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## Anti-Corruption's Next Great Migration?: Strengthening U.S. Refugee And Asylum Law Under Existing U.S. Anti-Corruption Commitments

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# ANTI-CORRUPTION'S NEXT GREAT MIGRATION?: STRENGTHENING U.S. REFUGEE AND ASYLUM LAW UNDER EXISTING U.S. ANTI-CORRUPTION COMMITMENTS

By Bianka Ukleja<sup>1</sup>

*"We don't have to engage in grand, heroic actions to participate in the process of change. Small acts, when multiplied by millions of people, can transform the world."* -Howard Zinn, American Historian

## ABSTRACT

First, this paper will describe the U.S.'s anti-corruption commitments under international law. Next, it will present the general features of current U.S. refugee and asylum law, pertaining to particular social group (PSG) and political opinion claims. Last, this paper will discuss how the Biden Anti-Corruption Memo provides fertile ground for DHS to initiate an informal rulemaking process under the Administrative Procedure Act (APA) to engage civil society on how U.S. refugee and asylum laws can better support a pathway to citizenship for anti-corruption activists in pursuit of key U.S. foreign policy interests abroad and who find themselves unable to seek protection in their home countries.<sup>1</sup>

## INTRODUCTION

Corruption – the abuse of entrusted power for private gain – takes vastly different forms from country to country.<sup>2</sup> Prominent examples of corruption include bribery, fraud, extortion, nepotism, clientelism, and kleptocracy – but

corruption takes many forms.<sup>3</sup> Around the world, key U.S. foreign policy players (who likely do not see themselves as such) dedicate their lives to combating various forms of corruption in government and in the private sector.

In extreme cases, these individuals can no longer seek their own State's protection against threats of harm, serious bodily injury, or even death because of their anti-corruption-related activity. These individuals risk their lives and the lives of their loved ones if they were to continue their anti-corruption work abroad. In some instances, the government (i.e., a governmental actor) is the persecutor; in other instances, the persecutor is a non-governmental actor that the State is unwilling or unable to control. If the degree of danger or retribution is so high as to render one's home country unsafe, many of these individuals make the painful decision to leave home and seek refuge abroad. If these key U.S. foreign policy players set their sights on the United States, they are considered noncitizens in adversarial confrontation within a complex, hyper-technical refugee and asylum framework without the guarantee of counsel or non-refoulement.<sup>4</sup> Perhaps unsurprisingly, their uphill battle is further constrained by (1) the possible issuance of a defective Notice to Appear before an Immigration Judge; (2) the specific and ever-evolving legal standards adopted for their predicate form of relief; (3) the credibility of their testimony;<sup>5</sup>

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(4) corroboration or lack thereof;<sup>6</sup> (5) discretionary factors in adjudication; (6) language barriers; (7) filing deadlines;<sup>7</sup> (8) lack of legal representation; and (9) physical and emotional trauma, among other factors.

And so, how can the international refugee law and international anti-corruption law frameworks work together to strengthen U.S. refugee and asylum laws to protect individuals living under corrupt governments and who voice their opposition to corruption by whistleblowing and other anticorruption activities?<sup>8</sup> The current parameters of U.S. refugee and asylum law critically fail to uphold the U.S.'s current legal and diplomatic anti-corruption commitments under the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), the Inter-American Convention Against Corruption (ICAC), the U.N. Convention Against Corruption (UNCAC). It follows that current U.S. refugee and asylum law fails to provide adequate liberty and refugee protections for high-risk individuals who, in their home countries, suffered past persecution or have a well-founded fear of future persecution due to their government's inability or unwillingness to protect them from harm on account of their anti-corruption activism, political opinion, whistleblowing, reporting, investigating, or other anti-corruption-related activity.<sup>9</sup>

## I. ANALYSIS

### A. WHAT ARE CURRENT U.S. ANTI-CORRUPTION COMMITMENTS UNDER INTERNATIONAL LAW?

In the U.S., the Constitution dictates the posture of international treaties and the treaties' underlying anti-corruption commitments in U.S. jurisprudence. The U.S. Constitution provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."<sup>10</sup> Treaties are binding agreements between nations and become part of international law.<sup>11</sup> Treaties to which the U.S. is a party also have the force of federal legislation, forming part of what the Constitution calls "the supreme Law of the Land."<sup>12</sup>

The Senate has considered and approved for

ratification all but a small number of treaties negotiated by the president and his representatives.<sup>13</sup> This list includes the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), ratified by the U.S. in 1998;<sup>14</sup> the Inter-American Convention Against Corruption (ICAC), ratified in 2000;<sup>15</sup> and the U.N. Convention Against Corruption (UNCAC), ratified in 2006.<sup>16</sup>

With these parameters in mind, this paper proffers which anti-corruption language within U.S. ratified international anti-corruption instruments should be invoked by (1) noncitizens in affirmative/defensive immigration proceedings, (2) executive agencies and departments committed to strengthening refugee and asylum laws under existing U.S. anti-corruption commitments, and (3) members of the public engaged in administrative rulemaking to ensure that the Department of Homeland Security's (DHS) refugee and asylum policy and procedures conform with the U.S.'s current legal and diplomatic anti-corruption commitments.

#### i. The OECD Convention on Combating Bribery on Foreign Public Officials in International Business Transactions

The OECD Anti-Bribery Convention is the first and only international anti-corruption instrument focused on the "supply side" of the bribery transaction – the person or entity offering, promising, or giving a bribe.<sup>17</sup> In response to the U.S.'s signature of the Convention, Congress amended its Foreign Corrupt Practices Act (FCPA) in 1998.<sup>18</sup> The new domestic legislation entered into force on November 10, 1998, extending the FCPA's jurisdiction to any person who engages in any act while in the territory of the U.S. and to any U.S. national and company engaged in an act outside the U.S. in furtherance of a proscribed purpose; adds "securing any improper advantage" to the list of improper purposes for payments to foreign officials; expands the term "a foreign official" to include any person acting for or on behalf of "public international organization;" and allows the U.S. Attorney General to seek injunctive relief against foreign citizens or residents and entities other than "issuers" or "domestic concerns" that have engaged in or are about to engage in a violation of the FCPA.<sup>19</sup> As a legally binding

international agreement, parties to the Convention agree to establish bribery of foreign officials as a criminal offense under their laws and to investigate, prosecute and sanction this offense.<sup>20</sup> Moreover, the Convention establishes an open-ended, peer-driven monitoring mechanism carried out by the OECD Working Group on Bribery.<sup>21</sup>

In its Preamble, the OECD Anti-Bribery Convention (1) “welcome[es] *other recent developments* which further . . . comba[t] bribery of public officials;” (2) “welcom[es] . . . *companies, business organizations, trade unions and other non-governmental organizations* to combat bribery;” and (3) “recogniz[es] that *achieving progress . . . requires efforts on a national level and also multilateral cooperation . . .*”<sup>22</sup> Article 5

(Enforcement) provides that “*investigation and prosecution . . . shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.*”<sup>23</sup> Article 9 (Mutual Legal Assistance) provides that “[*e*]ach Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings . . . and for non-criminal proceedings within the scope of this Convention . . . .”<sup>24</sup>

#### ii. The Inter-American Convention Against Corruption

The ICAC is a regional anti-corruption instrument of the Organization of American States (OAS).<sup>25</sup> Ratified by the U.S. in 2000, this Convention did not require implementing domestic legislation.<sup>26</sup> The OAS uses a four-pronged approach to effectively implement its essential purposes, based on its main pillars: democracy, human rights, security, and development.<sup>27</sup> The purposes of ICAC are (1) “*to promote and strengthen the development* by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption;” and (2) “*to promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions* to prevent, detect, punish and eradicate corruption in the performance of public

functions and acts of corruption specifically related to such performance.”<sup>28</sup>

The ICAC is notable for enumerating five commonly accepted legal definitions for what constitutes an “act of corruption,” while providing legal recognition of other unenumerated “acts of corruption” agreed upon by two or more State Parties.<sup>29</sup> Article 14 (Assistance and Cooperation) provides for “*the widest measure of mutual assistance . . . and the widest measure of technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption.*”<sup>30</sup>

#### iii. The U.N. Convention Against Corruption

The UNCAC is the only universal and legally binding anti-corruption instrument.<sup>31</sup> When the U.S. ratified the UNCAC in 2006, existing federal and state laws sufficed to implement the Convention’s obligations.<sup>32</sup> The Convention covers five main areas: preventive measures; criminalization and law enforcement; international cooperation, asset recovery, and technical assistance; and, information exchange.<sup>33</sup> The Convention also covers different forms of corruption such as bribery, trading in influence, abuse of functions, and acts of corruption in the private sector.<sup>34</sup> A highlight of the Convention is the inclusion of a specific chapter on asset recovery, aimed at returning assets to their rightful owners, including countries from which they had been taken illicitly.<sup>35</sup>

In its Preamble, the UNCAC (1) notes how *all States* should support individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their anti-corruption efforts are to be effective (further enshrined by Ch. 2 Art. 13 “Participation of Society”).<sup>36</sup> The Preamble also (2) bears in mind the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption (enshrined in Ch. 2, Art. 5 “Preventative Measures”).<sup>37</sup>

Chapter 2, Art. 10 (Public Reporting) provides that, “[e]ach State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.”<sup>38</sup> Article 32 (Protection of Witnesses, Experts and Victims), provides that, “[e]ach State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offenses established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.”<sup>39</sup> Article 46 (Mutual Legal Assistance) provides for “the widest measure of mutual legal assistance” such as: (1) taking evidence or statements from persons; (2) examining objects and sites; (3) providing information, evidentiary items and expert evaluations; (4) providing originals or certified copies of relevant documents and records; and (5) facilitating the voluntary appearance of persons, among others.<sup>40</sup> Undoubtedly, other provisions of this universal text could be explored for their applicability within the U.S. refugee and asylum law framework.

## B. THE GENERAL FEATURES OF CURRENT U.S. REFUGEE AND ASYLUM LAW AS THEY PERTAIN TO ANTI-CORRUPTION-RELATED CLAIMS

After World War II, the U.S. ratified the foundational international non-refoulement instruments, namely the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and the 1967 Protocol to the 1951 Geneva Convention (1967 Protocol), with their corresponding reservations and declarations.<sup>41</sup> The term “corruption” does not appear in either instrument. The term “corruption” also fails to appear in the Refugee Act of 1980, which incorporated the Convention’s definition into U.S. law.<sup>42</sup> The U.S. has since ratified several international anti-corruption instruments (described above), particularly at the turn of the new millennium, that operate beyond and largely independent of these migration-related governance frameworks.

Recently, Senior State Department Legal Advisor,

Harold Hongju Koh, criticized the outdated modes of thinking about migration sheltered in the 1951 Convention that “[do] not address every problem we face today, and . . . cannot be the only international legal means of protection for forced migrants.”<sup>43</sup> Koh has long argued in his academic work that the U.S. has reacted robustly to the fallout of refugee crisis, but neglected root causes.<sup>44</sup> In his July 27, 2021 Keynote Address at the Refugees International Conference hosted by the U.S. State Department, Koh, somewhat ironically, urged that the U.S., in collaboration with other key foreign policy players, “must . . . promote greater inclusion in national and international policymaking on refugee issues,” while completely dodging any reference to any of the U.S.’s longstanding international legal and diplomatic anti-corruption commitments.<sup>45</sup>

Today, the major sources of U.S. refugee and asylum law include the Immigration and Nationality Act (INA) Section 208 (see also 8 U.S.C. Section 1158); 8 C.F.R. Section 208 (Asylum Procedures); U.S. Supreme Court precedent; dynamic and frequently diverging circuit court decisions; Board of Immigration Appeals (BIA) decisions; the decisions of local Immigration Judges (IJs), published and unpublished; and in some cases, State law (for criminal and family law issues).<sup>46</sup> Under U.S. law, a “refugee” is a person who is unable or unwilling to return to his or her home country because of a “well-founded fear of persecution” due to (1) race, (2) membership in a particular social group, (3) political opinion, (4) religion, or (5) national origin.<sup>47</sup> An applicant seeking asylum or refugee status based on membership in a particular social group (PSG) must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined within particularity.<sup>48</sup> All three elements must be met to establish a cognizable particular social group.<sup>49</sup>

Particular social group (PSG) and political opinion have been the most common claims for anti-corruption activists seeking relief in U.S. immigration proceedings. In 2012, Summer E. Neimeier wrote a seminal law review article investigating the legal and political dimensions of U.S. anti-corruption obligations in the Americas following the 2011 BIA decision, *Matter of N-M-*, which for the first time allowed for political opinion whistleblower claims to go forward provided that: (1) the noncitizen’s opposition to state corruption provides evidence of his or her political opinion or gives a persecutor reason to impute such beliefs to him or her; and (2) the noncitizen shows that his actual or imputed political belief was one central reason for the harm.<sup>50</sup>

In 2012, Neimeier concluded that then-U.S. refugee and asylum law disadvantaged asylum-seekers who stood up against corruption in their home countries.<sup>51</sup> This paper

necessarily previews over a decade of subsequent developments in U.S. refugee and asylum law since Neimeier’s review, only to demonstrate that current U.S. refugee and asylum law continues to disadvantage anti-corruption activists in immigration proceedings. Despite the fact that some anti-corruption advocates have been granted asylum in the U.S. using PSG and political opinion claims, inconsistent rulings demonstrate the necessity for legal harmonization, reform, and civil society engagement as prescribed by UNCAC, ICAC, and OECD Anti-bribery Convention.

i. Particular Social Group Claims with an Anti-Corruption Nexus

As a general rule, noncitizens proffering profession-based PSGs (i.e., journalists, prosecutors, auditors, community organizers, and other law-enforcement-adjacent professionals) with a nexus to anti-corruption work must demonstrate (1) a common immutable characteristic;<sup>52</sup> (2) particularity;<sup>53</sup> and (3) social distinction within the society in question (also recognized by Society in Home Country).<sup>54</sup> Moreover, to constitute a PSG, the group cannot consist of solely one individual (in contrast with political opinion claims or religious belief claims that could be entirely personal and idiosyncratic).<sup>55</sup> While courts have created some protections for individuals that were engaged in anti-corruption work using PSGs, caselaw is inconsistent and fails to adequately protect these individuals despite U.S. treaty obligations.

Although *Pavlyk v. Gonzalez*’s holding rejected Ukrainian prosecutors as a PSG, *Plancarte Saucedo v. Garland* created some limited protections for retired professionals with immutable specialized knowledge. In *Pavlyk*, the United States Court of Appeals for the Seventh Circuit rejected the proposed PSG, alternatively described as “Ukrainian prosecutors” or “uncorrupt prosecutors who were subjected to persecution for exposing government corruption,” because being a prosecutor was “not an unchangeable or fundamental characteristic.”<sup>56</sup> The IJ stressed that the petitioner had not framed his particular social group as *former* prosecutors. Thus, his case was distinguishable from those in which the particular social group is

based on shared past experiences.<sup>57</sup> Today, asylum-seekers who are either (1) retired or (2) who have not been employed on anti-corruption-related projects in many years but may still be targeted for their specialized knowledge of certain criminal activity can find some degree of hope in *Plancarte Saucedo v. Garland*, holding that medical knowledge and nursing skills were immutable characteristics. If “*former* Female nurses” may qualify as a viable PSG for asylum purposes, so should “former Ukrainian prosecutors exposing governmental corruption.”<sup>58</sup>

But the inconsistencies are endless. In the Fifth Circuit, government employment does not constitute an immutable characteristic, despite the fact that government agencies regularly keep employment records (which contain home addresses, kinship ties, and other personal information) that endure.<sup>59</sup> Young anti-corruption activists also stand on shaky ground when “[y]oung Salvadoran students who expressly oppose gang practices and values” was found to lack particularized boundaries or social distinction.<sup>60</sup> However, in the Eighth Circuit, “Iranian women who advocate for women’s rights or who oppose Iranian customs relating to dress and behavior” has been successfully accepted as a viable PSG.<sup>61</sup>

In 2021, the BIA consequently held that “individuals who cooperate with law enforcement” may constitute a valid PSG if their cooperation is (1) public in nature, particularly where testimony was given in public court proceedings, and (2) the evidence in the record reflects that the society in question provides protection for such cooperation.<sup>62</sup> While *Matter of H-L-S-A-* conforms with the enumerated purposes of the ICAC and the ethos of Ch. 2, Art. 5 (“Preventative Measures”) of the UNCAC, what happens if the society in question does not provide legal protection for such cooperation or where the national judiciary is too backlogged or politically captured by a corrupt regime? Reviewing the specific facts of these cases is critical to gauge how these holdings can be used to advance PSG claims with a nexus to anti-corruption activity.

ii. Political Opinion Claims with an Anti-Corruption Nexus

If an asylum seeker’s job duties are not directly or

indirectly related to fighting corruption, there exists another tentative avenue for relief for their refusal to participate in bribery schemes, extortion, or other forms of corruption that their governments are unwilling or unable to control.<sup>63</sup> For asylum applications filed on or after May 11, 2005 (post-REAL ID Act), a noncitizen must establish that his or her political opinion (imputed or actual) was or will be at least *one central reason* for his persecution.<sup>64</sup> When a noncitizen cannot identify their attackers and do not furnish sufficient credible evidence of the attacker(s)' motivations, the unsupported theory that there is no other motivation except their political activity will be inadequate to sustain the claim to asylum.<sup>65</sup> A noncitizen need not show that the enumerated ground provides "the central reason or even a dominant central reason" for their persecution but must demonstrate that the enumerated reason is more than "incidental, tangential, superficial, or subordinate reason" for their persecution.<sup>66</sup> More than one central reason may, and often does, motivate a persecutor's actions.<sup>67</sup>

In 2011, *Matter of N-M-* changed the refugee and asylum law landscape so that anti-corruption whistleblowing activities could sustain political opinion claims under a new multi-factor analysis.<sup>68</sup> In *Matter of N-M-*, the BIA ultimately outlined several important factors for adjudicators to consider when conducting the nexus analysis in corruption cases, including whether and to what extent (1) a noncitizen engaged in activities that could be perceived as expressions of anticorruption beliefs, (2) there is direct or circumstantial evidence that the persecutor was motivated by the noncitizen's perceived or actual beliefs, (3) there is evidence of pervasive government corruption and direct ties between the corrupt actor and high level officials, and (4) the governing regime, rather than just the corrupt individual, retaliates against the applicant for the anticorruption beliefs.<sup>69</sup>

The BIA recognized that exposing or threatening to expose government corruption to higher government authorities, the media, or nongovernmental watchdog organizations could constitute the expression of a political opinion.<sup>70</sup> In 2012, Neimeier's main concern with the *Matter of N-M-* decision was the implication that anti-corruption activists in immigration proceeding must

make or participate in an expression of political belief, even though the statute does not require *an expression of political opinion* to qualify for asylum, but only an imputed political opinion.<sup>71</sup>

Subsequent case law reveals the inherent challenges of winning political opinion asylum claims in the post-*Matter of N-M-* landscape, especially for noncitizens from countries where corruption is, in fact, rampant and genuine, but their repeated refusal to participate in corruption and subsequent whistleblowing falls short of "an expression of political opinion." In *Latipov v. U.S. Attorney General*, Mr. Latipov was required to show more than widespread corruption in Uzbekistan; he had to show that his past persecution and fear of future persecution stemmed from his political opinion opposing that corruption (which he could not demonstrate by arguing that his refusal to pay bribes to government officials could be perceived as a political belief).<sup>72</sup>

In *Feng v. Sessions*, the Ninth Circuit did not find a sufficient nexus where Mr. Feng, who worked as a toll booth cashier at a Chinese state-owned company, refused to participate in an embezzlement scheme.<sup>73</sup> Mr. Feng had been approached by his immediate supervisor, who attempted to enlist Mr. Feng to participate in the embezzlement scheme. He refused to participate and reported it to the highway superintendent, a local government official.<sup>74</sup> Mr. Feng was subsequently fired, falsely accused of participating in the scheme, arrested, detained for days, and beaten by the police.<sup>75</sup> The Ninth Circuit honed-in on the fact that Mr. Feng failed to establish the necessary nexus between his speech against corruption and the persecution he endured at the hands of the police, who harmed him as a consequence of the false allegations levied against him.<sup>76</sup> Consequently, *Matter of N-M-* destroys political opinion claims where applicants refuse to engage in systemic, petty forms of corruption by low- to mid-level government officials which they inevitably and repeatedly engage with on a daily basis, or where applicants directly experience the consequences of their whistleblowing after one reporting incident due to specific relationship between local governance and law enforcement apparati.

### C. THE BIDEN ANTI-CORRUPTION MEMO, DHS RULEMAKING, AND NEXT STEPS

On February 2, 2021, President Joseph R. Biden issued Executive Order 14010, directing DHS and the Department of Justice (DOJ) to publish a joint rule by October 30, 2021, “addressing the circumstances in which a person should be considered a member of a ‘particular social group’ (PSG)” as the term was used in the INA’s definition of a refugee “derived from the 1951 Convention and 1967 Protocol.”<sup>77</sup> However, E.O. 14010 was issued with the intent to expedite border processing procedures for asylum seekers from North and Central America, conjuring Koh’s observation that the U.S. reacts robustly to the fallout of refugee crisis, but neglects root causes (i.e., widespread governmental corruption in Northern Triangle Countries).<sup>78</sup>

However, on June 3, 2021, President Biden issued the National Security Study Memorandum on the Fight Against Corruption (Biden Anti-Corruption Memo), which (1) established combating corruption as a core U.S. national security interest, and (2) directs the departments and agencies to make recommendations that will significantly bolster the ability of the U.S. government to combat corruption.<sup>79</sup> In his official Statement to the press, President Biden underscored how “[t]he United States will lead by example . . . in partnership with allies, civil society, and the private sector to fight the scourge of corruption . . . .”<sup>80</sup> President Biden invoked the Memo to directly challenge U.S. policymakers, anti-corruption advocates, and civil society members to “stand in support of courageous citizens around the globe who are demanding honest, transparent governance.”<sup>81</sup>

For decades, public opinion research has recognized the importance of the president in setting policy agenda and conceptualizing nation branding as a form of soft power.<sup>82</sup> However, it is worth noting that national image is not solely dependent upon media reports or policy speeches, but it is also associated with a country's products and services,<sup>83</sup> including robust legal frameworks that support anti-corruption advocates who are forced to leave their home countries under serious threat of persecution for their anti-corruption-related professional and/or

political activity. Nevertheless, critics remain frustrated by how the Biden Administration has leveraged anti-corruption and migration challenges amid an ongoing surge of migrants at the southern U.S. border.<sup>84</sup>

DHS has not initiated a *public* and *inclusive* rulemaking process that examines how current U.S. legal and diplomatic anti-corruption commitments can further strengthen U.S. refugee and asylum laws to ensure a pathway to citizenship for genuine anti-corruption activists in pursuit of key U.S. foreign policy interests abroad. In 2023, many U.S. departments and agencies, including the Treasury, State, Commerce, Defense, USAID, and DOJ, have since taken steps toward integrating Biden’s five-pillar anti-corruption strategy; DHS, is notably absent from this list.<sup>85</sup>

All things considered, U.S. policymakers, immigration advocates, and other dedicated members of civil society are ripely positioned to demand more from DHS and its corresponding agencies to strengthen U.S. immigration procedures to support courageous individuals around the globe demanding honest, transparent governance.<sup>86</sup> Cross-cutting analysis of anti-corruption strategies from around the globe reveals that by focusing at the agency level, it is possible to tailor reforms to the vulnerabilities associated with specific functions or tasks, thereby improving effectiveness.<sup>87</sup> Moreover, decentralization affords the public with a sense of ownership, responsibility, and the opportunity to interact with other parts of the anti-corruption ecosystem.<sup>88</sup> It follows that a new informal rulemaking process with robust public participation is required to gain new insights into current anti-corruption values and American perceptions of the disconnect between international refugee and asylum law frameworks and the U.S.’s ongoing international anti-corruption commitments.

## II. CONCLUSION

This paper argues that the current parameters of U.S. refugee and asylum law critically fail to uphold the ethos of the U.S.’s legal and diplomatic anti-corruption commitments under the OECD Anti-Bribery Convention, ICAC, and UNCAC. Therefore, current U.S. refugee and asylum law fails



to provide adequate liberty and refugee protections for high-risk individuals who, in their home countries, have suffered past persecution or have a well-founded fear of future persecution due to their government's inability or unwillingness to protect them from harm *on account of* their anti-corruption activism, political opinion, whistleblowing, reporting, investigating, and/or other anti-corruption-related activity. The bifurcation of migration-related and anti-corruption-related foreign policy agendas must cease. Looking ahead, the Biden Anti-Corruption Memo provides the impetus for DHS to initiate an informal rulemaking process under the APA to engage civil society on how U.S. refugee and asylum laws can better support a pathway to citizenship for anti-corruption activists in pursuit of key U.S. foreign policy interests abroad and are unable to seek protection in their home countries.

## ENDNOTES

<sup>1</sup> White House, Fact Sheet: U.S. Strategy on Countering Corruption (Dec. 6, 2021)

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/>.

<sup>2</sup> U4 ANTI-CORRUPTION RESOURCE CENTRE, *What is corruption?*, <https://www.u4.no/topics/anti-corruption-basics/basics>.

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

<sup>4</sup> ACLU, *The Right to Counsel*,

[https://www.aclu.org/sites/default/files/field\\_document/right\\_to\\_counsel\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/right_to_counsel_final.pdf). See UN Hum. Rts. Off. of the High Comm’r, *The Principle of Non-Refoulement under International Human Rights Law*,

[https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-](https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf)

[RefoulementUnderInternationalHumanRightsLaw.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf) (last visited Jun. 27, 2023) (“Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status”).

<sup>5</sup> INA § 208(b)(1)(B)(iii) (providing for totality of the circumstances review for credibility determinations).

<sup>6</sup> *E.g.*, *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004).

<sup>7</sup> INA § 208(a)(2)(B).

<sup>8</sup> Summer E. Neimeier, *Standing Up Against Corruption: An Analysis on the Matter of N-M- and Corruption in the Americas*, 44 U. Miami Inter-Am. L. Rev. 89, 90 (2012).

<sup>9</sup> INA 101(a)(42); see also REAL ID Act of 2005.

<sup>10</sup> U.S. Const. art. II §. 2.

<sup>11</sup> UNITED STATES SENATE, ABOUT TREATIES, <https://www.senate.gov/about/powers-procedures/treaties.htm#:~:text=Treaties%20are%20binding%20agreements%20between,Senate%20does%20not%20ratify%20treaties>.

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

<sup>13</sup> *Id.*

<sup>14</sup> OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, RATIFICATION STATUS AS OF MAY 2018, <https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

<sup>15</sup> OAS, INTER-AMERICAN CONVENTION AGAINST CORRUPTION (B-58), SIGNATORIES AND RATIFICATIONS, [https://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_B-58\\_against\\_Corruption\\_signatories.asp](https://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp).

<sup>16</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, U.N. CONVENTION AGAINST CORRUPTION, SIGNATURE AND RATIFICATION STATUS, <https://www.unodc.org/unodc/en/corruption/ratification-status.html>.

<sup>17</sup> OECD ANTI-CORRUPTION & INTEGRITY HUB, <https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/>.

<sup>18</sup> UNITED STATES, REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, <https://www.oecd.org/unitedstates/2390377.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> OECD ANTI-CORRUPTION & INTEGRITY HUB, <https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/>.

<sup>21</sup> OECD ANTI-CORRUPTION & INTEGRITY HUB, <https://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/>; see also OECD, *Fighting the Crime of Foreign Bribery: The Anti-Bribery Convention and the OECD Working Group on Bribery* (2018), <http://www.oecd.org/daf/anti-bribery/Fighting-the-crime-of-foreign-bribery.pdf>.

<sup>22</sup> OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> Organization of American States, WHO WE ARE, [https://www.oas.org/en/about/who\\_we\\_are.asp](https://www.oas.org/en/about/who_we_are.asp). (Hereinafter OAS, WHO WE ARE),

<sup>26</sup> SENATE CONSIDERATION OF TREATY DOCUMENT 105-39, SENATE LETTER OF TRANSMITTAL, <https://www.congress.gov/treaty-document/105th-congress/39/document-text>.

<sup>27</sup> OAS, WHO WE ARE.

<sup>28</sup> Organization of American States, INTER-AMERICAN CONVENTION AGAINST CORRUPTION (B-58), art. 2 (emphasis added).

<sup>29</sup> OAS, INTER-AMERICAN CONVENTION AGAINST CORRUPTION (B-58), art. 6; see also art. 11 (Progressive Development).

<sup>30</sup> OAS, INTER-AMERICAN CONVENTION AGAINST CORRUPTION (B-58), art. 14, §§ 1, 2 (emphasis added).

<sup>31</sup> United Nations Office for Drugs and Crime, UNITED NATIONS CONVENTION AGAINST CORRUPTION (2004) <https://www.unodc.org/unodc/en/treaties/CAC/>. (Hereinafter UNCAC (2004).

<sup>32</sup> EX. REPT. 109-18, UNITED NATIONS CONVENTION AGAINST CORRUPTION (TREATY DOC. 109-6), art. 4 (Aug. 30, 2006), <https://www.congress.gov/congressional-report/109th-congress/executive-report/18>.

<sup>33</sup> UNCAC (2004).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.* at art. 10 (emphasis added).

<sup>39</sup> *Id.* at art. 32 (emphasis added).

<sup>40</sup> *Id.* at art. 46(3)(a-k) (emphasis added).

- <sup>41</sup> See UNHCR, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, <https://www.unhcr.org/en-us/1951-refugee-convention.html>.
- <sup>42</sup> Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980).
- <sup>43</sup> U.S. Dep't. of State, THE REFUGEE CONVENTION AT 70: ACHIEVEMENTS AND CHALLENGES, KEYNOTE ADDRESS (July 27, 2021), <https://www.state.gov/the-refugee-convention-at-70-achievements-and-challenges/>. (Emphasis added).
- <sup>44</sup> Harold Hongju Koh, *The "Haiti Paradigm" in U.S. Human Rights Policy*, 103 Yale L.J. 2391 (1994); Harold Hongju Koh, *Refugees, the Courts and the New World Order*, 1994 Utah L. Rev. 999 (1994).
- <sup>45</sup> U.S. Dep't. of State, THE REFUGEE CONVENTION AT 70: ACHIEVEMENTS AND CHALLENGES, KEYNOTE ADDRESS (July 27, 2021), <https://www.state.gov/the-refugee-convention-at-70-achievements-and-challenges/> (emphasis added).
- <sup>46</sup> Kathy Purnell, *Asylum: Legal Foundations*, JUSTICE FOR OUR NEIGHBORS MICHIGAN, <https://www.miciviced.org/wp-content/uploads/2020/01/Legal-Fundamentals-Asylum-MockTrial-2019.pdf>.
- <sup>47</sup> INA § 101(a)(42); see also UNHCR, USA, TYPES OF ASYLUM, <https://help.unhcr.org/usa/applying-for-asylum/types-of-asylum/#:~:text=Forms%20of%20asylum,who%20are%20in%20removal%20proceedings> (noting the "refugee" definition also provides the standard for adjudicating both affirmative asylum claims before the United States Citizenship and Immigration Services (USCIS) and defensive asylum claims that proceed before an IJ).
- <sup>48</sup> U.S. Citizenship and Immigration Services, *Refugee, Asylum and International Operations Directorate (RAIO): Nexus – Particular Social Group Training Module* (July 20, 2022), [https://www.uscis.gov/sites/default/files/document/foia/Nexus\\_-\\_Particular\\_Social\\_Group\\_PSG\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf) (last visited May 1, 2023).
- <sup>49</sup> *Id.*
- <sup>50</sup> Summer E. Neimeier, *Standing Up Against Corruption: An Analysis on the Matter of N-M- and Corruption in the Americas*, 44 U. Miami Inter-Am. L. Rev. 89, 98 (2012) (citing *Matter of N-M-*, 25 I. & N. Dec. 525, 526 (BIA 2011) (noting that *N-M-* was a Columbian national who worked for thirteen years (1994-2004) in administrative positions with a state-run agency in Columbia; in the last six years of her employment, she faced pressure to circumvent required hiring process and to falsify statistical information; she continued to voice her concerns to the internal audit department of the agency and received threatening phone calls from anonymous callers threatening to kill and her and her son if she did not leave; the callers warned her not to call police; in 2004, she and her son left for the U.S).
- <sup>51</sup> *Id.* at 90.
- <sup>52</sup> See *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 2018).
- <sup>53</sup> See *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008); see also *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014).
- <sup>54</sup> See *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).
- <sup>55</sup> See *Matter of W-G-R-*, 26 I&N Dec. 208, n.3 (BIA 2014).
- <sup>56</sup> See U.S. Dep't of Justice, *Immigration Law Advisor* (Feb. 2015) Vol. 9 No. 2 (Aimee L. Mayer-Salins) <https://www.justice.gov/sites/default/files/eoir/pages/attchments/2015/02/26/vol9no2ed.pdf> (citing *Pavlyk v. Gonzalez*, 469 F.3d 1082, 1088 (7th Cir. 2006)).
- <sup>57</sup> *Id.*
- <sup>58</sup> See *Plancarte Saucedo v. Garland*, No. 19-73312 (9th Cir. 2021) (emphasis added).
- <sup>59</sup> See *Mwembie v. Gonzalez*, AA3 F.3d 405, 414-415 (5th Cir. 2006).
- <sup>60</sup> See *Solomon-Membrano v. Holder*, 578 Fed. Appx. 300 (4th Cir. 2014).
- <sup>61</sup> See *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).
- <sup>62</sup> See *Matter of H-L-S-A-*, 28 I&N Dec. 228 (BIA 2021).
- <sup>63</sup> INA § 101(a)(42) (codifying "unwilling or unable" language).
- <sup>64</sup> INA § 208(b)(1)(B)(i).
- <sup>65</sup> *Celicoourt v. Barr*, 980 F.3d 218, 221-22 (1st Cir. 2020).
- <sup>66</sup> *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).
- <sup>67</sup> *Cruz v. Sessions*, 853 F.3d 122, 128 (4th Cir. 2017).
- <sup>68</sup> OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/whistle-blower](http://www.oxforddictionaries.com/us/definition/american_english/whistle-blower) (last visited Feb. 24, 2015) (defining a whistleblower as "a person who informs on a person or organization regarded as engaging in an illicit activity"); see also Black's Law Dictionary 1627 (8th ed. 2004) (defining a whistleblower as "an employee who reports employer wrongdoing to a governmental or law-enforcement agency").
- <sup>69</sup> See *Matter of N-M-*, 25 I. & N. Dec. 525, 532-33.
- <sup>70</sup> See Neimeier at 102 (citing *Matter of N-M-*, 25 I. & N. Dec. at 529).
- <sup>71</sup> Neimeier at 102; see also *Baghdasaryan v. Holder*, 592 F.3d 1018, 1025 (9th Cir. 2010) (holding that where an Armenian law-enforcement official indicated that an asylum seeker "was detained and beaten because he was 'defaming' and 'raising his head' against" an Armenian general, such a comment was evidence that the government viewed the asylum seeker "as a protestor and punished him for his resistance to [the] government," thus establishing persecution based on imputed political opinion); see also *Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1018 (9th Cir. 2011) (holding that a Chinese labor organizer was persecuted based on an anti-government opinion that was imputed to him by police even after he "told Chinese officials that he was just in favor of 'the legal rights of those laid off workers'") (emphasis added).
- <sup>72</sup> *Latipov v. Atty. Gen.*, 562 Fed.Appx. 800, 802 (11th Cir. 2014).
- <sup>73</sup> *Feng v. Sessions*, 723 Fed.Appx. 418, 419 (9th Cir. 2018).
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> *Id.* at 419-20.

<sup>77</sup> Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border* (FEB. 2, 2021), <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>; see also U.S. Dep't. of State, *The Refugee Convention at 70: Achievements and Challenges, Keynote Address* (July 27, 2021), <https://www.state.gov/the-refugee-convention-at-70-achievements-and-challenges/>.

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

<sup>79</sup> See White House, *Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest* (June 3, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

<sup>80</sup> See White House, *Statement by President Joseph R. Biden, Jr. on the National Security Study Memorandum on the Fight Against Corruption* (June 3, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joseph-r-biden-jr-on-the-national-security-study-memorandum-on-the-fight-against-corruption/> (emphasis added).

<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> See Cui Zhang and Chares William Meadows III, *International Coverage, Foreign Policy, and National Image: Exploring the Complexities of Media Coverage, Public Opinion, and Presidential Agenda*, 6 Int'l J. Com. 76-95 (2012).

<sup>83</sup> Tang, I. & Li, H. (2010) Chinese corporate diplomacy: Huawei's CSR discourse in Africa. In J. Wang (Ed.), *Soft power in China: Public diplomacy through communication* (pp. 95-115). Basingstoke, UK: Palgrave Macmillan.

<sup>84</sup> Exec. Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border* (Feb. 2, 2021),

<https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>. See also Natalie Kitroeff, *Biden Faces a Trade-Off: Stop Corruption, or Migration?*, THE N.Y. TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/08/24/world/americas/guatemala-corruption-migrants.html>; Hesson et al., *Analysis: Corruption in Central America frustrates U.S. plan to tackle migration 'root causes'*, REUTERS (June 3, 2022),

<https://www.reuters.com/world/americas/corruption-central-america-frustrates-us-plan-tackle-migration-root-causes-2022-06-03/>.

<sup>85</sup> See White House, *Fact Sheet: Implementing the United States Strategy on Countering Corruption: Accomplishments and Renewed Commitment in the Year of Action* (Mar. 29, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/29/fact-sheet-implementing-the-united-states-strategy-on-countering-corruption-accomplishments-and-renewed-commitment-in-the-year-of-action/>.

<sup>86</sup> See White House, *Statement by President Joseph R. Biden, Jr. on the National Security Study Memorandum on the Fight Against Corruption* (June 3, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joseph-r-biden-jr-on-the-national-security-study-memorandum-on-the-fight-against-corruption/>.

<sup>87</sup> Innovations for Successful Societies, *Cross-Cutting Analysis – Anti-Corruption: Implementing National Anti-Corruption Strategies*, Princeton University (February 2018),

[https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/AntiCorruption%20Cross\\_Revised\\_1.pdf](https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/AntiCorruption%20Cross_Revised_1.pdf).

<sup>88</sup> *Id.*