nos regresaron, entonces estuvimos otra vez en Tapachula.” *In Arriaga, we were turned around and had to go back to Tapachula again.* “México fue lo peor, la policía nos agarraron por dos días en el bus, tocaron a mi hija, no nos dejaron pasar.” *Mexico was the worst, the police held us for two days on a bus, they touched my daughter, and they wouldn’t let us continue on.* “En la selva, en Darién, casi morimos y entonces tuvimos suerte que no nos secuestraron ni regresaron al otro lado.” *In the jungle, in Darién, we almost died and then we were lucky we weren’t kidnapped or forced to return once we reached the other side.* “Esperamos tres meses para la cita de CBP One, casi no la pudimos agarrar.” *We waited three months for the CBP One appointment, we almost couldn’t get it.* “Pasé dos veces por Guatemala porque ya me regresaron a Honduras primero.” *I had to go through Guatemala twice because they returned me to Honduras first.*¹

¹ Excerpts taken from conversations with several asylum-seekers. All Spanish-to-English

These stories and sentiments have been told to me with increasing frequency over my years of organizing with, working alongside, and accompanying asylum seekers. I have worked with people as they try to physically cross the U.S.-Mexico border or navigate detention, and have heard countless stories about the horrors of Customs and Border Protection (CBP). However, the most traumatic parts of many of my asylum-seeking friends' migration stories often occur outside of U.S. soil. What these stories have shown me is that frequently what causes the most immediate pain in the process of migration for many current asylum seekers is not the physical border itself or the mechanisms of enforcement that exist within the U.S., such as Immigration and Customs Enforcement (ICE) detention. Instead, what people repeatedly come back to telling me about is the pain of the process leading up to making it into the interior of the U.S. Much of this pain is directly related to U.S. policy designed to stop people from being able to reach the U.S. border, also known as border externalization.

In a literal sense, border externalization entails countries, generally migrant-receiving countries in the Global North, deterring migrant arrivals or otherwise engaging in border enforcement prior to migrants reaching a country's physical border.² Immigration scholar Ayelet Shachar has described externalization as a process in which "[t]he traditional static border is . . . reimagined as the *last* point of encounter, rather than the first."³ She has pointed to a global "regressive precedent" in which Global North countries follow each other's lead in implementing increasingly restrictive policies that further push their borders outward.⁴ In addition to the desire to deter migrants from arriving in Global North destination countries at all, externalization can be one way in which migrant-receiving countries try to evade international legal responsibilities that are triggered once a migrant is within their jurisdiction.⁵

translations that appear in this Note are the author's own, unless otherwise indicated.

² Jeff Crisp, *What is Externalization and Why is it a Threat to Refugees?*, CHATHAM HOUSE, <https://www.chathamhouse.org/2020/10/what-externalization-and-why-it-threat-refugees> (Mar. 5, 2021).

³ AYELET SHACHAR, *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY* 5 (2020).

⁴ Ayelet Shachar, *Instruments of Evasion: The Global Dispersion of Rights-Restricting Migration Policies*, 110 CALIF. L. REV. 967, 970, 973–74 (2022) [hereinafter Shachar, *Instruments of Evasion*].

⁵ Olzhas Gibatov, *Externalization of Migration Control in Transit States: The Cases of Morocco and Mexico* 5 (Dec. 14, 2020) (M.A. thesis, Nazarbayev University) (on file with School of Humanities and Sciences, Nazarbayev University); NAT'L IMMIGR. JUST. CTR., *PUSHING BACK PROTECTION: HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM* 7 (2021) [hereinafter *PUSHING BACK PROTECTION*], https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-08/Offshoring-Asylum-Report_final.pdf.

In past decades, Global North countries have increasingly moved toward externalizing their borders.⁶ Australia has been a leader in the tactic of offshoring, involving warehousing asylum-seekers and other arriving migrants in detention centers in other countries, outside of Australia's own borders.⁷ Australia has repeatedly ramped up its border externalization efforts. In past decades, the country has not only mandated the offshoring of asylum seekers but has also increased maritime interdictions and penalties for migrants arriving by sea and gone as far as designating portions of Australian territory "migration zones," allowing the nation to claim that migrants arriving in those territories never even reached Australian soil.⁸ The European Union (EU) has largely followed suit, increasing deterrence policies in the Sahel region of the African continent as well as ramping up maritime interdictions in the Mediterranean and off the Atlantic coast, among other policies.⁹

In line with these global trends, the U.S. has also taken up externalization of its borders.¹⁰ Building on a long history of externalization and interdiction,¹¹ the U.S. has in the past ten years implemented a range of border-expanding policies.¹² These have included the Migrant Protection Protocols (MPP), often called Remain in Mexico, which forced asylum seekers to apply for asylum while waiting in Mexican border cities,¹³ Title 42, which used presidential public health authority to close the border to most migrants,¹⁴ and metering, where migrants at ports of entry were put on long lists and turned back to wait, often for months, in Mexico.¹⁵ Other policies include the Trump-era "Asylum Cooperative Agreements" (ACAs) with Central American nations, involving sending asylum seekers to Guatemala to

⁶ Shachar, *Instruments of Evasion*, *supra* note 4, at 969–70; Nancy Hiemstra, *Pushing the US–Mexico Border South: United States' Immigration Policing Throughout the Americas*, 5 INT. J. MIGRATION & BORDER STUD. 44, 44–46 (2019).

⁷ HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 95, 99, 101 (2021).

⁸ *Id.* at 98–100; Shachar, *Instruments of Evasion*, *supra* note 4, at 983–84, 989–90.

⁹ WALIA, *supra* note 7, at 102, 106–09, 112–13; Mark Akkerman, *The Military and Security Industry: Promoting Europe's Refugee Regime*, in ASYLUM FOR SALE: PROFIT AND PROTEST IN THE MIGRATION INDUSTRY 149, 149–51 (Siobhán McGuirk & Adrienne Pine eds., 2020).

¹⁰ PUSHING BACK PROTECTION, *supra* note 5, at 44–45.

¹¹ *Id.* at 38–43.

¹² *Id.* at 44–45.

¹³ *The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program*, AM. IMMIGR. COUNCIL (Feb. 12, 2025) [hereinafter *Explanation of Migrant Protection Protocols*], <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

¹⁴ AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 2 (May 2022) [hereinafter A GUIDE TO TITLE 42 EXPULSIONS], https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf.

¹⁵ Kirk Semple, *What is 'La Lista,' Which Controls Migrants' Fates in Tijuana?*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/world/americas/caravan-migrants-tijuana-mexico.html>.

adjudicate their asylum claims.¹⁶ In addition, there is the 2023 Circumvention of Lawful Pathways (CLP) rule, in which asylum-seekers who had not already been denied asylum in a country through which they have traveled were required to use an application called CBP One in order to enter the U.S. or face presumptive ineligibility for asylum.¹⁷ Concurrently with CLP, the Biden Administration entered an agreement with Mexico to accept Cuban, Haitian, Nicaraguan, and Venezuelan (CHNV) nationals that the U.S. has chosen to deport or expel but is unable to return to their countries of origin due to strained diplomatic relations.¹⁸ Finally, the U.S. has, and continues, to engage in numerous operations involving funding, training, and at times even sending U.S. troops or border agents to other countries, particularly in Latin America, to conduct border operations and stop migrants before they get close to the U.S.-Mexico border.¹⁹

While the policies of the U.S. and other Global North countries have varied, a common thread is that the majority rely on at least some amount of agreement and participation by another country, almost always in the Global South²⁰ or with less geopolitical power. For example, the European Union has signed a variety of “compacts” and “memorandums of understanding” with third countries regarding migration, including a very contentious agreement with Türkiye,²¹ indicating at least some degree of third country assent as a part of the EU’s externalization schemes. Similarly, Australia’s offshoring policies are reliant upon the agreement of other, smaller island nations such as Nauru, who consent to the holding of third-country migrants within their territory.²² And in the U.S. context, many of the above-mentioned policies (such as the ACAs and agreement by Mexico to take third-country nationals) rely on the agreement of another country by their very

¹⁶ Shachar, *Instruments of Evasion*, *supra* note 4, at 977.

¹⁷ *Fact Sheet: Circumvention of Lawful Pathways Final Rule*, DEP’T OF HOMELAND SEC. (May 11, 2023), <https://www.dhs.gov/archive/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule> [hereinafter *Fact Sheet: Circumvention of Lawful Pathways*]. CBP One is a mobile application that an asylum seeker must use prior to reaching the border to schedule a time to present at a port of entry. *Id.*

¹⁸ Stef W. Kight, *Mexico Agrees to Accept Non-Mexican Migrants Rejected by U.S.*, AXIOS (May 3, 2023), <https://www.axios.com/2023/05/03/biden-mexico-migration-border-deportation-title-42>.

¹⁹ Hiemstra, *supra* note 6, at 47–53.

²⁰ The Global North–Global South framework is often used by international organizations when discussing the geographic location of more- and less-developed countries. The Global South is made up of the less-developed countries, including Mexico, Guatemala, and Colombia. *Global North and Global South*, BRITANNICA, <https://www.britannica.com/topic/Global-North-and-Global-South> (Mar. 17, 2025).

²¹ Shachar, *Instruments of Evasion*, *supra* note 4, at 975–76.

²² Julia Morris, *Making a Refugee Market in the Republic of Nauru*, in *ASYLUM FOR SALE: PROFIT AND PROTEST IN THE MIGRATION INDUSTRY* 165, 168–70, 173–74 (Siobhán McGuirk & Adrienne Pine eds., 2020).

nature.²³ Others such as MPP have also ultimately required assent or participation from Mexico or other additional countries in order to be actualized.²⁴

Ultimately, then, an essential piece of border externalization involves a reliance on the agreement of transit or other third countries, generally Global South or developing nations, to implement or enforce certain migration policies.²⁵ Immigration advocates have and should continue to combat this tendency within the legal regimes of receiving countries themselves.²⁶ However, this Note argues that a key avenue to address border externalization, particularly in the U.S.-Latin America context, should be through litigation, based in international human rights law, in Global South transit countries to block these transit countries' ability to participate in the externalization of Global North²⁷ borders.

To show the importance and potential effectiveness of this strategy, Part I explores trends in U.S. border externalization between 2016 and early 2024, highlighting how the U.S. relies on the agreement of at least one other country. This Part also touches on the limitations that internal U.S. litigation strategy has had in this arena and successes that developing countries have had in influencing Global North immigration policy. Part II maps out the relevant international law principles at play and highlights the role of international law in the domestic legal systems of much of Latin America and particularly of Mexico, Guatemala, and Colombia. It then delves into case studies of two different forms of U.S. border externalization: (1) the use of CBP One and resultant metering and waiting in Mexico through CLP, as well as attendant policies that came out of this era of CLP and (2) U.S. engagement in Guatemalan and Colombian border policy to intercept migrants in these key transit countries. These case studies explore how legal advocates in these countries could use international law principles integrated into their countries' legal systems to force their countries to withdraw from participating in these specific policies, and what that retraction of participation would mean for these forms of U.S. border externalization. This Part also includes an analysis of some of the limitations of this approach, particularly regarding the roles of imperialism and impunity in Latin America. Finally, the conclusion speaks to the importance of transnational solidarity amongst immigration advocates and migrants worldwide.

²³ Shachar, *Instruments of Evasion*, *supra* note 4, at 975, 977; Kight, *supra* note 18.

²⁴ Joint Declaration and Supplementary Agreement on Migration and Refugees, Mex.-U.S., June 7, 2019, T.I.A.S. 19-607 [hereinafter Joint Declaration].

²⁵ See discussion *infra* Part I.

²⁶ See discussion *infra* Part II.

²⁷ The Global North encompasses more-developed countries, including the United States, Canada, and Europe. *Global North and Global South*, *supra* note 20.

I. EXTERNALIZATION PATTERNS AND ATTEMPTS TO ADDRESS THEM IN THE U.S. AND IN THE GLOBAL SOUTH

A. *Trends in U.S. Border Externalization Policy*

The U.S. approach to externalization has focused on three key themes: (1) interdiction/interception by the U.S. or other countries' immigration officials prior to reaching U.S. soil; (2) "burden-shifting" asylum acceptance onto transit or other third countries; and (3) a broad umbrella category of waiting in, deportation to, or expulsion into Mexico.²⁸ Almost all these forms of externalization rely on agreement or cooperation with another country, if not the outright participation of that other country in carrying out the policy itself.²⁹

The first of these categories, interception or interdiction, externalizes U.S. borders by stopping migrants before they arrive in the U.S., often using U.S. training and money, and sometimes even U.S. troops.³⁰ Migrant interdiction or interception takes place both at sea and on land, and at least in the maritime context, has been explicitly upheld in U.S. court.³¹ In *Sale v. Haitian Centers Council*, the Supreme Court held that the practice of the U.S. Coast Guard interdicting Haitian vessels in international waters and returning them to Haiti without screening the passengers for qualification as refugees did not violate the Refugee Convention's prohibition of refoulement.³² Specifically, the Court noted that neither Article 33 of the Refugee Convention nor the 1980 amendment to the U.S. Refugee Act governed the U.S. return of migrants who were outside of U.S. territory.³³

Since that time, despite broad international condemnation of *Sale*,³⁴ the U.S. has only expanded its apparatus of interception and interdiction. This has occurred through programs like the Mérida Initiative, an agreement between the U.S. and Mexico which involves U.S. funding and training of Mexican border forces, with the goal of "securing Mexico's porous and insecure southern borders."³⁵ The U.S. similarly conducts other funding and training operations throughout Latin America, such as the former Plan Venceremos in Guatemala (involving Guatemalan

²⁸ Jennifer M. Chacón, *Recounting: An Optimistic Account of Migration*, 110 CALIF. L. REV. 1041, 1042–43 (2022); *Explanation of Migrant Protection Protocols*, *supra* note 13; Shachar, *Instruments of Evasion*, *supra* note 4, at 979–81.

²⁹ See *infra* notes 35–37 and accompanying text.

³⁰ Shachar, *Instruments of Evasion*, *supra* note 4, at 979–81; see *infra* notes 35–37 and accompanying text.

³¹ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

³² *Id.* at 178–79, 187.

³³ *Id.* at 177, 182.

³⁴ Shachar, *Instruments of Evasion*, *supra* note 4, at 982.

³⁵ CLARE RIBANDO SEELKE & KRISTIN FINKLEA, CONG. RSCH. SERV., R41349, U.S.–MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 9, 21–22 (2017).

officials stopping, detaining, and deporting northbound migrants), as well as the creation of the Central American Regional Security Initiative (CARSI), both of which have funneled money, equipment, and training to Central American nations to stop the flow of migrants.³⁶ In Guatemala specifically, the U.S. has also deployed Department of Homeland Security (DHS) agents to operate in the country, as well as to train Guatemalan forces, and in 2019 to go as far as to rent vans and return northbound migrants to the Honduran border.³⁷ These operations were conducted with the participation of Guatemalan forces and pursuant to explicit agreements with the U.S.³⁸ Similarly, the U.S., Colombia, and Panama are directly collaborating in the Darién Gap region, where U.S. operatives have trained Colombian and Panamanian forces in an effort to curb migration in the region.³⁹ The U.S. has even considered sending its troops to conduct border enforcement in the Darién Gap area.⁴⁰

The second broad form of U.S. border externalization involves what is often called “burden shifting,” essentially pushing (Global South) transit countries to accept more asylum seekers and cutting off legal options for migrants who do not seek asylum in these transit countries.⁴¹ In this category fall the aforementioned ACAs, which directly shifted arriving asylum seekers from U.S. territory to Guatemala by designating Guatemala (and, as proposed but never implemented, El Salvador and Honduras) as a “safe third country.”⁴² These agreements were explicit and assented to by the U.S. and the various Central American signatories.⁴³ In addition, the ever-increasing varieties of transit bans are under this umbrella, from the first Trump-era Safe Third Country Transit Ban rule, to the transit ban under CLP, to the proposed transit ban in 2024 border bill negotiations; all of these proposals functionally take the same form, forcing asylum seekers to apply for status

³⁶ Hiemstra, *supra* note 6, at 49.

³⁷ Jeff Abbott, *Guatemala Takes a Hard Line Against Migrants—With US Support*, THE NATION (Feb. 16, 2021), <https://www.thenation.com/article/world/migrants-immigration-guatemala-mexico/>.

³⁸ *Id.*

³⁹ Courtney Kube, Carol E. Lee & Julia Ainsley, *Senior Biden Officials are Pushing to Send U.S. Troops to South American Jungle to Help Curb Human Smuggling*, NBC NEWS (May 23, 2023, 9:05 AM), <https://www.nbcnews.com/politics/immigration/senior-biden-officials-are-pushing-send-us-troops-south-american-jungl-rcna85574>.

⁴⁰ *Id.*

⁴¹ I use “burden shifting” in quotes here because it is a phrase commonly used in migration discourse and is the framing through which I believe the U.S. government is making policy, but not because I see migrants as a burden. I am inspired by Jennifer Chacón’s important intervention around the concept of refugees and other migrants not as “burdens” for the state to take on but rather as presenting positive opportunities for receiving countries. Chacón, *supra* note 28, at 1042–43, 1051.

⁴² Shachar, *Instruments of Evasion*, *supra* note 4, at 977.

⁴³ *Id.*

in transit countries or face disqualification from protection in the U.S.⁴⁴ By repeatedly attempting to implement this style of policy, the U.S. seems to aim to externalize its borders via slowing asylum seekers down, if not stopping them, by incentivizing seeking status in other countries first.⁴⁵

The third category of externalization is a mixed bag of policies that all involve some dynamic of waiting or being sent back to Mexico, in which Mexico operates as a holding place for those who are either aiming to enter the U.S. or who have been rejected from the U.S.⁴⁶ In this category are policies like MPP, Title 42, and the acceptance of CHNV nationals removed from the U.S.⁴⁷ Most of these policies rely on Mexican acquiescence in some form, such as the formal agreement involved in MPP⁴⁸ and the May 2023 joint announcement that Mexico would accept certain third-country nationals.⁴⁹ In addition, the former and current versions of metering similarly operate to externalize the U.S. border through forcing potential applicants seeking to enter the U.S. through a port of entry to endure long and generally dangerous waits in Mexican border cities.⁵⁰ Under first Obama and later Trump, CBP officials at ports of entry only allowed a limited number of migrants seeking asylum to cross per day.⁵¹ This policy, which Mexican officials directly participated in carrying out on the Mexican side by maintaining waitlists of migrants,⁵² was struck down in 2021.⁵³ However, under CLP, metering was in many ways

⁴⁴ Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,821, 33,829–30 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208); *Fact Sheet: Circumvention of Lawful Pathways*, *supra* note 17; *Immigrants and Asylum Seekers Are Not Bargaining Chips: Congress Must Reject Permanent Legislative Changes that Would Eviscerate U.S. Asylum Protections*, NAT'L IMMIGR. JUST. CTR. (Dec. 8, 2023) [hereinafter *Not Bargaining Chips*], <https://immigrantjustice.org/staff/blog/immigrants-and-asylum-seekers-are-not-bargaining-chips-congress-must-reject-permanent>.

⁴⁵ Transit bans are the main form of border externalization that do not seem to obviously require the consent of an additional country, though there certainly are ways transit countries could influence the impact of these bans, such as through summarily denying huge swathes of migrants access to asylum themselves. Susan M. Akram & Elizabeth Ruddick, *A Comparative Perspective on Safe Third and First Country of Asylum Policies in the United Kingdom and North America: Legal Norms, Principles and Lessons Learned*, 40 B.U. INT'L L.J. 79, 98–99 (2022).

⁴⁶ *Explanation of Migrant Protection Protocols*, *supra* note 13; Dara Lind, *The US has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam is Breaking*, VOX (Nov. 28, 2018, 4:00 AM), <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>.

⁴⁷ *Explanation of Migrant Protection Protocols*, *supra* note 13; A GUIDE TO TITLE 42 EXPULSIONS, *supra* note 14, at 3, 6; Kight, *supra* note 18 (explaining that the end of Title 42 will allow Mexico to continue holding migrants from Venezuela, Nicaragua, Cuba and Haiti).

⁴⁸ Joint Declaration, *supra* note 24.

⁴⁹ Kight, *supra* note 18.

⁵⁰ Semple, *supra* note 15; Lind, *supra* note 46.

⁵¹ HILLEL R. SMITH, CONG. RSCH. SERV., LSB10295, THE DEPARTMENT OF HOMELAND SECURITY'S "METERING" POLICY: LEGAL ISSUES 1–2 (2023).

⁵² *Id.* at 2.

⁵³ See generally *id.* at 4–5.

resurrected; CLP, much like MPP, Title 42, and the original metering policy, resulted in migrants waiting, often for months, in Mexico, and also involved migrants who presented at ports of entry without appointments being turned back.⁵⁴ International and border rights organizations reported on asylum seekers without CBP One appointments being turned back and put on waiting lists, as well as blocked from accessing ports of entry, by both U.S. and Mexican officials.⁵⁵ In these ways, Mexico supports the U.S. in carrying out many of its key border externalization policies.

B. Efforts to Block Externalization: Struggles in the Global North and Successes in the Global South

Advocates in the U.S. have tried hard to block each of the above-mentioned policies through litigation as well as grassroots efforts.⁵⁶ Unfortunately, attempts at addressing border externalization policies purely within the legal systems of Global North “receiving” countries have had mixed success, in part because border externalization policies are designed to evade formal legal responsibility by Global North destination countries.⁵⁷ However, there are some promising examples of sending and transit countries succeeding in shifting Global North immigration policy, including border externalization.

In both Europe and the U.S., litigation challenging externalization policy has had mixed success, and has often resulted in failure. For example, after EU member states struck a deal with Türkiye involving the return of all irregular migrants arriving in Greece to Türkiye, as well as other immigration provisions, asylum seekers sued in the European General Court to block the provision.⁵⁸ This litigation

⁵⁴ INT’L RESCUE COMM., LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42: ONE MONTH OF MONITORING U.S.-MEXICO BORDER PORTS OF ENTRY 1–2 (2023) [hereinafter LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42], https://www.rescue.org/sites/default/files/2023-06/Limits%20on%20Access%20to%20Asylum%20After%20Title%2042_1.pdf.

⁵⁵ *Id.*; Class Action Complaint for Vacatur, Declaratory Judgment, and Injunctive Relief at 2–3, *Al Otro Lado, Inc. v. Mayorkas*, No. 3:23-cv-01367 (S.D. Cal. July 27, 2023) [hereinafter Class Action Complaint for Vacatur].

⁵⁶ *Id.*; *Title 42 Challenges*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uclawsf.edu/our-work/litigation/title-42-challenges> (last visited Apr. 8, 2025); *Call to Action: Tell the White House to End Title 42*, COMMUNITIES UNITED FOR STATUS AND PROT., <https://www.wearecusp.org/campaigns/end-title-42/> (last visited Apr. 8, 2025); *5 Frightening Facts About “Remain in Mexico” Program for Asylum-Seekers*, UNITARIAN UNIVERSALIST SERV. COMM. (Jan. 28, 2020), <https://www.uusc.org/5-frightening-facts-about-remain-in-mexico-program-for-asylum-seekers/>.

⁵⁷ Border externalization “grants strategic space to skirt human rights obligations toward refugees and asylum seekers without formally withdrawing them.” Shachar, *Instruments of Evasion*, *supra* note 4, at 970, 982, 998 (emphasis omitted). Shachar also notes how *Sale* has “emerged as a classic regressive precedent” because it “absolv[es] a destination country from any responsibility and accountability if the denial of rights it has authorized takes place beyond its territorial waters.” *Id.* at 982.

⁵⁸ Narin Idriz, *Taking the EU-Turkey Deal to Court?*, VERFASSUNGS BLOG (Dec. 20, 2017),

aimed at blocking one piece of EU border externalization was unsuccessful, partially because the General Court ruled it did not have jurisdiction, as the deal was carried out by EU member states, rather than an EU institution itself.⁵⁹

In the U.S., many legal challenges to border externalization have met a similar fate. While efforts to end metering and the Safe Third Country Transit Ban during the first Trump era succeeded,⁶⁰ recent attempts to end similar policies have not. Specifically, legal challenges aimed at blocking CLP and the mandatory use of the CBP One app have encountered roadblocks and now, nearly a year into the start of the policy, have yet to achieve an injunction against any part of CLP.⁶¹ In *East Bay Sanctuary Covenant v. Biden*, challenging CLP overall, the district court did find the policy to be illegal,⁶² but the Ninth Circuit quickly stayed the vacatur of the policy without explanation.⁶³ In a 2024 order, granting an abeyance pending settlement (also without any written rationale), dissenting Judge VanDyke noted the likely success of the government in upholding CLP, either temporarily or permanently, in front of either the Ninth Circuit or the Supreme Court.⁶⁴ Similarly, Title 42 was ultimately ended due to policy change, rather than legal wins, despite years of litigation.⁶⁵

While few final decisions have been reached in these cases, plenary power and the broad discretion granted to the executive branch on immigration matters has

<https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>.

⁵⁹ *Id.*

⁶⁰ *Al Otro Lado, Inc. v. Mayorkas*, No. 17-cv-02366, 2021 WL 3931890, at *18 (S.D. Cal. Sept. 2, 2021) (holding the turnback policy of metering to be a violation of CBP's inspection and referral duties); *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 31, 57 (D.D.C. 2020) (vacating the original Safe Third Country transit ban under Trump for violating the Administrative Procedure Act's notice-and-comment rulemaking provisions).

⁶¹ Press Release, Nat'l Immigr. Just. Ctr., Federal Appeals Court Grants Stay in Biden Asylum Ban Case (Aug. 3, 2023), <https://immigrantjustice.org/press-releases/federal-appeals-court-grants-stay-biden-asylum-ban-case>; Press Release, Am. Immigr. Council, Court Allows Turnbacks of Asylum Seekers Without CBP One Appointments to Continue (Oct. 13, 2023), <https://www.americanimmigrationcouncil.org/news/court-allows-turnbacks-asylum-seekers-without-cbp-one-appointments-continue>; *Al Otro Lado and Haitian Bridge All. v. Mayorkas*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uclawsf.edu/our-work/litigation/al-otro-lado-and-haitian-bridge-alliance-v-mayorkas> (last visited Apr. 8, 2025); Michael D. Shear, *Appeals Court Allows Biden's Asylum Restrictions to Continue for Now*, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/03/us/politics/biden-asylum-appeal.html>.

⁶² *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1043 (N.D. Cal. 2023) (granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment).

⁶³ Order at 1, *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9th Cir. 2023) (granting stay of district court's order and judgment).

⁶⁴ *E. Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131–32, 1136 (9th Cir. 2024) (VanDyke, J., dissenting).

⁶⁵ *Title 42 Challenges*, *supra* note 56 (explaining that Title 42 was eventually terminated by the Biden Administration ending the COVID-19 public health emergency).

played a role in preliminary decisions.⁶⁶ For example, in *Huisha-Huisha v. Mayorkas*, in which plaintiffs challenged Title 42 as applied to asylum-seeking families, the D.C. Circuit affirmed a narrow preliminary injunction issued by the district court that ultimately allowed Title 42 to largely continue.⁶⁷ In its decision, the court explained that the plaintiffs had not shown a likelihood to succeed on the merits regarding the right of asylum seekers to access asylum procedures during COVID-19 because of the large amount of discretion vested in the executive branch regarding immigration and particularly asylum decisions.⁶⁸ This rationale and the discretion granted to the executive branch suggests that other challenges regarding the right to seek asylum and border policy may meet a similar fate in U.S. courts and that the U.S. legal system is not likely to stop many of the forms of U.S. border externalization.⁶⁹

Further, the U.S. has repeatedly brought back similar forms of externalization, which indicates the appetite for these policies, and therefore the challenges of addressing them purely in the U.S. alone. For example, despite repeated successes in striking down Trump-era transit bans,⁷⁰ the concept of the transit ban has reemerged in multiple policy proposals since—it is a core part of CLP and was also featured in border bill negotiations in recent years.⁷¹ Similarly, though Title 42 expulsions have ended, the proposed border bill that debuted in February 2024 included provisions that resurrected the spirit of the policy, by allowing and mandating the federal government to summarily expel or remove arriving migrants once border crossings reach certain daily numbers.⁷² This continual recycling of different forms of border externalization indicates the resiliency of these policies in the U.S. and suggests that addressing them within the context of the U.S. alone may not be the best route to success.

While immigration advocates in the Global North have faced legal setbacks, Global South and other transit countries have successfully exercised some control over Global North policy, including immigration. For example, in Türkiye, a key transit country to the European Union, the Turkish government chose to open the Pazarkule Gate in 2020 to allow migrants access to EU territory in an effort to achieve funding concessions from the European Union.⁷³ This move was very

⁶⁶ See, e.g., *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 730–31 (D.C. Cir. 2022).

⁶⁷ *Id.* at 725–27, 730, 735 (affirming the District Court’s preliminary injunction expelling the Plaintiffs in part, but only to places where they will “not be persecuted or tortured.”).

⁶⁸ *Id.* at 730–32.

⁶⁹ See *id.*

⁷⁰ See Cap. Area Immigrants’ Rts. Coal., 471 F. Supp. 3d 25, 60 (D.D.C. 2020); *E. Bay Sanctuary Covenant v. Barr*, 519 F. Supp. 3d 663, 664–65, 668 (N.D. Cal. 2021) (granting a preliminary injunction against a later version of the Trump-era transit ban).

⁷¹ *Fact Sheet: Circumvention of Lawful Pathways*, *supra* note 17; *Not Bargaining Chips*, *supra* note 44.

⁷² S. 4361, 118th Cong. § 244B (2024).

⁷³ Shachar, *Instruments of Evasion*, *supra* note 4, at 1003–04.

quickly successful in achieving Türkiye's goals for greater funding.⁷⁴ In the U.S., the refusal of the Cuban government to accept repatriations in the 1990s forced the U.S.'s hand and led to the creation of the Wet Foot-Dry Foot policy, under which Cubans who arrived in the U.S. were functionally guaranteed protection and a path to permanent status.⁷⁵ Finally, more recently, the enactment and implementation of a Mexican law banning the detention of children under the age of twelve resulted in the U.S. being unable to expel families with young children under Title 42 along parts of the border.⁷⁶ This change in and enforcement of Mexican migration policy is a clear example of a change in transit country law regarding migration, obligating a receiving country to reduce its border externalization as a result.

II. BLOCKING EXTERNALIZATION USING LATIN AMERICAN HUMAN RIGHTS LAW

Given the ever-increasing trend of U.S. border externalization, the failure of U.S. courts to fully block these policies, and the integration of international human rights law into the legal systems of many transit countries, one key strategy in combating border externalization is through litigation in these transit countries to enforce their international and domestic human rights obligations.⁷⁷ While there are additional domestic laws in each of the countries that can form the basis of these challenges, at least some of the litigation strategies should focus on core principles of international refugee and human rights law, including nonrefoulement and the right to seek asylum, as well as the principle against aiding and abetting other countries' human rights violations. This Part first outlines these primary international law concepts at play and addresses how they are integrated into the legal systems of Mexico, Colombia, and Guatemala. It then demonstrates the potential for this form of litigation through case studies.

⁷⁴ *Id.* I also agree with Shachar's analysis that this choice used migrants as bargaining chips and am therefore not suggesting it was a "good" action by Türkiye per se, but rather one that involved a transit country successfully influencing receiving countries' migration policy.

⁷⁵ Annasofia A. Roig, *No Way, USA!: The Lack of a Repatriation Agreement with Cuba and Its Effects on U.S. Immigration Policies*, 13 FIU L. REV. 875, 883–84 (2019).

⁷⁶ Zolan Kanno-Youngs, *Mexican Law Halts U.S. from Turning Back Some Migrant Families*, N.Y. TIMES, <https://www.nytimes.com/2021/02/04/us/politics/mexico-united-states-border-immigration.html> (Feb. 6, 2021); Lomi Kriel, *How Inconsistent Policies and Enforcement have Created False Hope for Migrants at the Border*, TEX. TRIBUNE (May 13, 2021, 5:00 PM), <https://www.texastribune.org/2021/05/13/biden-border-policy-migrants/>.

⁷⁷ Kanno-Youngs, *supra* note 76; Pacheco Tineo Family v. Plurinational State of Bolivia, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 272, ¶ 2 (Nov. 25, 2013); Brief for Asylum Seeker Advocacy Project (ASAP) et al. as Amici Curiae Supporting IMUMI, Amparo en Revisión 302/2020, Primera Sala De La Suprema Corte De La Nación [First Chamber of the Supreme Court of the Nation] Sept. 27, 2021 (Mex.) at 14.

A. *Principles of International Human Rights Law: Strong Protections for Migrants*

Nonrefoulement, the principle of not returning refugees to a country in which they fear persecution or torture, is a cornerstone of human rights and refugee law and is particularly strong within the Western Hemisphere.⁷⁸ Nonrefoulement has acquired the status of *jus cogens*, or a norm of international law “from which no derogation is permitted,”⁷⁹ and appears in both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) and in the Convention and Protocol Relating to the Status of Refugees (Refugee Convention).⁸⁰ The duty of nonrefoulement has been interpreted particularly strongly in the context of the Americas—in an Advisory Opinion, the Inter-American Court of Human Rights (IACt.HR) made clear that nonrefoulement duties apply beyond the strict territorial lines of a state.⁸¹ The IACt.HR stated that the duty of nonrefoulement applies when a person is “subject to the effective authority and control of the State,” which includes “at the border, international transit zones and on the high seas.”⁸² The Court also clarified that a person being subject to jurisdiction of a state “is not limited to the concept of national territory, but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the State in question.”⁸³ Further, in an earlier opinion, the IACt.HR held that the American Convention on Human Rights (American Convention) prohibits return or deportation to any country where a migrant fears persecution, including third countries.⁸⁴ Through these opinions and interpretations of international human rights treaties, the IACt.HR has made clear that the duty of nonrefoulement extends to situations such as one country expelling third-country nationals into another country in which they fear

⁷⁸ Brief for Asylum Seeker Advocacy Project (ASAP) et al. as Amici Curiae Supporting IMUMI, Amparo en Revisión 302/2020, at 24–25; Michael Lipka, *Most Americans Express Support for Taking in Refugees, but Opinions Vary by Party and Other Factors*, PEW RSCH. CTR., (Sept. 19, 2022), <https://www.pewresearch.org/short-reads/2022/09/19/most-americans-express-support-for-taking-in-refugees-but-opinions-vary-by-party-and-other-factors/>.

⁷⁹ Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 534 (2001).

⁸⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Convention Relating to the Status of Refugees art. 33, *opened for signature* Jul. 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention on Refugees].

⁸¹ The Institution of Asylum and Its Recognition as a Human Right in the Inter-American Protection System, Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (ser. A) No. 25, ¶ 187 (May 30, 2018).

⁸² *Id.*

⁸³ *Id.* ¶ 172.

⁸⁴ Pacheco Tineo Family v. Plurinational State of Bolivia, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 272, ¶ 134 (Nov. 25, 2013) (citing Organization of American States, American Convention on Human Rights art. 22(8), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123).

persecution, even if that action is carried out outside the national borders of the expelling country.⁸⁵

Seeking asylum is also enshrined as a human right and legal obligation in both the broad international context as well as specifically within the Western Hemisphere. Globally, the Universal Declaration of Human Rights recognizes the right to seek asylum.⁸⁶ In addition, the American Convention and the American Declaration of the Rights and Duties of Man (American Declaration) each include a right to seek asylum.⁸⁷ In interpreting these international instruments, the IACt.HR has recognized that the right to seek asylum is more than a “mere State prerogative.”⁸⁸ Further, the IACt.HR has affirmed that “a proceeding that may lead to the expulsion or deportation” of an individual seeking asylum must be “of an individual nature, in order to allow the personal circumstances of each person to be assessed.”⁸⁹ The Court went on to explain that “[t]his necessarily means that such persons cannot be turned back at the border or expelled without an adequate and individualized analysis of their application” and that “[b]efore returning anyone, States must ensure that the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings in the country to which they would be expelling him.”⁹⁰ With regard to children specifically, the IACt.HR has made clear that the right to seek asylum means that children “may not be rejected at the border without an adequate and individualized analysis of their requests” and that children may not be returned to “a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the State where they suffer this risk.”⁹¹

Further, migrants are to be afforded human rights in both transit and receiving countries. This expectation is laid out in the New York Declaration for Refugees and Migrants (New York Declaration), in which participating states agreed to protect the human rights of arriving migrants and those in transit.⁹² The New York Declaration further includes a commitment that “public officials and law

⁸⁵ *Id.* ¶¶ 135–36.

⁸⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

⁸⁷ American Convention on Human Rights art. 22(7), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; American Declaration of the Rights and Duties of Man art. 27, June 10, 1948, <https://digitallibrary.un.org/record/565094?ln=en&cv=pdf>.

⁸⁸ Rights And Guarantees of Children in the Context of Migration and/or in Need of International Protection (*Rights and Guarantees of Children*), Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 73 (Aug. 19, 2014).

⁸⁹ *Pacheco Tineo Family*, Inter-Am. Ct. H.R. (ser. C.) No. 272, ¶ 133.

⁹⁰ *Id.* ¶ 153.

⁹¹ *Rights and Guarantees of Children*, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 81.

⁹² G.A. Res. 71/1, New York Declaration for Refugees and Migrants, ¶ 26 (Sept. 19, 2016).

enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders.”⁹³ In these ways, the New York Declaration further broadens international human rights commitments to migrants and refugees.

Finally, in addition to their own obligations, states must not aid and abet other states in committing human rights violations. Article 16 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) indicates that states can be held internationally responsible for supporting the wrongful act of another state.⁹⁴ Specifically, states may be held responsible in three circumstances: (1) if they are “aware of the circumstances making the conduct of the assisted State internationally wrongful;” (2) if assistance is “given with a view to facilitating the commission of [the wrongful] act, and . . . actually do[es] so;” and (3) if “the completed act [is] such that it would have been wrongful had it been committed by the assisting State itself.”⁹⁵ Essentially, this means that aiding another state in violating international law constitutes, on its own, a violation of international law.⁹⁶ While the Articles on State Responsibility are not a treaty, they have been frequently referenced by international courts as binding on all states, particularly in the context of human rights,⁹⁷ and are “viewed as reflecting customary international law.”⁹⁸

B. Mexico, Guatemala, and Colombia: International Law Integration and Participation in U.S. Border Policy

Taking the above-outlined principles together, the potential for litigation in these transit countries and its impacts on U.S. border externalization will be demonstrated through two case studies: the mandatory use of CBP One under CLP in Mexico, as well as the attendant U.S.–Mexico cooperation around the border during the policy, and the actual or proposed U.S.-sponsored interceptions of migrants in Guatemala and Colombia. These case studies first examine how

⁹³ *Id.* ¶ 24.

⁹⁴ Int’l L. Comm’n, Draft Articles on Responsibility of State for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 65–66 (2001) [hereinafter Draft Articles on Responsibility of State for Internationally Wrongful Acts].

⁹⁵ *Id.* at 66.

⁹⁶ Brief for Asylum Seeker Advocacy Project (ASAP) et al. as Amici Curiae Supporting IMUMI, Amparo en Revisión 302/2020, Primera Sala De La Suprema Corte De La Nación [First Chamber of the Supreme Court of the Nation] Sept. 27, 2021 (Mex.) at 40.

⁹⁷ *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 398, 420, 431, 460 (Feb. 26); *Hirsi Jamaa and Others v. Italy*, 2012-II Eur. Ct. HR. 97, 184 (De Albuquerque, J., concurring).

⁹⁸ Brief for Asylum Seeker Advocacy Project (ASAP) et al. as Amici Curiae Supporting IMUMI, Amparo en Revisión 302/2020, at 40 n.150.

international law applies in each country and how each of the transit countries in question participate in these specific U.S. border policies. Following that, the case studies then analyze how each countries' involvement constitutes violations of international law (and therefore domestic law in each country as well). Finally, the studies review the potential impacts that would result from these countries being forced to cease their involvement in the violative policies at hand.

1. *International Human Rights Law in Mexico, Guatemala, and Colombia*

In Mexico, international human rights law is integrated into and interpreted as equal to rights deriving from the Mexican Constitution.⁹⁹ This framing, which came about as part of legal shifts in Mexico in 2011–2013, means that international human rights treaties that Mexico has signed are binding law in Mexico, at the same level as domestic law.¹⁰⁰ Mexico has signed, ratified, or voted in favor of all of the relevant treaties and conventions previously mentioned in Section II.A, including the Refugee Convention, the Convention Against Torture, the Universal Declaration of Human Rights, the American Convention, and the New York Declaration,¹⁰¹ which indicates that Mexico is bound by each of the international laws and norms outlined above.¹⁰² Similarly, as a member of the Organization of American States (OAS), Mexico is expected to follow the duties outlined in the American Declaration.¹⁰³ Additionally, as an OAS member, Mexico is bound by IACt.HR decisions, and given the heightened status of international human rights in Mexican law, these decisions are held at the same level as Mexican domestic court decisions.¹⁰⁴

⁹⁹ Christina M. Cerna, *Status of Human Rights Treaties in Mexican Domestic Law*, AM. SOC'Y OF INT'L L.: INSIGHTS (Feb. 23, 2016), <https://www.asil.org/insights/volume/20/issue/4/status-human-rights-treaties-mexican-domestic-law>.

¹⁰⁰ *Id.*

¹⁰¹ See discussion *supra* Section II.A; *International Bill of Human Rights: Universal Declaration of Human Rights: Resolution/Adopted by the General Assembly*, U.N. DIGIT. LIBR. [hereinafter UDHR Voting Record], <https://digitallibrary.un.org/record/670964?ln=en> (last visited Apr. 8, 2025); *UN Treaty Body Database: Ratification Status for Mexico*, U.N. HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=112&Lang=EN (last visited Apr. 8, 2025); Convention on Refugees, *supra* note 80, at 45; *American Convention on Human Rights "Pact of San Jose, Costa Rica"*, ORG. OF AM. STATES [hereinafter *Signatories of the American Convention on Human Rights*], https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm (last visited Apr. 8, 2025) (identifying signatories of the American Convention on Human Rights).

¹⁰² Cerna, *supra* note 99.

¹⁰³ *Member States*, ORG. OF AM. STATES, https://www.oas.org/en/member_states/default.asp (last visited Apr. 8, 2025); *American Declaration of the Rights and Duties of Man*, PROJ. CAN. HUM. RTS. COMMITMENTS, <https://humanrightscorrespondents.ca/american-declaration-of-the-rights-and-duties-of-man-2/> (last visited Apr. 8, 2025).

¹⁰⁴ Cerna, *supra* note 99.

In one ongoing case in which the Mexican Supreme Court considered Mexico's role in MPP, the Court affirmed Mexico's international human rights obligations toward migrants.¹⁰⁵ The Court first laid out Mexico's obligations under IACt.HR precedent.¹⁰⁶ It then confirmed that Mexico has international obligations under the Global Compact for Safe, Orderly and Regular Migration (GCM) to respond to the needs of and protect migrants who may be in vulnerable situations.¹⁰⁷ In analyzing these obligations and Mexico's actions, the Court concluded that Mexico's participation in the Remain in Mexico program violated international human rights law (as well as various related domestic Mexican laws).¹⁰⁸ The Court's order in this case included a directive to Mexican officials to bring the situation of migrants transiting through Mexico on their way to the U.S. into compliance with domestic and international human rights law, and to halt Mexico's participation in Remain in Mexico until such time that this compliance was achieved.¹⁰⁹

Many other Latin American transit countries are similarly bound by international human rights law, including IACt.HR decisions. Guatemala, a key transit country, incorporates the right to asylum into its constitution and explicitly gives international human rights law precedence over municipal law.¹¹⁰ Guatemala also goes further and incorporates the right to asylum into their constitution, namely that a "political refugee will not be expelled from Guatemalan territory to the country seeking him."¹¹¹ Guatemala is a party to each of the aforementioned human rights treaties and is an OAS member,¹¹² indicating the theoretical legal preeminence of each of the human rights obligations previously outlined.

¹⁰⁵ Amparo en Revisión 302/2020 [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo II (2022) (Mex.) at 9–11, 68–69.

¹⁰⁶ *Id.* at 100–02.

¹⁰⁷ *Id.* at 100–03.

¹⁰⁸ *Id.* at 114–22.

¹⁰⁹ *Id.* at 148–50.

¹¹⁰ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, Nov. 17, 1993, arts. 27, 46. For a translated version, see *Guatemala 1985 (rev. 1993)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Guatemala_1993 (last visited Apr. 8, 2025) (Luis Francisco Valle Velasco trans.).

¹¹¹ *Id.* art. 27 ("No se acordará la expulsión del territorio nacional de un refugiado político, con destino al país que lo persigue." This translates to "The expulsion from national territory of a political refugee to the country that is persecuting them will not be agreed upon.").

¹¹² *Ratification of International Human Rights Treaties—Guatemala*, UNIV. MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/research/ratification-guatemala.html> (last visited Apr. 8, 2025); *Signatories of the American Convention on Human Rights*, *supra* note 101; *Member States*, *supra* note 103; *Convention Against Torture*, *supra* note 80; *Convention on Refugees*, *supra* note 80; *Universal Declaration of Human Rights*, *supra* note 86; *American Convention on Human Rights*, *supra* note 87; *American Declaration of the Rights and Duties of Man*, *supra* note 87; *Draft Articles on Responsibility of State for Internationally Wrongful Acts*, *supra* note 94.

Colombia, also a major transit country for migrants traveling through the Darién Gap,¹¹³ has similar principles of human rights law integration to Mexico and Guatemala. The Colombian Constitution specifies that “[i]nternational treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority,” that the rights enumerated in the Constitution “shall be interpreted in accordance with international treaties on human rights ratified by Colombia”¹¹⁴ and that “[i]n all cases, the rules of international humanitarian law shall be observed.”¹¹⁵ The Constitutional Court has affirmed that these principles apply, stating that “international humanitarian law is valid at all times in Colombia” and that it is “automatically incorporated” into Colombian law.¹¹⁶ The Constitutional Court goes on to say that the Constitution affirms that there are situations in which international human rights law takes precedence over Colombian law.¹¹⁷ Colombia is a party and therefore bound by the same treaties as Mexico and Guatemala, as well as being an OAS member and therefore subject to the jurisdiction and decisions of the IACt.HR, indicating that Colombia is similarly bound by the international norms regarding migration outlined above, in Section II.A.¹¹⁸

2. Mexican, Guatemalan, and Colombian Participation in U.S. Border Policy

Mexico has played an integral role in both past and current metering policies,¹¹⁹ indicating the importance and value of enjoining Mexico’s ability to participate in this kind of border collaboration.¹²⁰ Under the original metering process, Mexican officials as a part of the government-run Grupos Beta, supported in the maintenance of the list of asylum seekers who were in line to cross the border, keeping the list each evening and interfacing with U.S. officials regarding how many people would be allowed to cross each day.¹²¹ Similarly, while CBP One itself has

¹¹³ Kube, Lee & Ainsley, *supra* note 39.

¹¹⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93. For a translated version, see *Colombia 1991 (rev. 2015)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Colombia_2015 (last visited Apr. 8, 2025) (Max Planck Inst. trans.).

¹¹⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 214(2).

¹¹⁶ Marco Sassòli, Antoine Bouvier, & Anne Quintin, *How Does Law Protect in War?: Colombia, Constitutional Conformity of Protocol II*, <https://casebook.icrc.org/case-study/colombia-constitutional-conformity-protocol-ii> (last visited Apr. 8, 2025).

¹¹⁷ *Id.*

¹¹⁸ UDHR: Voting Record, *supra* note 101; Convention on Refugees, *supra* note 80, at 38, 41, 45; *Signatories of the American Convention on Human Rights*, *supra* note 101; *Member States*, *supra* note 103.

¹¹⁹ Semple, *supra* note 15; SMITH, *supra* note 51, at 1–2; LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 1–2.

¹²⁰ LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2–3.

¹²¹ Semple, *supra* note 15; STEPHANIE LEUTERT, ELLIE EZZELL, SAVITRI ARVEY, GABRIELLA SANCHEZ, CAITLYN YATES & PAUL KUHNE, ASYLUM PROCESSING AND WAITLISTS AT THE

been maintained by the U.S., Mexican officials have played a key role in the functionality of the system.¹²² In just the first month of CLP, a group of monitoring organizations observed numerous instances of Mexican officials preventing asylum seekers from accessing ports of entry, telling asylum seekers to stay away from the U.S. border, threatening asylum seekers who approached the border, and maintaining their own lists that dictated which migrants without CBP One appointments would be allowed to approach the border.¹²³ These organizations also observed that many migrants who approached ports of entry and were turned away by U.S. officials, as many without CBP One appointments were, ended up sleeping outside the ports of entry in unsafe conditions or being otherwise exposed to danger, including detention by Mexican immigration officials.¹²⁴

In addition to stopping migrants from accessing U.S. ports of entry and failing to provide humanitarian conditions under CLP, Mexico ramped up actions to deport migrants waiting in Northern cities, many of whom were waiting to cross into the U.S.¹²⁵ It also allowed the U.S. to expel asylum seekers into Mexico along certain parts of the border, agreeing to take some of those asylum seekers into custody.¹²⁶ Finally, alongside and as part of CLP, Mexico explicitly agreed to continue accepting third-country nationals from Cuba, Haiti, Nicaragua, and Venezuela who have been deported or expelled from the U.S.¹²⁷ I personally observed many of these dynamics in Nogales while there in both June and December of 2023; there were long lines of asylum seekers camped outside of the DeConcini port of entry, many of whom had clearly been there for days, and all of whom were exposed to the dangers of extortion and kidnapping, as well as deathly heat in the summer. In speaking with Venezuelan and Haitian asylum seekers who have made it to Portland, Oregon, many have reported making numerous attempts to reach the U.S. border, including via ports of entry, and having been pushed back by Mexican immigration officials, as well as denied entry by U.S. officials.

U.S.–MEXICO BORDER 10–11 (2018). Grupos Beta is a “service by the National Institute of Migration (INM) of Mexico” and is “composed of officials from the three levels of government.” *Grupos Beta de Protección a Migrantes*, INT’L ORG. MIGRATION, <https://micicinitiative.iom.int/grupos-beta-de-proteccion-migrantes-0> (last visited Apr. 8, 2025).

¹²² SMITH, *supra* note 51, at 1–2.

¹²³ LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2–3 (stating that “in Nogales and Tijuana Mexican authorities administered waitlists.”).

¹²⁴ *Id.* at 2–4.

¹²⁵ Rosa Flores, Sara Weisfeldt, Emma Tucker & Macie Goldfarb, *Mexico Makes Agreement with US to Deport Migrants from its Border Cities as One Mayor Warns His City is at ‘A Breaking Point,’* CNN (Sept. 24, 2023, 10:45 PM), <https://www.cnn.com/2023/09/23/us/mexico-us-border-patrol-agreement-migration-surge/index.html>; LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 1–3.

¹²⁶ Flores, Weisfeldt & Tucker, *supra* note 125.

¹²⁷ Kight, *supra* note 18.

Colombia and Guatemala support U.S. turnback policy earlier in the migration journey through currently or prospectively allowing U.S. agents into their countries to conduct migration-related activities, by accepting U.S. funding to strengthen their own border security, and by bowing to U.S. pressure to intercept migrants.¹²⁸ In Guatemala, the U.S. directly finances, trains, and provides equipment for “south-facing” Guatemalan border enforcement, as well as sending U.S. personnel to accompany Guatemalan border officials.¹²⁹ As mentioned above, U.S. border officials in Guatemala have directly participated in the return of migrants to Honduras, bussing them to the Honduran border.¹³⁰ Migrant caravans have been repeatedly “dissolved” in Guatemala, as the Associated Press euphemistically puts it, after the U.S. has “put pressure” on transit countries, including Guatemala, to ramp up border enforcement.¹³¹ These efforts to block migrant passage have included the use of riot police and tear gas, with Guatemala expressing an intent to return migrants to their countries of origin in compliance with U.S. expectations.¹³² Illustrating the human reality of these policies, a Venezuelan migrant recounted to me her migration journey, emphasizing that she had to cross multiple times into Guatemala because the police there kept pushing her back into Honduras. She eventually succeeded in crossing into and transiting through Guatemala, but the experience caused enough stress for her to find it notable to tell me about.

In Colombia, 2023 U.S.–Colombia–Panama negotiations and actions similarly indicate collaboration on the interception of asylum seekers.¹³³ The three countries issued a joint statement in April 2023 affirming shared intentions to “end the illicit movement of people” through the Darién Gap region.¹³⁴ In conjunction with the joint statement, Alejandro Mayorkas, DHS Secretary, said that migrants

¹²⁸ See discussion *supra* Section I.A.

¹²⁹ TODD MILLER, *EMPIRE OF BORDERS: THE EXPANSION OF THE U.S. BORDER AROUND THE WORLD* 31–33, 37–38 (2019).

¹³⁰ Abbott, *supra* note 37.

¹³¹ *A Caravan of Migrants from Honduras Who Were Heading to the US Dissolves in Guatemala*, ASSOCIATED PRESS [hereinafter *Caravan of Migrants from Honduras Dissolves in Guatemala*], <https://apnews.com/article/guatemala-honduras-migrants-3553722800a9606232d0ba2a537f78a3> (Jan. 21, 2024, 7:15 PM); James Blears, *Guatemalan Authorities Stop Migrant Caravan Headed to US*, VATICAN NEWS (Jan. 16, 2022, 3:34 PM), <https://www.vaticannews.va/en/world/news/2022-01/guatemalan-authorities-stop-migrant-caravan-headed-to-us.html>.

¹³² Blears, *supra* note 131; Oliver De Ros & Santiago Billy, *Large Migrant Caravan Dissolves in Guatemala*, ASSOCIATED PRESS (Jan. 19, 2021, 3:26 PM), <https://apnews.com/article/joe-biden-honduras-gangs-coronavirus-pandemic-immigration-c381b8ac9f22291188a403b7bbeb1d51>.

¹³³ Luke Taylor, *‘Terrifying’: Critics Decry US Plan to Stop Migrants at Darién Gap*, THE GUARDIAN (Apr. 14, 2023, 5:00 AM), <https://www.theguardian.com/global-development/2023/apr/14/darien-gap-panama-colombia-us-agreement-migrants>.

¹³⁴ *Trilateral Joint Statement*, DEP’T. OF HOMELAND SEC.: ARCHIVE (Apr. 11, 2023), <https://www.dhs.gov/archive/news/2023/04/11/trilateral-joint-statement>.

would be “turned back.”¹³⁵ As a part of this campaign, the U.S. has “supported the mobilization” of Panamanian and Colombian security forces and has sent large quantities of equipment and monetary aid.¹³⁶ In addition to the potential for being turned back, migrants experience dire humanitarian circumstances on both the Colombian and Panamanian sides of the Darién Gap, whether from the Colombian cartel that controls one side of the route or from smaller gangs in Panama.¹³⁷ While I have not personally been to the Darién Gap, these horrors are borne out in the stories I have been told by the migrants I have accompanied in the U.S.: I have heard about children nearly drowning as families crossed rivers; mothers almost dying from being bitten by poisonous spiders; people watching other migrants fall to the ground and die around them, with no emergency services in sight; and migrants witnessing young girls be raped by gang members along the route.

C. The Participation of Mexico, Guatemala, and Colombia in U.S. Border Externalization Constitutes Numerous Violations of International Human Rights Law and of the Domestic Law of these Countries

In each of the preceding situations, there are numerous ways that Mexico, Guatemala, and Colombia are violating international human rights law and could therefore be barred from carrying out some of their current actions in their own domestic courts, as well as by the IACt.HR.

1. Mexico

First, Mexico violated its own duty of ensuring the right to seek asylum under CLP by blocking migrants from accessing the U.S. border or otherwise engaging in activities that involve migrants being forced to wait in Mexico.¹³⁸ Previously, the IACHR held that a Canadian program sending migrants back to the U.S. to await processing of their asylum claims violated the right to seek asylum. One part of that violation involved a lack of U.S. assurances that would permit asylum seekers to return to Canada.¹³⁹ Here, not only did Mexico fail to assure migrants that they can access the U.S., but they in fact directly impeded access to the U.S. by physically blocking migrants, threatening them, or detaining them,¹⁴⁰ indicating that Mexico

¹³⁵ Taylor, *supra* note 133.

¹³⁶ Syra Ortiz Blanes, *Officials Highlight U.S. Efforts to Stem Migration Across Darién Gap Amid Record Crossings*, MIA. HERALD (Aug. 18, 2023, 6:00 AM), <https://www.miamiherald.com/news/local/immigration/article278338314.html>.

¹³⁷ INT’L CRISIS GROUP, BOTTLENECK OF THE AMERICAS: CRIME AND MIGRATION IN THE DARIÉN GAP 8–10 (2023) [hereinafter BOTTLENECK OF THE AMERICAS], <https://www.crisisgroup.org/sites/default/files/2023-11/102-darien-gap%20%281%29.pdf>.

¹³⁸ LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2–5.

¹³⁹ See John Doe v. Canada, Case 12.586, Inter-Am. Comm’n H.R., Report No. 78/11, 1–2 (2011).

¹⁴⁰ LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2–4.

has denied migrants the right to seek asylum in violation of international and domestic law.

Further, to the extent some of these migrants who have been blocked from accessing ports of entry are also being deported by Mexico in its efforts to “depressurize” Northern cities,¹⁴¹ Mexico may have violated the duty of nonrefoulement, in an act of what has been called “chain refoulement,”¹⁴² in addition to another violation of the right to seek asylum. Similar practices in Europe have been labeled as “pushbacks” and suggested by scholars to be a violation of the duty of nonrefoulement;¹⁴³ applying a similar lens in the American context suggests that “pushbacks” from the border of migrants seeking to approach it would indeed violate Mexico’s duty of nonrefoulement.¹⁴⁴

Mexico also violated its duty under the New York Declaration, as well as under IACt.HR precedent, regarding upholding the rights of migrants transiting through its territory.¹⁴⁵ To the extent law enforcement officers under the New York Declaration are supposed to uphold the human rights of individuals seeking to cross the border, blocking those same people from accessing the territory in which they intend to seek asylum and then deporting them is clearly not in line with upholding their human rights.¹⁴⁶

Further, under both the New York Declaration as well as the GCM, migrants are to be provided with basic human services and be protected from abuse, particularly those who are vulnerable, such as women and children.¹⁴⁷ Migrants who are waiting for days or even weeks outside U.S. ports of entry in Mexico are particularly vulnerable to being targeted by organized crime and are not being provided with basic human services,¹⁴⁸ which indicates a potential violation of their

¹⁴¹ Flores, Weisfeldt & Tucker, *supra* note 125.

¹⁴² See Inter-Am. Comm’n H.R., Res. 04/19, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking, princ. 6 (Dec. 7, 2019), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf> (explaining that “a ‘chain’ (or indirect) refoulement is . . . the transfer of persons to a country or territory from which they can be returned to a country where their life, liberty or personal integrity are in danger.”).

¹⁴³ Jan-Phillip Graf & Kai Budelmann, *A Pushback Against International Law?*, VÖLKERRECHTSBLOG (Aug. 12, 2020), <https://voelkerrechtsblog.org/de/a-pushback-against-international-law/>.

¹⁴⁴ De Ros & Billy, *supra* note 132.

¹⁴⁵ G.A. Res. 71/1, *supra* note 92, ¶ 24; *The New York Declaration: FAQs*, U.N. HIGH COMM’R FOR REFUGEES (Feb. 2018), <https://www.unhcr.org/sites/default/files/legacy-pdf/584689257.pdf>.

¹⁴⁶ See LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2–5; G.A. Res. 71/1, *supra* note 92, ¶¶ 24, 26, 29, 32–33.

¹⁴⁷ G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration, ¶ 31 (Dec. 19, 2018); G.A. Res. 71/1, *supra* note 92, ¶¶ 29–33.

¹⁴⁸ LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2–3.

human rights under these international agreements. This kind of reasoning was particularly persuasive to the Mexican Supreme Court in its decision regarding Mexico's role in the Remain in Mexico program, in which the Court made clear that if Mexico could not protect migrants' human rights in line with IACt.HR precedent and the GCM while they were transiting through and waiting in Mexico, then Mexico could not legally participate in the U.S. program.¹⁴⁹

The Court could and ideally should reach a similar conclusion here. Even while Mexico did not sign as formal of an agreement under CLP as it did with Remain in Mexico, Mexico participated in blocking access to ports, deporting migrants seeking asylum, and both allowing third-country nationals to wait in Northern Mexican cities for months on end as well as accepting third-country expulsions and deportations without guaranteeing migrants' human rights.¹⁵⁰ All of these actions are in contravention of Mexico's obligation under international and therefore domestic law.¹⁵¹ Mexico should accordingly cease its involvement until it can comply with its international obligations.

Finally, Mexico violated customary international law under the Articles on State Responsibility by assisting the U.S. in its own human rights violations.¹⁵² In their amicus brief in the *East Bay* CLP case, the United Nations High Commissioner for Refugees (UNHCR) lays out the various ways that CLP is a violation of the U.S.'s own human rights obligations.¹⁵³ The UNHCR makes clear that CLP violates international human rights law by denying the right to seek asylum, including by treating asylum as discretionary, as well as by risking refoulement by deporting or expelling migrants who fear persecution.¹⁵⁴ In particular, the UNHCR notes that the expulsion of CHNV individuals to Mexico may well constitute

¹⁴⁹ Amparo en Revisión 302/2020 [SCJN], *Gaceta del Semanario Judicial de la Federación*, Décima Época, Tomo II (2022) (Mex.), at 102–05, 150.

¹⁵⁰ Flores, Weisfeldt & Tucker, *supra* note 125; LIMITS ON ACCESS TO ASYLUM AFTER TITLE 42, *supra* note 54, at 2; ARIEL G. RUIZ SOTO, COLLEEN PUTZEL-KAVANAUGH & DORIS MEISSNER, SHIFTING REALITIES AT THE U.S.-MEXICO BORDER 3 (2024); Valerie Gonzalez, *Mexican Officials Clear Border Camp as US Pressure Mounts to Limit Migrant Crossings*, WRBL, <https://www.wrbl.com/news/ap-top-headlines/ap-mexican-officials-clear-border-tent-camp-as-us-pressure-mounts-to-stem-migrant-influx/> (Dec. 28, 2023, 1:21 PM); Connor Finnegan, *'Outsourcing' Border Enforcement: Biden's Migration Policies Rely on Mexico Despite its Grim Record*, ABC NEWS (May 10, 2023, 2:00 AM), <https://abcnews.go.com/Politics/outourcing-border-enforcement-bidens-migration-policies-rely-mexico/story?id=99167102>.

¹⁵¹ See discussion *supra* Section II.B.1.

¹⁵² Draft Articles on Responsibility of State for Internationally Wrongful Acts, *supra* note 94, at 65–66.

¹⁵³ Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Plaintiffs-Appellees and Affirmance, *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2024 WL 725502 (9th Cir. Feb. 21, 2024).

¹⁵⁴ *Id.* at 10–15.

refoulement.¹⁵⁵ The UNHCR also writes that the penalization of asylum seekers for entering the U.S. without using CBP One contravenes international refugee law.¹⁵⁶

Other legal scholars have similarly indicated the ways that CLP specifically contravenes the U.S.'s own international human rights obligations, hitting similar themes to the UNHCR.¹⁵⁷ In their brief in *Al Otro Lado v. Mayorkas*, petitioners also highlight that the practice of turning asylum seekers back who lack a CBP One appointment constitutes refoulement by the U.S., noting the dangers for migrants of waiting in Mexico.¹⁵⁸ Based on IACt.HR precedent,¹⁵⁹ the U.S. practice of expelling individuals or turning back individuals over whom it has some degree of jurisdiction and control, as people attempting to access its international borders, without any degree of individualized process and without affirming that Mexico will itself protect their right to seek asylum, constitutes a violation of the right to seek asylum and the duty of nonrefoulement.

Under the Articles of State Responsibility and attendant commentary, states may be held responsible for assisting another state if they meet the three-element test: (1) awareness of what makes the assisted state's actions wrongful; (2) that the assistance being given is in order to facilitate the wrongful act and actually does so; and (3) that the act would have been wrong had the assisting state carried it out itself.¹⁶⁰ Here, Mexico meets each element. Mexico very likely understands what makes the U.S.'s actions wrongful; given the *jus cogens* nature of nonrefoulement, as well as the importance of the right to seek asylum,¹⁶¹ combined with numerous current and previous lawsuits challenging most of the elements of the policy on human rights grounds (including some in Mexico itself),¹⁶² Mexico is either actually or constructively aware of the U.S. violations of human rights.

¹⁵⁵ *Id.* at 15–16.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ See, e.g., Ana Luquerna & Christy Crouse, *Biden's Proposed Asylum Policy does not Fulfill U.S. Treaty Obligations*, OPINIOJURIS (Mar. 22, 2023), <https://opiniojuris.org/2023/03/22/bidens-proposed-asylum-policy-does-not-fulfill-u-s-treaty-obligations/> (explaining that the policy disregards the legal definition of a refugee and the U.S. commitment to the principle of nonrefoulement under the 1951 Refugee Convention).

¹⁵⁸ Class Action Complaint for Vacatur, Declaratory Judgment, and Injunctive Relief at 64–65, *Al Otro Lado, Inc. v. Mayorkas*, No. 3:23-cv-01367 (S.D. Cal. July 27, 2023).

¹⁵⁹ See *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 272, ¶ 153 (Nov. 25, 2013).

¹⁶⁰ Draft Articles on Responsibility of State for Internationally Wrongful Acts, *supra* note 94, at 65–66.

¹⁶¹ Allain, *supra* note 79, at 538–40; American Convention on Human Rights, *supra* note 87, art. 22(7).

¹⁶² See, e.g., Amparo en Revisión 302/2020 [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo II (2022) (Mex.); *Title 42 Challenges*, *supra* note 56.

Further, Mexico actually facilitated the wrongful conduct; for example, expelling CHNV asylum seekers into Mexico has been contingent upon agreements with Mexico,¹⁶³ indicating Mexico's facilitation of the refoulement and denial of right to seek asylum of these individuals. Similarly, if the U.S. is framed as participating in pushbacks and turning away people over whom it has some form of jurisdiction, in violation of the duty of nonrefoulement,¹⁶⁴ then Mexican officials turning asylum seekers around prior to even reaching the border could also constitute a facilitation of those pushbacks as well.

Finally, the acts would also be wrongful if Mexico was the one carrying them out. Refoulement and the denial of the right to seek asylum are contrary to international law—regardless of which state carries them out¹⁶⁵—and Mexico's own acts of refoulement and denial of the right to seek asylum against asylum seekers on its own likely is wrongful already. All of this indicates that Mexico satisfies the third element as well. Therefore, regarding the policy of accepting third-country expulsions or deportations from the U.S., Mexico should be found to be in violation of Article 16 of the Articles on State Responsibility.

If Mexican courts (or the IACt.HR) were to follow these principles, while CLP (or other policies that have since been implemented) might not be completely ended, some core pieces of the policy and the additional collaborations between the U.S. and Mexico that it has generated would be unable to function. For example, if Mexico were to be prevented from accepting CHNV expulsions and deportations, then the U.S. would simply not legally be able to send these asylum seekers to Mexico.¹⁶⁶ In addition, were Mexico to be forced to improve the humanitarian situation of migrants prior to allowing for their return or turnback into Mexico, then a similar situation as what happened under Title 42 in the Rio Grande Valley might come to pass, in which the U.S. has no choice but to let asylum seekers in.¹⁶⁷ Further, while Mexico deporting individuals, many of whom may be waiting to cross the border, from its northern cities was not a written part of CLP,¹⁶⁸ it was

¹⁶³ Kight, *supra* note 18.

¹⁶⁴ See Graf & Budelmann, *supra* note 143.

¹⁶⁵ Allain, *supra* note 79, at 541; American Convention on Human Rights, *supra* note 87, art. 22(7).

¹⁶⁶ See Uriel J. Garcia, *Here's What You Need to Know About Title 42, the Pandemic-Era Policy that Quickly Sends Migrants to Mexico*, TEX. TRIBUNE, <https://www.texastribune.org/2022/04/29/immigration-title-42-biden/> (May 8, 2023) (explaining that before a migrant can be expelled to Mexico pursuant to Title 42, Mexico must agree to accept them); Secretaria de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act*, GOBIERNO DE MEX. (Dec. 20, 2018), <https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en> (discussing Mexico affirming its sovereign right to admit or deny foreign nationals into its territory).

¹⁶⁷ See Kanno-Youngs, *supra* note 76.

¹⁶⁸ See *Fact Sheet: Circumvention of Lawful Pathways*, *supra* note 17.

implemented alongside CLP as a part of the U.S.'s post-Title 42 border regime, and could not take place if Mexico were blocked by its own courts from doing so. Finally, though Mexican officials being forced to stop blocking migrants without CBP One appointments from approaching ports of entry would not necessarily have translated into the U.S. allowing those individuals to cross through, it would have removed one layer of barrier that individuals experienced in accessing asylum during the CLP era.

2. *Guatemala and Colombia*

Guatemala and Colombia are each similarly violating international law through a mixture of refoulement, denial of the right to seek asylum, failure to guarantee the human rights of migrants transiting through their territories, and assisting the U.S. in its own human rights violations.¹⁶⁹ First, Guatemala is clearly engaging in refoulement to the extent that it is summarily expelling people from its borders and at times deporting them to their home countries, seemingly without any individualized process.¹⁷⁰ Particularly for asylum seekers from Honduras who are attempting to flee Honduras and crossing into Guatemala, only to be pushed back, Guatemala's actions involve returning individuals to countries where they fear persecution, a clear contravention of the duty of nonrefoulement.¹⁷¹ For other migrants who are not deported to their home countries but may be unsafe in Honduras, Guatemala's actions similarly constitute refoulement under the clarified definition, which includes return to a third country in which one fears persecution.¹⁷² In addition, both Guatemala's actual turnbacks of migrants and those that Colombia potentially could implement either with U.S. backing or U.S. forces, amount to a denial of the right to seek asylum; neither of these processes seem to involve individualized review or any degree of assurance that the states to

¹⁶⁹ While I think there is a strong argument that everything regarding Colombia also applies to Panama, Panama has fewer Constitutional protections around international human rights law than does Colombia, so I believe that Colombia would be a stronger place to focus on litigating. Panama is an OAS member, *Member States*, *supra* note 103, so is bound by the American Convention, IACt.HR, and IACHR, but does not explicitly elevate international human rights law in the same ways that Mexico, Guatemala, and Colombia do. See CONSTITUCIÓN POLÍTICA DE PANAMA art. 4 ("The Republic of Panama abides by the rules of International Law."). The only mention of international human rights in the Panamanian Constitution is in Article 129: "The Office of the Ombudsman monitors the protection of the fundamental rights and guarantees recognized in this Constitution as well as of those which are provided for by international human rights conventions." *Id.* art. 129.

¹⁷⁰ See *Caravan of Migrants from Honduras Dissolves in Guatemala*, *supra* note 131; Blears, *supra* note 131.

¹⁷¹ *Caravan of Migrants from Honduras Dissolves in Guatemala*, *supra* note 131; Blears, *supra* note 131.

¹⁷² *Pacheco Tineo Family v. Plurinational State of Bolivia*, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 272, ¶ 134 (Nov. 25, 2013).

which individuals are being returned will provide them with fair asylum procedures, in contravention of IACt.HR precedent.¹⁷³ For these reasons, Guatemalan and Colombian courts could and should enjoin their respective countries in participating in the actualization of these policies.

Guatemala and Colombia's actions also constitute mistreatment of migrants and failure to attend to their vulnerable status as they are in transit and should therefore be held unlawful. Like with Mexico, the actual actions of Guatemalan officials toward migrants, including the use of tear gas and riot police,¹⁷⁴ likely contravene the New York Declaration's mandate that border officials attend to the human rights of migrants in transit.¹⁷⁵ Similarly, the Colombian state appears to be unlawfully abdicating its duty under the New York Declaration and GCM¹⁷⁶ by failing to protect migrants against abuse by the powerful cartels that control migration routes, who extort and threaten migrants, and at times physically harm them.¹⁷⁷ Courts in Guatemala and Colombia can and should follow the lead of the Mexican Supreme Court in *Amparo en Revisión 302/2020*¹⁷⁸ and declare that each of these countries' participation in U.S.-sponsored interception of migrants cannot continue, at least until each country can come into compliance with its international human rights obligations regarding the humane treatment of migrants within their respective territories.

Finally, to the extent that the U.S. is driving the turn back policies that block access northward, Guatemala and Colombia's participation in these policies amount to illegal assistance in wrongful acts under the Articles of State Responsibility.¹⁷⁹ While Guatemala and Colombia directly implement many of the actions involved in actualizing these border policies, as explained above, some involve more direct action by the U.S.—in particular, U.S. border officials driving migrants in Guatemala to the Honduran border, as well as any deployment of U.S. troops in the Darién Gap region.¹⁸⁰ First, these actions by the U.S. in both countries, assuming U.S. officials in the region would be turning migrants back, likely constitute refolement and the denial of the right to seek asylum for the reasons

¹⁷³ See *id.* ¶ 153; *Caravan of Migrants from Honduras Dissolves in Guatemala*, *supra* note 131; Blears, *supra* note 131; Blanes, *supra* note 136.

¹⁷⁴ De Ros & Billy, *supra* note 132.

¹⁷⁵ See G.A. Res. 71/1, *supra* note 92, ¶¶ 32–33.

¹⁷⁶ See G.A. Res. 73/195, *supra* note 147, ¶ 31.

¹⁷⁷ BOTTLENECK OF THE AMERICAS, *supra* note 137, at 10–12; Taylor, *supra* note 133.

¹⁷⁸ See generally *Amparo en Revisión 302/2020* [SCJN], *Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo II* (2022) (Mex.) at 150.

¹⁷⁹ Draft Articles on Responsibility of State for Internationally Wrongful Acts, *supra* note 94, at 65–66.

¹⁸⁰ See Abbott, *supra* note 37; Kube, Lee & Ainsley, *supra* note 39 (“[O]fficials said the most likely option for now would be to move a small number of U.S. troops already in the countries . . . to the Darien Gap to advise local forces.”).

outlined in the preceding paragraphs, in this case by the U.S. instead of by Guatemala or Colombia themselves. Therefore, the U.S. actions are likely wrongful under international law, given that they contravene core human rights norms.

Turning to the three-element test under the Articles of State Responsibility, both countries likely satisfy all elements. Much like with Mexico, Guatemala and Colombia likely both know what makes the actions of the U.S. wrongful; the duties the U.S. is failing to follow here are well-known human rights principles, and numerous treaties and IACt.HR cases have reaffirmed the importance of nonrefoulement and the right to seek asylum.¹⁸¹ Further, unless the U.S. illegally invaded Guatemala and Colombia, these countries to some extent are facilitating the U.S. actions just by allowing the U.S. access to their territory¹⁸² while knowing that the U.S. intends to implement human rights abuses therein.¹⁸³ Their intention toward and actual facilitation of the U.S. refoulement and denial of the right to seek asylum is further made clear by the direct collaboration between the Guatemalan border forces and U.S., as spelled out by Todd Miller, and by the agreement reaffirmed by Colombia in the spring of 2023.¹⁸⁴ Each of these forms of collaboration indicate an intention by the two Latin American nations to block migrants from moving northward to the U.S., and either explicitly or implicitly allow for the U.S. to commit its wrongful acts.¹⁸⁵ Finally, as shown in the preceding paragraphs, these same actions are clearly wrongful when they are also carried out by Guatemala and prospectively Colombia, so element three is easily satisfied here. Therefore, courts in Guatemala and Colombia can find that each country is violating the Articles of State Responsibility by assisting the U.S.'s wrongful actions toward migrants in their countries.

The U.S. would be completely stymied from (legally) participating in migrant turnbacks in Guatemala and Colombia if both countries refused to participate. Guatemala and Colombia can ultimately decide what to do with their own military

¹⁸¹ See generally Allain, *supra* note 79, at 533; Pacheco Tineo Family v. Plurinational State of Bolivia, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 272, ¶¶ 134–35 (Nov. 25, 2013); American Convention on Human Rights, *supra* note 87, art. 22(7); Rights And Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 173 (Aug. 19, 2014).

¹⁸² See League of Nations Covenant art 10 (“The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”); see also U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); Abbott, *supra* note 37; Kube, Lee & Ainsley, *supra* note 39.

¹⁸³ Abbott, *supra* note 37; Kube, Lee & Ainsley, *supra* note 39.

¹⁸⁴ MILLER, *supra* note 129, at 31–33, 37–38; *Trilateral Joint Statement*, *supra* note 134.

¹⁸⁵ See MILLER, *supra* note 129, at 37–38, 44; *Trilateral Joint Statement*, *supra* note 134.

and border forces, and similarly can exercise discretion regarding accepting funding from the U.S.¹⁸⁶ Therefore, they could cease accepting U.S. funding, training, and border directives. Further, the U.S. cannot send troops or officials to these countries without consent, or it would constitute an additional violation of international law and potentially lead to serious conflict with these states for violating their territorial integrity.¹⁸⁷

Overall, these are just a few examples of how international law principles and their integration into global south domestic law could be leveraged against border externalization and show the potential power of litigating human rights issues relating to migration in Latin American courts. Given the patterns in kinds of externalization, particularly by the U.S., and the reticence of U.S. courts to block border externalization, similar arguments and tactics are likely to be unfortunately only more applicable and important.

D. Challenges of Effecting Change Through Global South Litigation: The Realities of Imperialism and Impunity

Ultimately, then, a strategy that accounts for the importance and potential power of Global South legal systems, particularly in Latin America, is important for addressing the global issue of border externalization. This strategy indicates the importance of lawyers and advocates in the Global North practicing transnational solidarity and collaborating across borders. For example, in *Amparo en Revisión 302/2020*, various U.S.-based NGOs submitted an amicus brief,¹⁸⁸ and others have submitted additional briefs as the case takes another turn.¹⁸⁹ Attorney Natalie Cadwalader-Schultheis (an inspiration for this Note) has advocated the importance of more of this kind of action,¹⁹⁰ and given the growing challenges of winning within the U.S., the potential to win within Mexico and other Latin American countries, and the importance of supporting immigration advocates across the world, this sort of cross-border collaboration is only increasingly necessary.

Unfortunately, one reality that advocates will only have to continue confronting is the difference between the law on paper and the law in actuality, particularly given the history of imperial domination of the U.S. toward Mexico

¹⁸⁶ See League of Nations Covenant art. 10; U.N. Charter art. 2, ¶ 4.

¹⁸⁷ League of Nations Covenant art. 10; U.N. Charter art. 2, ¶ 4.

¹⁸⁸ See generally Brief for Asylum Seeker Advocacy Project (ASAP) et al. as Amici Curiae Supporting IMUMI, *Amparo en Revisión 302/2020*, Primera Sala De La Suprema Corte De La Nación [First Chamber of the Supreme Court of the Nation] Sept. 27, 2021 (Mex.).

¹⁸⁹ Letter from Licha Nyiendo, Chief Legal Officer, Human Rights First, to the Supreme Court of Justice of the Nation of Mexico (May 3, 2023), https://humanrightsfirst.org/wp-content/uploads/2023/10/Amicus-Letter_Remain-in-Mexico-Mexican-Amparo_May-2023.pdf.

¹⁹⁰ Natalie Cadwalader-Schultheis (@cadwaladragon), X (May 3, 2023, 7:52 AM), <https://x.com/cadwaladragon/status/1653774643650785280?s=20>.

and other Global South countries. The U.S. has a long history of imperialism in Mexico and throughout Latin America, using strongarm economic and military tactics to the U.S.'s global benefit, including both means and ends that were not necessarily legal.¹⁹¹ These tactics have had profound impacts on the politics and policies of Latin America,¹⁹² and their legacies live on. For example, in recent years, Republicans have increased calls to bomb or invade Mexico, in part due to drug issues, but also related to border security.¹⁹³ Centuries of colonial and imperial domination make defying the U.S. challenging, which is likely partially why so many countries have willingly collaborated with the U.S. in implementing its immigration policy until now. In addition to imperialism, issues with the rule of law and the inability of transit countries to actually protect migrants are real challenges. For example, the Gulf Clan in Colombia, which is largely in control of the migration routes along the Darién Gap,¹⁹⁴ operates with impunity in parts of Colombia,¹⁹⁵ suggesting that even if Colombia takes legal steps to protect migrants, there will be limitations to the effectiveness of this approach on the ground.

For these reasons, while this legal approach is one piece of the puzzle, it must be part of a larger strategy toward building and strengthening international movements to support migrants and address the violence of borders, and toward pushing Global South countries to step out of compliance with Global North border imperialism.

CONCLUSION: TOWARD INTERNATIONAL SOLIDARITY

Given both the value and the challenges of this legal approach, how should immigration advocates move forward? In writing about refugee responsibility-sharing and imperialism, immigration scholar E. Tendayi Achiume notes that imperialist states acting to protect refugees “would likely require radical political mobilizations rooted in social movements in those countries.”¹⁹⁶ She goes on to say

¹⁹¹ Daniel Denvir, *The United States Has Used Latin America as Its Imperial Laboratory*, JACOBIN (Mar. 23, 2023), <https://jacobin.com/2023/03/greg-grandin-interview-us-policy-latin-america>; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 146–50 (June 27).

¹⁹² *Id.*

¹⁹³ Greg Grandin, *The Republicans Who Want to Invade Mexico*, N.Y. TIMES (Nov. 1, 2023), <https://www.nytimes.com/2023/11/01/opinion/sunday/republican-war-mexico.html>; Zack Beauchamp, *Why so Many Top Republicans Want to Go to War in Mexico*, VOX (Apr. 21, 2023, 4:00 AM), <https://www.vox.com/politics/2023/4/21/23686510/mexico-invade-bomb-trump-republicans-cartels>.

¹⁹⁴ BOTTLENECK OF THE AMERICAS, *supra* note 137, at 1, 5–7.

¹⁹⁵ Inigo Alexander, ‘Terrifying’: Days of Terror Under Colombia’s Gulf Clan Cartel, AL JAZEERA (May 12, 2022), <https://www.aljazeera.com/news/2022/5/12/terrifying-days-of-terror-under-colombias-gulf-clan-cartel>.

¹⁹⁶ E. Tendayi Achiume, *Empire, Borders, and Refugee Responsibility Sharing*, 110 CAL. L.

that “where the aim is accountability for international displacement connected to imperial intervention or domination, transnational social movements, as well as social movements within the imperial nation-state, will likely be instrumental.”¹⁹⁷ As a person who is an organizer first and an aspiring lawyer second, I appreciate Achiume’s perspective, and see it as crucial in addressing border externalization. As the world becomes more surveilled, as borders expand far beyond their literal physical markers, and as more and more people are on the move, migrants, organizers, lawyers and companions must also expand past the physical borders of the state to support one another in challenging each individual state and our international institutions to actually uphold the human rights of migrants. As I chanted at a protest recently: Long live international solidarity!