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2024

## Deadly Journeys: Climate Change, U.S. Border Enforcement, and Human Rights

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# DEADLY JOURNEYS: CLIMATE CHANGE, U.S. BORDER ENFORCEMENT, AND HUMAN RIGHTS

*Julia Neusner* †

## ABSTRACT

Extreme weather events and slow onset disasters, exacerbated by climate change, are increasingly driving global displacement. As displaced people seek cross-border protection in unprecedented numbers, the United States has responded by tightening border controls and restricting asylum access. These policies have exposed migrants and asylum seekers in transit to greater risks of injury and death due to the impacts of climate change and climate-related disasters. Drawing on legal analysis, historical context, and firsthand interviews with people seeking U.S. asylum, this Article examines the implications of U.S. policies that limit freedom of movement and asylum access.

The Article raises critical legal questions regarding U.S. obligations under international and domestic law to protect asylum seekers, mitigate climate-related risks, and uphold the rights of noncitizens within its borders. It probes the extent to which U.S. policies may subject impacted individuals to the risk of forced return, or *refoulement*, to places where their lives and safety are at risk, contravening international legal norms. It also examines the extraterritorial reach of U.S. immigration enforcement efforts. In addressing these questions, this Article underscores the urgent need for safe and regular migration pathways to protect people on the move from the intensifying effects of climate change.

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## I. INTRODUCTION

Extreme weather events and slow onset disasters tied to climate change increasingly drive displacement on a global scale.<sup>1</sup> The United Nations High Commissioner for Refugees (UNHCR) estimates that “over the past decade, weather-related events triggered an average of 21.5 million new displacements each year, more than twice as many as displacements caused by conflict and violence.”<sup>2</sup> As forced displacement on a global scale reaches unprecedented levels,<sup>3</sup> governments have responded by closing off safe and regular migration pathways, pushing displaced people into remote territories made more dangerous by the effects of climate change.<sup>4</sup> This Article argues that U.S. policies that limit freedom of movement and asylum access have exposed migrants and asylum seekers in transit to greater risks of injury and death due to the impacts of climate change and climate-related disasters.

Though displaced people impacted by climate change are primarily displaced internally, climate impacts often intersect with other drivers of displacement that may force people to seek protection across international borders.<sup>5</sup> As the United Nations Special Rapporteur on human rights in the context of climate change affirms, a “large number of people are being displaced across international borders due to climate change and . . . there is an international legal responsibility to properly

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1. See U.N. Int’l Panel on Climate Change (IPCC), *Climate Change 2023 Synthesis Report: Summary for Policymakers*, at A.2, (2023).
  2. *Displaced on the Frontlines of the Climate Emergency*, THE U.N. REFUGEE AGENCY [UNHCR], <https://storymaps.arcgis.com/stories/065d18218b654c798ae9f360a626d903> [<https://perma.cc/JPK5-VTJF>].
  3. See *Five Takeaways from the 2022 UNHCR Global Trends Report*, USA FOR THE U.N. REFUGEE AGENCY [UNHCR] (July 11, 2023), <https://www.unrefugees.org/news/five-takeaways-from-the-2022-unhcr-global-trends-report/> [<https://perma.cc/7T5V-BYW5>].
  4. See Julia Neusner & Kennji Kizuka, *Two Years of Suffering: Biden Administration Continues Use of Discredited Title 42 Order to Flout Refugee Law*, HUM. RTS. FIRST 1, 4–5 (Mar. 17, 2022), <https://humanrightsfirst.org/library/two-years-of-suffering-biden-administration-continues-use-of-discredited-title-42-order-to-flout-refugee-law/> [<https://perma.cc/PS3H-P53C>] [hereinafter Neusner & Kizuka, *Two Years*].
  5. See JULIA NEUSNER ET AL., U.S. COMM. FOR REFUGEES & IMMIGRANTS ET AL., CLIMATE OF COERCION: ENVIRONMENTAL AND OTHER DRIVERS OF CROSS-BORDER DISPLACEMENT IN CENTRAL AMERICA AND MEXICO 3 (2023) [hereinafter NEUSNER ET AL., *Climate of Coercion*].

protect them.”<sup>6</sup> But instead of protection, receiving states are responding with pushback policies meant to contain and reverse the movement of migrants and displaced persons.<sup>7</sup> These policies exacerbate the vulnerability of people who move across international borders—not only by forcing them to take more dangerous journeys, but also by obstructing their access to less climate-vulnerable regions.<sup>8</sup> Hélène Benveniste, Michael Oppenheimer, and Marc Fleurbaey<sup>9</sup> found that migrants generally move to areas that are less susceptible to the impacts of climate change, and concluded “closing borders would increase the number of people more severely exposed and vulnerable to climate change impacts, by trapping them in areas where they are more exposed and vulnerable than where they would end up if they had the possibility to move more freely.”<sup>10</sup>

The U.S. government has been anticipating hardening its borders against climate-driven migration for decades. A 2003 report commissioned by the U.S. Department of Defense predicted that “the United States could likely survive shortened growing cycles and harsh weather conditions without catastrophic losses. Borders will be strengthened around the country to hold back unwanted starving

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6. Ian Fry (Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change), *Providing Legal Options to Protect the Human Rights of Persons Displaced Across International Borders Due to Climate Change*, ¶ 28, U.N. Doc. A/HRC/53/34 (Apr. 18, 2023).
  7. See, e.g., Felipe González Morales (Special Rapporteur on the Human Rights of Migrants), *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea*, ¶ 34, U.N. Doc. A/HRC/47/30 (May 12, 2021) (defining pushbacks as “various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.”); Witold Klaus & Marta Pachoka, *Examining the Global North Migration Policies: A “Push Out-Push Back” Approach to Forced Migration*, 57 INT’L MIGRATION 281, 282 (2019).
  8. See Hélène Benveniste et al., *Effect of Border Policy on Exposure and Vulnerability to Climate Change*, 117 PROC. OF THE NAT’L ACAD. OF SCI. 26692, 26692 (Oct. 27, 2020).
  9. Hélène Benveniste, THE SALATA INST. FOR CLIMATE SUSTAINABILITY AT HARV. UNIV., <https://www.salatainstitute.harvard.edu/people/helene-benveniste/> [<https://perma.cc/5FB3-UBTU>]; Michael Oppenheimer, PRINCETON UNIV., CTR. FOR POL’Y RSCH. ON ENERGY AND THE ENV’T., <https://cpree.princeton.edu/people/michael-oppenheimer> [<https://perma.cc/D4UP-NVHT>]; Marc Fleurbaey, PRINCETON UNIV., UNIV. CTR. FOR HUM. VALUES, <https://uchv.princeton.edu/people/marc-fleurbaey> [<https://perma.cc/597M-UQLM>].
  10. Benveniste et al., *supra* note 8, at 26695.

immigrants from the Caribbean Islands (an especially severe problem), Mexico, and South America.”<sup>11</sup> In 1994, the U.S. government introduced its “Prevention by Deterrence” strategy, where it increased border enforcement in urban areas to intentionally funnel people crossing the border into remote terrain and require border crossers to trek through deserts in sweltering heat or cross treacherous rivers.<sup>12</sup> The U.S. government has since further restricted migration pathways by surging resources to border enforcement and introducing new policies that limit asylum access at the border. From March 2020 to May 2023, the Department of Homeland Security (DHS) “used the COVID-19 pandemic as a pretext to summarily expel” millions of migrants and asylum seekers to Mexico or the countries they fled under Title 42 of the U.S. Code.<sup>13</sup> The *Circumvention of Lawful Pathways*<sup>14</sup> rule that succeeded the policy, in place since May 2023, severely restricts asylum access at U.S. ports of entry, and renders many who enter the U.S. between ports ineligible for asylum.<sup>15</sup>

These policies have, predictably, led to the injury and death of border crossers contending with worsening environmental hazards.<sup>16</sup> As climate change and other drivers of displacement continue to push people to seek U.S. protection, their journeys grow increasingly dangerous with rising temperatures and changing weather patterns. Heat exposure was the most common cause of death for people crossing the U.S.-Mexico border in recent years, followed by drownings.<sup>17</sup> In

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11. PETER SWARTZ & DOUG RANDALL, AN ABRUPT CLIMATE CHANGE SCENARIO AND ITS IMPLICATIONS FOR UNITED STATES NATIONAL SECURITY 18 (2003).
  12. NO MORE DEATHS & LA COALICIÓN DE DERECHOS HUMANOS, LEFT TO DIE: BORDER PATROL, SEARCH AND RESCUE, & THE CRISIS OF DISAPPEARANCE 13 (2021).
  13. HUM. RTS. FIRST, HUM. RTS. FIRST’S SUBMISSION TO THE OFF. OF THE HIGH COMM’R FOR HUM. RTS. (OHCHR) SPECIAL RAPPOREUR ON THE HUM. RTS. OF MIGRANTS PURSUANT TO HUMAN RIGHTS COUNCIL RESOLUTION 43/6 1 (2021).
  14. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) [hereinafter Circumvention of Lawful Pathways Rule].
  15. *US: Biden ‘Asylum Ban’ Endangers Lives at the Border*, HUM. RTS. WATCH (May 11, 2023, 7:55 PM EDT), <https://hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border> [<https://perma.cc/2QHF-B272>].
  16. See Sergio Ortiz Borbolla, *Biden’s Asylum Ban Will Return Refugees to Danger and Death*, WASH. OFF. ON LA. AM. (Feb. 23, 2023), <https://wola.org/2023/02/biden-asylum-ban-refugees-danger-death/> [<https://perma.cc/M26B-5HHQ>]; Camilo Montoya-Galvez, *Crossings Along U.S.-Mexico Border Jump as Migrants Defy Extreme Heat and Asylum Restrictions*, CBS, <https://www.cbsnews.com/news/us-mexico-border-crossings-migrants-yumatucson-arizona/> [<https://perma.cc/S8GJ-G5B5>] (Aug. 7, 2023, 8:49 PM) [hereinafter Montoya-Galvez, *Crossings*].
  17. Montoya-Galvez, *Crossings*, *supra* note 16.

September 2023, the International Organization for Migration (IOM) declared the U.S.-Mexico border “the deadliest land route for migrants worldwide on record.”<sup>18</sup> However, the restrictive policies have failed to deter movement across the U.S.-Mexico border. Washington Office on Latin America (WOLA) analyst, Adam Isacson,<sup>19</sup> told CBS News,

For at least 30 years, U.S. border policy has assumed that if the migration experience is dangerous and miserable at the border, with a high likelihood of deportation, then people won’t come . . . That keeps being proved wrong, as migration has been increasing steadily since the early 2010s — not just in the United States, but throughout the Americas.<sup>20</sup>

Indeed, restrictions on asylum and border access have corresponded with increasing rates of border crossings between ports of entry. In fiscal year 2022, “apprehensions of migrants at the southern U.S. border exceeded 2.3 million, a record-high.”<sup>21</sup> And, warming temperatures are making these crossings increasingly dangerous—as evidenced by rising numbers of “rescues” by Border Patrol of people experiencing weather-related injuries. In Fiscal Year 2021, the U.S. Border Patrol reported rescuing 3,760 people experiencing heat-related injuries at the Southwest border—more than three times the number of people rescued due to heat-related conditions in the previous fiscal year (1,159), and more than five times the number of rescues in 2017 (725).<sup>22</sup> Likewise, Border Patrol has reported rescuing 961 people experiencing injuries due to exposure to cold environmental conditions in Fiscal Year 2021—nearly a sevenfold increase from the previous year (139).<sup>23</sup> As temperatures have risen, at least 686 people died attempting to enter the U.S.-Mexico border in 2022, making it the “deadliest land route for migrants worldwide on record,” according to the IOM.<sup>24</sup> This is likely a

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18. *US-Mexico Border World’s Deadliest Migration Land Route*, INTERNATIONAL ORGANIZATION FOR MIGRATION [IOM] (Sept. 12, 2023), <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route> [<https://perma.cc/DC75-U3ZR>].
  19. Adam Isacson, WASH. OFF. ON LAT. AM., <https://www.wola.org/people/adam-isacson/> [<https://perma.cc/A9W5-FRN2>].
  20. Montoya-Galvez, *Crossings*, *supra* note 16.
  21. Diana Roy, *Ten Graphics that Explain the U.S. Struggle with Migrant Flows in 2022*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/article/ten-graphics-explain-us-struggle-migrant-flows-2022> [<https://perma.cc/DX4H-CKGN>] (Dec. 22, 2022, 2:50 PM).
  22. *Border Rescues and Mortality Data*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data> [<https://perma.cc/9B8Q-S5L5>] (July 24, 2023).
  23. *Id.*
  24. *US-Mexico Border World’s Deadliest Migration Land Route*, INT’L ORG. FOR MIGRATION [IOM] (Sept. 12, 2023), <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route> [<https://perma.cc/>]

significant undercount, as many people who go missing in the desert are never found.<sup>25</sup>

In addition to hardening its own borders, the United States has funded and facilitated increased immigration enforcement in Latin American countries with the goal of stopping migrants and asylum seekers from reaching U.S. soil.<sup>26</sup> Bill Frelick, Ian Kysel, and Jennifer Podkul<sup>27</sup> define “externalization of migration controls” as “extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims.”<sup>28</sup> U.S. policies that restrict movement through the Americas constitute externalization under this definition.<sup>29</sup> U.S. Secretary of Homeland Security Alejandro Mayorkas made the objective of regional coordination abundantly clear: “Working with our neighbors in the region, we can and will reduce the number of migrants who reach our southern border.”<sup>30</sup> While the United States coordinates with many Latin American countries to restrict movement throughout the region,<sup>31</sup> this Article primarily focuses on U.S. collaboration with Mexico and does not comprehensively address U.S. action in other Latin American countries.

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5CYZ-YQ2H]; Migrant Deaths and Disappearances, MIGRATION DATA PORTAL, <https://www.migrationdataportal.org/themes/migrant-deaths-and-disappearances> [https://perma.cc/MB6Q-PZQH] (Nov. 30, 2023).

25. Craig Waxman et al., ‘No Olvidado’: *These Americans Find and Bury Missing Migrants*, CNN, <https://www.cnn.com/interactive/2019/12/us/no-olvidado-missing-migrants-border/> [https://perma.cc/9L82-DFH8].
26. See Todd Miller, *A Return on Our Investment: Border Externalization in “America’s Backyard” Under the Biden Administration*, THE BORDER CHRONICLE (Sept. 7, 2023), <https://www.theborderchronicle.com/p/a-return-on-our-investment-border> [https://perma.cc/6YEQ-3HD7] [hereinafter Miller, *A Return on Our Investment*].
27. Bill Frelick, et al, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION HUM. SEC. 190, 190 (2016).
28. *Id.* at 193.
29. See, e.g., Press Release, U.S. Dep’t of State, U.S. Gov’t Announces Sweeping New Actions to Manage Reg’l Migration (Apr. 27, 2023), <https://www.state.gov/u-s-government-announces-sweeping-new-actions-to-manage-regional-migration/> [https://perma.cc/GFY7-TGFX].
30. Alejandro Mayorkas, Sec’y of the Dep’t of Homeland Sec., Remarks at a Press Conference on New Regional Migration Management Measures (Apr. 28, 2023), <https://www.dhs.gov/news/2023/04/28/secretary-mayorkas-and-secretary-state-blinken-remarks-press-conference-april-27> [https://perma.cc/2F4Z-RNCE].
31. See Miller, *A Return on Our Investment*, *supra* note 26.

As the United States has externalized border enforcement further and further south, the same dangers migrants have long confronted in the U.S.-Mexico borderlands are, predictably, materializing in transit countries. Under pressure from the United States, the Mexican government has implemented policies that increase border militarization and impose new limits on land travel through Mexico.<sup>32</sup> These policies have pushed U.S.-bound individuals to embark on more dangerous journeys—including atop the infamous “Beast” train, for example, where riders are exposed to extreme heat and cold, or through sweltering deserts and across dangerous rivers.<sup>33</sup>

U.S. policies restricting border access have also left migrants and asylum seekers to wait indefinitely in Mexico, where many have languished in makeshift tent encampments and other precarious conditions that expose them to extreme heat and other adverse effects of climate change.<sup>34</sup> In addition, due in part to newly implemented visa restrictions in Mexico, an unprecedented number of migrants and asylum seekers—unable to fly to Mexico directly—have passed through the infamous Darien Gap, a stretch of jungle connecting Colombia and Panama, where harsh environmental conditions and activity by organized criminal groups create deadly hazards.<sup>35</sup>

The interplay of these phenomena—climate change, displacement, and responsive U.S. border policy—raise important legal questions, and their salience will only continue to rise. What obligations do the United States and other states have to protect people on the move? The United States is obligated under international and domestic law to protect asylum seekers within its territory, regardless of their manner of entry,

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32. See GRETCHEN KUHNER & SAVITIRI ARVI, *STUCK IN UNCERTAINTY AND EXPOSED TO VIOLENCE: THE IMPACT OF US AND MEXICAN MIGRATION POLICIES 1–3* (Joanna Kuebler & Diana Quick eds., 2023).

33. See Natalie Kitroeff & Alejandro Cegarra, *Aboard ‘the Beast’ on a Journey to America*, N.Y. TIMES (May 10, 2023), <https://www.nytimes.com/2023/05/10/world/americas/migrants-beast-train-mexico.html> [<https://perma.cc/UZ4W-6MCQ>].

34. See, e.g., REBECCA GENDELMAN ET AL., *FAILURE TO PROTECT: BIDEN ADMINISTRATION CONTINUES ILLEGAL TRUMP POLICY TO BLOCK AND EXPEL ASYLUM SEEKERS TO DANGER 28* (Eleanor Acer et al. eds. 2021) (“In Tijuana, approximately 1,500 people are living in a makeshift tent encampment outside the San Ysidro port of entry, many of whom have been stranded in Mexico for over a year unable to request U.S. asylum protection due to the Title 42 expulsion policy. There is no security in the encampment, and sanitation and medical assistance are very limited. In March 2021, the camp flooded, further exacerbating the dire conditions for migrants living there”).

35. See KUHNER & ARVI, *supra* note 32, at 3; see also Luke Taylor, *UN Bodies Call for Urgent Action Over Panama’s Darién Gap Migration Route*, GUARDIAN (Aug. 3, 2023, 6:30 PM EDT), <https://www.theguardian.com/world/2023/aug/03/darien-gap-migration-panama-un-crisis> [<https://perma.cc/9YLE-4B8B>].



and including those who present at ports of entry.<sup>36</sup> Do U.S. policies limiting border and asylum access subject impacted people to the risk of *refoulement*, or forced return, to places where their lives and safety are at risk in contravention of international law?<sup>37</sup> These policies also raise questions about U.S. obligations to mitigate physical harm to migrants subjected to extreme heat and other climate-related conditions within its territory and in third countries. What rights do noncitizens have in the U.S. borderlands – areas the American Civil Liberties Union has dubbed “constitution-free” zones?<sup>38</sup> Further, does the United States bear responsibility for rights violations arising from exposure to the adverse impacts of climate change that occur outside of its territory?

The answers to these questions are critical, as global displacement continues to rise and climate change makes migration journeys increasingly perilous. This Article explores the intersection between climate change and U.S. policies restricting border and asylum access. This Article intersperses historical and legal analysis with the real-life accounts of asylum seekers who have experienced climate impacts in transit (drawn from both personally conducted interviews and from public reports). Part II describes the methodology, which combines firsthand interviews with migrants and asylum seekers who have traversed the Americas, with analysis from publicly available sources. Part III surveys U.S. policies (and policies of other countries in the Americas implemented at the behest of the United States) that restrict access to asylum and freedom of movement. Part IV describes the impact of restrictive immigration policies and climate change on people in transit to the United States. Part V assesses the legal implications of U.S. policies and border externalization that increase the vulnerability of migrants and asylum seekers to the adverse impacts of climate change.

## II. METHODOLOGY

This Article is based on interviews personally conducted from 2020 to 2023 with people who traveled through the Americas to seek U.S.

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36. *See, e.g.*, Convention Relating to the Status of Refugees art. 31, 28 July 1951, 189 U.N.T.S. 137 (“The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened.”); *see also e.g.*, 8 U.S.C. § 1158(a)(1) (1958).
  37. *See* United Nations Human Rights Office of the High Commissioner [OHCHR], Non-Refoulement Under International Human Rights Law 1 (2018).
  38. *The Constitution in the 100-Mile Border Zone*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Aug 21, 2014 ), <https://www.aclu.org/documents/constitution-100-mile-border-zone> [<https://perma.cc/EB53-3FP2>]; *see Constitution Free Zone: The Numbers*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Oct. 22, 2008), <https://www.aclu.org/documents/constitution-free-zone-numbers> [<https://perma.cc/7AE9-MVCG>].

asylum and who spoke about their experiences with climate change impacts while in transit.<sup>39</sup> The interviewees include thirty-eight Central American and Mexican asylum seekers whom this Author interviewed in two Tijuana, Mexico shelters with the assistance of a student group from Stanford Law School in January 2023.<sup>40</sup> Case examples from interviews conducted independently by this Author with Venezuelan asylum seekers who had traveled by foot to the U.S.-Mexico border and were staying in a New York shelter in August 2023 are also included.<sup>41</sup> This Article also draws upon case examples from on-the-ground interviews and desk research this Author conducted as a Research and Policy Attorney with the nonprofit advocacy organization Human Rights First from 2020 to 2022.<sup>42</sup>

This analysis is also informed by interviews with legal service providers and advocates assisting migrants and asylum seekers at the U.S.-Mexico border, which the Author conducted in August 2023, and has not yet shared publicly. This Article is also based on a review of academic literature and publicly available news media sources on extreme weather events, climate change, and migrants and asylum seekers in transit from 2018 to 2023. This literature review includes regional and international news media reports of deaths and injuries of migrants and asylum seekers in transit during this period, as well as

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39. These interviews were conducted in person at shelters and tent encampments in Mexico and the United States. To protect the security of the individuals interviewed, most of whom are asylum seekers who are fleeing persecution, no information that could be used to identify and locate them is provided. Any names of asylum seekers are pseudonyms. Before each interview, the Author/Interviewer explained that she was a researcher, that the information the interviewees shared would be publicly reported (and their anonymity maintained), and that neither she nor any organization with which she was affiliated could provide legal assistance or other aid. The Author proceeded only after the interviewee expressed verbal consent to these terms.
40. These interviews also contributed to a March 2023 report title I co-authored on the impact of climate change on asylum seekers' decisions to flee their homes. This article integrates data from the same interviews on the impact of climate change and climate-related disasters on asylum seekers in transit, which has not yet been publicly shared. NEUSNER ET AL., *Climate of Coercion*, *supra* note 5, at 2.
41. This research also informed an article I co-wrote on challenges for asylum seekers in New York City. See Julia Neusner & Tana Ganeva, *No Vacancies at the Hotel Roosevelt*, TRUTHDIG (Aug. 10, 2023), <https://www.truthdig.com/articles/no-vacancies-at-the-hotel-roosevelt/> [<https://perma.cc/X32N-NGR3>]; see *infra* Section IV(B).
42. Human Rights First has published the results of this research in numerous advocacy reports, none of which focus exclusively on the climate-related danger in transit. For a complete list of publications I coauthored, including those published by Human Rights First see *Julia Neusner*, HUM. SEC. INITIATIVE (HUMSI), <https://www.humsi.org/our-team/julia-neusner/publications> [<https://perma.cc/Z56U-V789>].

incidents reported by human rights advocacy, legal services, and other nonprofit organizations.

### III. U.S. POLICIES RESTRICT BORDER AND ASYLUM ACCESS

Within the past two decades, the U.S. government has significantly increased immigration enforcement efforts, both at the U.S.-Mexico border and through externalization of enforcement efforts through third countries. Part A details U.S. policies that restrict U.S. asylum and border access. Part B describes U.S. policies that externalize immigration enforcement to third countries, with a primary focus on U.S. influence in Mexico.

#### *A. Restrictive Policies at the U.S.-Mexico Border*

In 1994, the U.S. government implemented its “prevention by deterrence” strategy, which made unauthorized border crossings more difficult and perilous by increasing enforcement and apprehensions near ports of entry.<sup>43</sup> In its strategic plan, Border Patrol predicted that people seeking to cross the border would be “forced over more hostile terrain, less suited for crossing . . .”<sup>44</sup> The plan acknowledges,

Mountains, deserts, lakes, rivers and valleys form natural barriers to passage. Temperatures ranging from sub-zero along the northern border to the searing heat of the southern border [a]ffect illegal entry traffic as well as enforcement efforts. Illegal entrants crossing through remote, uninhabited expanses of land and sea along the border can find themselves in mortal danger.<sup>45</sup>

Border Patrol predicted that “increas[ing] the ‘cost’ to illegal entrants to the point of deterring repeated attempts” would decrease the number of border crossings.<sup>46</sup> The “cost” the strategic plan references is the substantially increased risk of injury or death in harsh, remote borderlands. In *Storming the Wall: Climate Change, Migration, and Homeland Security*, Todd Miller describes Prevention by Deterrence as “a border policing strategy[] in which the desert, the river, and the sea itself become metaphorical hostile agents.”<sup>47</sup> While the policy initially corresponded with an overall decline in apprehensions,

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43. U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN: 1994 AND BEYOND 1, 6 (1994).

44. *Id.* at 7.

45. *Id.* at 2.

46. *Id.* at 7.

47. TODD MILLER, *STORMING THE WALL: CLIMATE CHANGE, MIGRATION, AND HOMELAND SECURITY* 38 (Greg Ruggiero ed. 2017) [hereinafter MILLER, *STORMING THE WALL*].

the U.S. government's "grim calculus" has caused migrant deaths in deserts and more remote parts of the border to skyrocket.<sup>48</sup>

Since then, efforts by the U.S. government to prevent people without authorization from moving across the southwest border have intensified.<sup>49</sup> The government has expanded physical barriers along the border and significantly increased surveillance and enforcement capacity.<sup>50</sup> The number of Border Patrol agents on the ground has swelled from 1,500 agents in the 1970s to "a sophisticated paramilitary force" of more than 19,000 agents today.<sup>51</sup> In *The Dispossessed*, journalist John Washington writes that a series of policies that the United States introduced since 2001 have "turned an already dangerous crossing into a veritable gauntlet and added a row of teeth to prevention through deterrence."<sup>52</sup> In 2018, the Trump administration introduced the "zero tolerance" policy, under which the administration increased criminal prosecutions of noncitizens arriving without authorization and directed DHS officials to separate parents from their children.<sup>53</sup>

In addition to implementing physical barriers to entry and subjecting those who arrive to brutal treatment, the United States has erected new legal barriers for migrants and asylum seekers. Many of these barriers limit access to asylum. In 2016, the U.S. government began artificially limiting asylum access at ports of entry at the southwest border through the metering policy (which a federal judge later found to be illegal).<sup>54</sup> In 2019, President Donald Trump's administration introduced the Migrant Protection Protocols program, which forced asylum seekers to wait in dangerous conditions in Mexico while their U.S. asylum cases were pending. The policy, which the Biden administration terminated in 2020 but then briefly reimplemented in 2021 and 2022 "fueled tremendous suffering, confusion, and chaos."<sup>55</sup> In March 2020, the Trump administration later implemented the Title 42 expulsion policy, which used the COVID-19 pandemic as a justification

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48. REECE JONES, *NOBODY IS PROTECTED*, 182–83 (2022).

49. *See id.* at 182.

50. *Id.* at 13, 17.

51. *Id.* at 13.

52. JOHN WASHINGTON, *THE DISPOSSESSED* 220 (2020).

53. OFF. OF INSPECTOR GEN., *OIG- 18-84, SPECIAL REVIEW - INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 2-3* (2018).

54. Daniel Weissner, *Judge Says 'Metering' of Asylum Applicants at Border is Illegal*, *REUTERS* (Sept. 3, 2021, 11:56 PM EDT), <https://www.reuters.com/legal/litigation/judge-says-metering-asylum-applicants-border-is-illegal-2021-09-03/> [<https://perma.cc/84AS-3RT5>].

55. JULIA NEUSNER & KENJI KIZUKA, *FATALLY FLAWED: "REMAIN IN MEXICO" POLICY SHOULD NEVER BE REVIVED* 6 (2022)[hereinafter NEUSNER & KIZUKA, *FATALLY FLAWED*].

to prohibit asylum access at ports of entry altogether.<sup>56</sup> The policy also allowed for the expulsion of asylum seekers who entered the United States between ports of entry to Mexico or the countries they fled.<sup>57</sup>

When the Title 42 expulsion policy expired in May 2023, rather than restore asylum access, the U.S. government introduced a federal rule, “Circumvention of Lawful Pathways,” that effectively bans asylum for anyone who enters the United States at a land border without a previously-scheduled appointment.<sup>58</sup> Appointments for processing at ports of entry are limited and difficult to obtain: they can only be scheduled through the Customs and Border Protection (CBP)’s mobile app, CBP One, which has seen numerous technical problems with its rollout that make it difficult, and sometimes impossible, to use.<sup>59</sup> The *Circumvention of Lawful Pathways* rule also renders applicants ineligible for protection if they do not first seek protection in the countries they pass through en route to the United States, even though these intermediary countries are frequently unsafe. The *Circumvention of Lawful Pathways* rule, which mirrors prior Trump-era policies that were deemed illegal, poses an additional threat to displaced people seeking protection.<sup>60</sup>

#### *B. Externalization of Migration Enforcement*

In addition to implementing barriers to entry at the U.S. border, the U.S. government has expanded migration enforcement southward by pressuring Mexico and other states to adopt stricter enforcement

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56. See KENJI KIZUKA ET AL., PANDEMIC AS PRETEXT: TRUMP ADMINISTRATION EXPLOITS COVID-19, EXPELS ASYLUM SEEKERS AND CHILDREN TO ESCALATING DANGER 1 (2020); see also Colleen Long, *Title 42 has Ended. Here’s What It Did, and How US Immigration Policy is Changing*, AP NEWS (May 12, 2023, 3:14 AM CST), <https://apnews.com/article/immigration-biden-border-title-42-mexico-asylum-be4e0b15b27adb9bede87b9bbebf798d> [<https://perma.cc/L874-D6PU>].
57. KIZUKA ET AL., *supra* note 56, at 1.
58. The *Circumvention of Lawful Pathways* rule remains in effect as of this writing. *Circumvention of Lawful Pathways Rule*, *supra* note 14, at 31315; *What is President Biden’s ‘Asylum Ban’ and What Does It Mean for People Seeking Safety?*, INT’L RESCUE COMM., <https://www.rescue.org/article/what-president-bidens-asylum-ban-and-what-does-it-mean-people-seeking-safety> [<https://perma.cc/A9DT-9JPW>] (July 25, 2023).
59. See Joel Rose & Marisa Peñaloza, *Migrants are Frustrated with the Border App, Even After Its Latest Overhaul*, NPR (May 12, 2023, 9:08 PM), <https://npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul> [<https://perma.cc/QB7Y-2EXP>].
60. *Biden Administration Plan to Resurrect Asylum ban Advances Trump Agenda*, HUM. RTS. FIRST, at 1-3 (Jan. 17, 2023), <https://humanrightsfirst.org/library/biden-administration-plan-to-resurrect-asylum-ban-advances-trump-agenda-would-condemn-refugees-to-return-to-harm-family-separation-and-permanent-limbo/> [<https://perma.cc/V7DX-XCLM>].

policies to prevent migrants and asylum seekers from reaching the U.S. border.<sup>61</sup> Nancy Hiemstra<sup>62</sup> writes that at the same time the U.S. government implemented prevention by deterrence, it “extended the deterrence logic south of the US-Mexico border by land, orchestrating and funding the interception and detention of migrants en route to the USA, in transit countries throughout Latin America.”<sup>63</sup> The United States has long pressured Mexico and other countries to curb movement of U.S.-bound people through their territory, including by providing equipment, training, and funding to immigration and other law enforcement agencies.<sup>64</sup> For instance, the United States funded and outfitted Guatemala’s new border patrol unit, the “chorti,” which carries out enforcement at the southern border with Honduras.<sup>65</sup> Todd Miller writes, “this ‘pushing out of the border,’ as U.S. officials like to phrase it—and the deterrence strategy that accompanies it—has been a pillar of U.S. bipartisan border strategy since 9/11.”<sup>66</sup>

Under pressure from the United States, the Mexican government has increased immigration enforcement and created barriers to stop people bound for the United States from moving through its territory.<sup>67</sup> Historian Ana Raquel Minian writes that since 1980, Mexico has complied with U.S. pressure to increase enforcement in the country “so Central American refugees would never even reach the Mexico-U.S. border . . . converting their entire country into a border wall.”<sup>68</sup> Border enforcement collaboration between the United States and Mexico began in 2000 with Plan Sur, “a U.S.-backed deportation campaign.”<sup>69</sup> In 2008,

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61. See Miller, *A Return on Our Investment*, *supra* note 26.

62. Nancy Hiemstra, STONY BROOK UNIV.: STONY BROOK EXPERTS, <https://www.stonybrook.edu/experts/profile/nancy-hiemstra> [https://perma.cc/FGE6-8CLM] (Nancy Hiemstra is a political geographer with an emphasis on U.S. immigration enforcement policies and the consequences thereof in Latin America.).

63. Nancy Hiemstra, *Pushing the US-Mexico Border South: United States’ Immigration Policing Throughout the Americas*, 5 INT’L J. MIGRATION & BORDER STUD. 44, 45 (2019).

64. See Miller, *A Return on Our Investment*, *supra* note 26.

65. *Id.*

66. *Id.*

67. See Ana Raquel Minian, *We Already Have a Big, Beautiful Wall*, WASH. POST (Feb. 5, 2018, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/02/05/we-already-have-a-big-beautiful-wall/> [https://perma.cc/4GG2-WLM9].

68. *Id.*

69. Todd Miller, *Mexico: The US Border Patrol’s Newest Hire*, AL JAZEERA (Oct. 4, 2014, 6:00 AM), <http://america.aljazeera.com/opinions/2014/10/mexico-us-borderpatrolsecurityimmigrants.html> [https://perma.cc/4MZ9-XDZT] [hereinafter Miller, *Mexico*].

the United States launched the Merida Initiative, through which it has provided hundreds of millions of dollars in military aid and other funding<sup>70</sup> “to help modernize and make more efficient Mexico’s border policing and militarization.”<sup>71</sup>

More recently, U.S. pressure on Mexico to intercept U.S.-bound migrants and asylum seekers has mounted.<sup>72</sup> At Mexico’s southern border with Guatemala, a U.S.-funded “gauntlet of roadside checkpoints” awaits migrants and asylum seekers headed north.<sup>73</sup> The Mexican government’s immigration enforcement surge has included increasing the use of detention and the involuntary deportations of migrants and asylum seekers.<sup>74</sup> Additionally, the Mexican government has initiated restrictions on bus access within Mexico, requiring travelers to furnish proof of their immigration status. This has required migrants and asylum seekers to endure lengthy waiting periods in southern Mexico to obtain humanitarian visas for onward travel to the U.S.-Mexico border.<sup>75</sup> In May 2023, Mexico enacted a nationwide edict halting the issuance of humanitarian visas for onward travel altogether.<sup>76</sup>

At the behest of the United States, the Mexican government also introduced new visa requirements for travelers from Ecuador,

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70. *The Merida Initiative*, U.S. EMBASSY & CONSULATES IN MEX. (Sept. 7, 2021), <https://mx.usembassy.gov/the-merida-initiative/> [<https://perma.cc/3GE7-XFA5>].
71. Miller, *Mexico*, *supra* note 69.
72. Kate Morrissey, *What Does Immigration Enforcement Look Like in Southern Mexico? A Lot Like the U.S. Border*, SAN DIEGO UNION-TRIB. (Nov. 28, 2021, 5:00 AM), <https://www.sandiegouniontribune.com/news/immigration/story/2021-11-28/immigration-enforcement-mexico-southern-border> [[perma.cc/JDP9-J6GH](https://perma.cc/JDP9-J6GH)].
73. Miller, *Mexico*, *supra* note 69.
74. See Maureen Meyer & Adam Isacson, *The ‘Wall’ Before the Wall: Mexico’s Crackdown on Migration at its Southern Border*, WASH. OFF. ON LATIN AM. (Dec. 17, 2019), <https://www.wola.org/analysis/mexico-southern-border-report/> [<https://perma.cc/34PN-ZEW7>].
75. Gretchen Kuhner & Savitri Arvey, *Stuck in Uncertainty and Exposed to Violence: The Impact of US and Mexican Migration Policies on Women Seeking Protection in 2021*, INSTITUTO PARA LAS MUJERES EN MIGRACIÓN & WOMEN’S REFUGEE COMM’N 3 (2022), <https://www.womensrefugeecommission.org/wp-content/uploads/2022/02/Stuck-in-Uncertainty-2.pdf>.
76. *Gobierno Ordena No Otorgar Permisos Para el Tránsito de Migrantes, Tras Fin del Título 42*, ANIMAL POLITICO (May 12, 2023), <https://animalpolitico.com/sociedad/mexico-migrantes-ebrard-titulo-42-eu> [<https://perma.cc/TM2P-BB96>]; Tonatiuh Guillén López, *Estados Unidos y México, Hostil Sintonía Contra Migrantes*, PROCESO (May 22, 2023, 9:25 AM), <https://www.proceso.com.mx/opinion/2023/5/22/estados-unidos-mexico-hostil-sintonia-contra-migrantes-307430.html> [<https://perma.cc/3YKE-YPZ4>].

Venezuela, and Brazil, rendering most citizens of these countries unable to fly into Mexico or enter at a port of entry at a land border.<sup>77</sup> These restrictions have corresponded with a significant increase in crossings through the hellish Darién Gap—a notorious sixty-plus mile jungle expanse connecting Colombia and Panama that is plagued with major environmental hazards and significant activity by armed criminal groups.<sup>78</sup> In April 2023, the U.S. government announced a trilateral agreement with Colombia and Panama to “[e]nd the illicit movement of people and goods through the Darién.”<sup>79</sup> As part of the plan, the Panamanian government has reportedly agreed to “dedicate some 1,200 immigration agents, border police, and naval air service members” to the Darién jungle region.<sup>80</sup>

#### IV. IMPACTS OF U.S. POLICIES RESTRICTING ASYLUM ACCESS AND FREEDOM OF MOVEMENT

Policies restricting asylum access and freedom of movement have had a substantial impact on migrants and asylum seekers in transit. Predictably, limitations on safe and regular migration pathways and increased enforcement have diverted border crossers to more dangerous terrain.<sup>81</sup> However, these policies have not had the deterrent effect their

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77. Press Release, Secretaría de Relaciones Exteriores de México, Mexico Temporarily Suspends Visa Exemption for Citizens of Ecuador (Aug. 20, 2021), <https://www.gob.mx/sre/prensa/mexico-temporarily-suspends-visa-exemption-for-citizens-of-ecuador?idiom=en> [https://perma.cc/48VM-MVEF]; Lexi Lonas, *Mexico Will Require Visas for Venezuelans After US Request*, THE HILL (Jan. 7, 2022, 5:10 PM), <https://thehill.com/latino/588811-mexico-will-require-visas-for-venezuelans-after-us-request/> [https://perma.cc/M37H-VB5C]; Press Release, Secretaría de Relaciones Exteriores de México, Mexico Modifies the Visa Application Procedure for Brazilian Passports (Aug. 3, 2022), <https://www.gob.mx/sre/prensa/mexico-modifies-the-visa-application-procedure-for-brazilian-passports?idiom=en> [https://perma.cc/4W54-4X3C].

78. *Mexico/Central America: New Visa Restrictions Harm Venezuelans*, HUM. RTS. WATCH (July 5, 2022, 10:30 AM), <https://www.hrw.org/news/2022/07/05/mexico/central-america-new-visa-restrictions-harm-venezuelans> [https://perma.cc/YTQ6-ZKF5]; Caitlyn Yates & Juan Pappier, *How the Treacherous Darien Gap Became a Migration Crossroads of the Americas*, MIGRATION POL’Y INST. (Sept. 20, 2023), <https://www.migrationpolicy.org/article/darien-gap-migration-crossroads> [https://perma.cc/94RW-BFFG].

79. Press Release, *Trilateral Joint Statement*, DEP’T OF HOMELAND SEC. (Apr. 11, 2023), <https://dhs.gov/news/2023/04/11/trilateral-joint-statement> [https://perma.cc/W9KK-B4TU].

80. Diana Roy, *Crossing the Darién Gap: Migrants Risk Death on the Journey to the U.S.*, COUNCIL ON FOREIGN RELATIONS (June 22, 2022), <https://www.cfr.org/article/crossing-darien-gap-migrants-risk-death-journey-us> [https://perma.cc/CL87-BP2J] (Feb. 1, 2024).

81. See Neusner & Kizuka, *Two Years*, *supra* note 4, at 4–5.



authors anticipated. Border crossings have continued to rise over the past decade, despite mounting challenges.<sup>82</sup> Part A describes the impacts of restrictive U.S. policies within U.S. territory and in U.S.-Mexico borderlands. These impacts include higher rates of injuries and fatalities linked to climate change among migrants and asylum seekers forced to wait in Mexico or attempt to enter the United States through dangerous terrain. Part B describes impacts of U.S. migration enforcement externalization policies south of the U.S.-Mexico border, which have forced migrants and asylum seekers to undertake more dangerous journeys through the Darién Gap and other harsh terrain made more dangerous by climate change.

*A. Impact of U.S. Policies at the U.S.-Mexico Border*

U.S. policies restricting border and asylum access push migrants and asylum seekers to attempt dangerous crossings in more remote areas, which often requires them to traverse harsh terrain made more treacherous by the adverse impacts of climate change.<sup>83</sup> Indeed, the Border Patrol's 1994 Prevention by Deterrence strategy had the intended effect of pushing border crossers into deadly territory. In *Nobody Is Protected: How the Border Patrol Became the Most Dangerous Police Force in the United States*, geographer Reece Jones explains that the policy "funneled people into the deserts," turning them into "graveyards."<sup>84</sup> The policy impelled migrants to walk sixty to seventy miles through "parched and inhospitable landscape" not only to cross the border itself, but also to evade the network of checkpoints the Border Patrol maintains within one hundred miles of the border.<sup>85</sup> In these conditions, writes Jones, "the average person needs six or seven liters of water per day, and the migrants may be in the desert up to a week. Few are able to carry enough water, leaving many in life-threatening situations in remote locations, far from roads or even cell phone service."<sup>86</sup>

While physical barriers and the increasing militarization of the border have long diverted border crossers into dangerous territory, policies that restrict lawful pathways have had the same effect. Policies that restrict access to asylum at U.S. ports of entry push people seeking protection to cross between ports of entry, as the DHS Office of

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82. John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico Border in 7 Charts*, PEW RSCH. CTR., (Nov. 9, 2021) <https://www.pewresearch.org/short-reads/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/> [<https://perma.cc/A8VD-87VR>]; Montoya-Galvez, *Crossings*, *supra* note 16.

83. Neusner & Kizuka, *Two Years*, *supra* note 4, at 4–5.

84. JONES, *supra* note 48, at 182.

85. *Id.* at 182–83.

86. *Id.* at 183.

Inspector General has acknowledged.<sup>87</sup> The metering, Title 42, and the *Circumvention of Lawful Pathways* rule policies have, in many cases, left asylum seekers who otherwise would have simply walked up to a port of entry with no other option than to enter between ports of entry to seek protection. As this Author observed with Human Rights First, “[p]olicies that block access to asylum at U.S. ports of entry push asylum seekers unable to access protection at official border posts to undertake dangerous crossings away from ports . . . . These crossings often involve crossing harsh terrain, swimming across hazardous rivers, and trekking through deserts in sweltering heat.”<sup>88</sup>

Indeed, government data analyzed by Human Rights First shows that Cuban, Haitian, and Venezuelan asylum seekers overwhelmingly sought protection at U.S. ports of entry before the U.S. imposed significant restrictions on asylum access at ports of entry.<sup>89</sup> After these policies, Border Patrol data shows a spike in encounters with individuals from these countries between ports of entry:

In Fiscal Year (FY) 2017, for instance, 99 percent of the total number of Cubans and Haitians encountered at the southern border arrived through a port of entry. In FY 2022 (through December 2021), with asylum access effectively shuttered at U.S. ports of entry due to Title 42, fewer than 1 percent of Cubans and 3 percent of Haitians arriving at the southern border entered through a port of entry.<sup>90</sup>

In addition, the “percentage of Nicaraguan and Venezuelan asylum seekers presenting themselves at U.S. ports of entry has followed a similar downward trend, declining from 32 and 56 percent, respectively, in FY 2020 to just 0.5 and 0.8 percent in FY 2022.”<sup>91</sup>

Since the Title 42 expulsion policy was lifted in May 2023, the *Circumvention of Lawful Pathways* rule policy continues to drive migrants and asylum seekers into dangerous territory at the southwest border, despite rising temperatures. Following the implementation of

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87. OFF. OF INSPECTOR GEN, *supra* note 53, at 5–7 (“CBP official reported that the backlogs created by these competing directives likely resulted in additional illegal border crossings . . . . According to one Border Patrol supervisor, the Border Patrol sees an increase in illegal entries when aliens are metered at ports of entry.”).

88. Neusner & Kizuka, *Two Years*, *supra* note 4, at 4–5.

89. Julia Neusner & Kennji Kizuka, *Restarting Orderly Process Critical to Managing Arrival of Asylum Seekers at Arizona Border*, HUM. RTS. FIRST, at 1, (Feb. 8, 2022), <https://humanrightsfirst.org/library/restarting-orderly-process-critical-to-managing-arrival-of-asylum-seekers-at-arizona-border/> [<https://perma.cc/B5CG-WAME>] [hereinafter Neusner & Kizuka, *Orderly Process*].

90. *Id.* at 2.

91. *Id.*

the *Circumvention of Lawful Pathways* rule, The Washington Post reported in July 2023 that “[c]rossings have historically dipped during the peak summer months when temperatures along the border soar past 100 degrees. But as migrants trying to evade capture face tougher odds to sneak through, they often resort to more remote areas with greater risk.”<sup>92</sup> Likewise, in August 2023, a Kino Border Initiative<sup>93</sup> researcher noted, “the [*Circumvention of Lawful Pathways*] rule forces many seeking asylum to cross through remote and dangerous areas to seek protection, contributing to high numbers of encounters in the Arizona desert and growing profits for organized crime.”<sup>94</sup>

As rising temperatures have shattered heat records in 2023, border crossers face increasingly perilous conditions.<sup>95</sup> In summer 2023, parts of the U.S.-Mexico borderlands region became engulfed in a record-breaking *heat dome*, a consequence of climate change that produced record high temperatures in the triple digits for more than a week.<sup>96</sup> In June 2023, Adam Isaacson, a researcher with the Washington Office on Latin America (WOLA), pointed out, “In South Texas, wet bulb temperatures in the low 90s and heat indices near 120 are perilously close to levels considered fatal after several hours of exposure, as they overwhelm the human body’s ability to keep cool.”<sup>97</sup> Heat-related deaths and injuries in the borderlands soared in the wake of Title 42, the *Circumvention of Lawful Pathways* rule, and other policies obstructing asylum and border access.<sup>98</sup> Publicly reported fatalities of

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92. Nick Miroff & Toluse Olorunnipa, *Southern Border ‘Eerily Quiet’ After Policy Shift on Asylum Seekers*, WASH. POST (July 12, 2023, 6:00 AM), <https://www.washingtonpost.com/national-security/2023/07/12/us-mexico-border-migrant-crossings/> [https://perma.cc/XGB5-W9YE].
  93. *See Mission and Vision*, KINO BORDER INITIATIVE, <https://kinoborderinitiative.org/mission-and-values/> [https://perma.cc/S9CM-KTQ7].
  94. E-mail from Pedro de Velasco, Dir. of Educ. & Advoc., Kino Border Initiative (Aug. 17, 2023) (on file with author).
  95. *See* Emiliano Rodriguez Mega & Simon Romero, *Mexico is Reeling from Soaring Temperatures, Too*, N.Y. TIMES, (June 29, 2023), <https://www.nytimes.com/2023/06/29/world/americas/mexico-heat-wave.html> [https://perma.cc/8CP9-57FQ].
  96. *See* Gina Jiménez, *Extreme Heat is Already Straining the Mexican Power Grid*, INSIDE CLIMATE NEWS (June 29, 2023), <https://insideclimatenews.org/news/29062023/extreme-heat-is-already-straining-the-mexican-power-grid/> [https://perma.cc/J427-S6A4].
  97. Adam Isaacson, *Weekly U.S.-Mexico Border Update: Extreme Heat and Migrant Deaths, Texas “Buoy Wall,” June Migration*, WASH. OFF. ON LATIN AM. (July 14, 2023), <https://www.wola.org/2023/07/weekly-u-s-mexico-border-update-extreme-heat-and-migrant-deaths-texas-bouy-wall-june-migration/> [https://perma.cc/GN96-Y4ZG] [hereinafter Isaacson, *Weekly U.S.-Mexico Border Update*].
  98. *See* Camilo Montoya-Galvez, *At Least 853 Migrants Died Crossing the U.S.-Mexico Border in Past 12 Months—a Record High*, CBS (Oct. 28, 2022, 10:37 AM EDT), <https://www.cbsnews.com/news/migrant-deaths->

people who attempted to cross the U.S.-Mexico border are abundant. For example, in July 2023, a woman who had been crossing the desert with her two young children died in Yuma County, Arizona, likely due to dehydration.<sup>99</sup>

In Arizona, civil society organizations have scrambled to meet the humanitarian aid needs of migrants and asylum seekers suffering under sweltering heat.<sup>100</sup> For example, Dora Rodriguez, founder and director of the nonprofit organization Salvavisi3n, has expressed in an interview that her organization has been struggling to provide food, water, and other aid to migrants and asylum seekers in the Arizona borderlands as sweltering conditions with triple-digit temperatures have made the work even more challenging and exhausting. “The heat has made everything so much harder,” she said. Rodriguez explained that the group depends on private donations, and that the federal government provides no support. Sometimes DHS agents reach out to Rodriguez and her organization to provide humanitarian support to migrants and asylum seekers impacted by extreme heat.<sup>101</sup>

In addition, advocates say the actions of U.S. immigration enforcement officers have exacerbated heat-related challenges for border crossers, including by refusing to provide medical aid to injured people and destroying water and other supplies left by nonprofit organizations for migrants in need.<sup>102</sup> In addition, as Jones writes in *Nobody Is Protected*, the Border Patrol “fail[s] to properly search for missing people in the border zone” and “actively disrupts efforts by humanitarian agencies. Beyond the destruction of water drops and aid stations, they often refuse to provide location information to other rescuers, deny access to interview people in Border Patrol custody who were with the missing person, and harass search teams in the border zone.”<sup>103</sup> During a record-breaking heat wave in summer 2023, Border Patrol agents reportedly “resort[ed] to keeping migrant men outside in triple-digit heat to avoid overcrowding at an over-capacity station[.]”<sup>104</sup>

Increasing temperatures are also altering weather patterns, rendering journeys across waterways more perilous. Hundreds of migrants and asylum seekers have lost their lives while attempting to traverse the hazardous Rio Grande, which becomes even more treacherous when heavy rainfall elevates water levels and intensifies

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crossing-us-mexico-border-2022-record-high/ [https://perma.cc/M2WH-6U92] [hereinafter Montoya-Galvez, *853 migrants*].

99. Montoya-Galvez, *Crossings*, *supra* note 16.

100. JONES, *supra* note 48, at 183.

101. Telephone Interview with Dora Rodriguez, Dir., Salvavisi3n (Aug. 2023) (on file with author).

102. JONES, *supra* note 48, at 183–86.

103. *Id.* at 185–86.

104. Montoya-Galvez, *853 Migrants*, *supra* note 98.

currents.<sup>105</sup> Several Venezuelan asylum seekers expressed in interviews that without other options (due to the *Circumvention of Lawful Pathways* rule), they crossed the Rio Grande to enter the United States. One man said his family nearly drowned crossing the river.<sup>106</sup> In addition, migrants and asylum seekers have died while trying to swim around the border wall separating the United States and Mexico at Playas de Tijuana since 2021, including Yuri Rios, a Honduran mother of two,<sup>107</sup> a man from Russia, and a migrant who drowned in November 2022.<sup>108</sup>

In addition to driving more dangerous border crossings, U.S. policies designed to deter migration have also left migrants and asylum seekers stranded in Mexico. Since 2021, the U.S. government carried out more than two million expulsions under Title 42.<sup>109</sup> Since the policy was lifted, tens of thousands have become stranded in Mexico due to the *Circumvention of Lawful Pathways* rule, where they confront severe dangers and endure precarious living conditions that make them more susceptible to the adverse impacts of climate change.<sup>110</sup>

Team members conducting research for this Article witnessed some of these impacts firsthand: while in Tijuana in January 2023, a bomb cyclone precipitation event affecting California and Baja California<sup>111</sup>

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105. Joel Rose & Marisa Peñaloza, *Migrant Deaths at the U.S.-Mexico Border Hit a Record High, in Part Due to Drownings*, NPR (Sept. 29, 2022, 5:00 AM), <https://www.npr.org/2022/09/29/1125638107/migrant-deaths-us-mexico-border-record-drownings> [<https://perma.cc/2Y4J-CT3G>].
106. Interview with Anonymous Asylum Seeker, in N.Y.C., N.Y. (Aug. 2023).
107. John Bacon, *Woman Drowns, 13 People Rescued After Immigrants Try to Swim Around US-Mexico Border Barrier*, USA TODAY (Oct. 31, 2021, 9:52 AM), <https://www.usatoday.com/story/news/nation/2021/10/31/woman-drowns-13-people-pulled-water-us-mexico-border-barrier/6223923001/> [<https://perma.cc/WUT3-T7LV>].
108. Joebeth Terríquez, *Two Migrants Drown While Trying to Swim Around Tijuana-San Diego Border Fence*, SAN DIEGO UNION-TRIB. (Nov. 14, 2022, 3:55 PM), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2022-11-14/deaths-of-migrants-at-sea-alert-mexicos-northern-border> [<https://perma.cc/PNF9-2R7C>].
109. Azadeh Erfani, *FAQ: The End of Title 42 Expulsions*, NAT'L IMMIGRANT JUST. CTR. (May 10, 2023), <https://immigrantjustice.org/staff/blog/faq-end-title-42-expulsions> [<https://perma.cc/B44S-JR6E>].
110. See Vanessa Romo et al., *Title 42, a COVID-Era Halt on Asylum Applications, Has Ended. Here's What to Expect*, NPR (May 12, 2023, 12:00 AM), <https://npr.org/2023/05/11/1175378000/title-42-expire-asylum-us-border-texas> [<https://perma.cc/4UYY-LX86>]; Mega & Romero, *supra* note 95; Jiménez, *supra* note 96.
111. Gabrielle Canon, *Bomb Cyclones to Atmospheric Rivers: What's Causing the California Deluge?*, THE GUARDIAN (Jan. 7, 2023, 6:00 PM), <https://theguardian.com/us-news/2023/jan/07/california-storm-deluge->

flooded the access road to the shelter where the team conducted interviews, making access to the shelter challenging and dangerous.<sup>112</sup> The shelter was crowded at the time, overwhelmingly with asylum seekers who were awaiting the opportunity to obtain a limited exemption to Title 42 restrictions on asylum access at ports of entry.<sup>113</sup> As a result, many residents had to sleep on mats on the floor. Shortly after the team's visit, rainwater inundated the shelter itself, saturating the mats where many residents slept and causing some to become sick.<sup>114</sup> Guerline Jozef, the executive director of the nonprofit organization Haitian Bridge Alliance, told this Author that the January 2023 rainstorms also wreaked havoc on a Tijuana shelter comprised of canvas tents, where more than one hundred-fifty Haitian individuals and families resided while awaiting the opportunity to seek U.S. asylum.<sup>115</sup> Jozef said that following the destruction of the tents by the January 2023 bomb cyclone, additional rainstorms in late February 2023 caused further damage to the newly replaced tents.<sup>116</sup>

Those who are unable to access shelter space are even more exposed to danger. Shelters frequently confront security challenges and are often operating at full capacity, leaving many migrants and asylum seekers with no alternative but to sleep in makeshift tent encampments or on the streets with little protection from extreme weather conditions.<sup>117</sup> In 2019, the Trump administration's Remain in Mexico policy gave rise to a sprawling tent encampment in the Mexican border city of Matamoros.<sup>118</sup> Since then, makeshift tent encampments have arisen in

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cause-bomb-cyclone-atmospheric-river [<https://perma.cc/4FXB-WVPY>]; NEUSNER ET AL., *Climate of Coercion supra* note 5, at 9.

112. NEUSNER ET AL., *Climate of Coercion, supra* note 5, at 9.

113. *Id.*

114. Kate Morrissey, *Asylum Seekers in Tijuana Are Scrambling Through Mobile App Error Messages for Few Appointments into the U.S.*, SAN DIEGO UNION-TRIB. (Jan. 22, 2023, 6:00 AM), <https://www.sandiegouniontribune.com/news/immigration/story/2023-01-22/cbp-one-app-asylum-tijuana> [<https://perma.cc/BWX5-63T7>].

115. Telephone Interview with Guerline Jozef, Exec. Dir., Haitian Bridge All. (Feb. 2023).

116. *Id.*; NEUSNER ET AL., *Climate of Coercion supra* note 5, at 9.

117. Rafael Carranza, *Conditions Worsen at Shelter as More Migrants Approach Tijuana*, AZCENTRAL, <https://www.azcentral.com/story/news/politics/border-issues/2018/11/19/conditions-worsen-migrant-shelter-tijuana-nears-capacity/2062317002/> [<https://perma.cc/Q4RB-2CC6>] (Nov. 19, 2018, 10:21 PM).

118. *See Q&A: Trump Administration's "Remain in Mexico" Program*, HUM. RTS. WATCH (Jan. 29, 2020, 10:00 AM), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program> [<https://perma.cc/C6CH-ZYRL>].

other border cities, including Ciudad Juárez<sup>119</sup> and Reynosa,<sup>120</sup> as Title 42 and the *Circumvention of Lawful Pathways* rule have stranded asylum seekers blocked from accessing protection at ports of entry.<sup>121</sup> In these encampments, climate impacts like heavy rains and extreme temperature fluctuations have posed further challenges. For instance, in December 2022, a winter storm devastated the makeshift tent encampments at the Texas border when a “mass of Arctic air” swept through the area, resulting in freezing temperatures.<sup>122</sup> Months later, in March 2023, unseasonable triple-digit temperatures in the same region scorched tent encampment residents as a local church struggled to supply adequate drinking water to the residents.<sup>123</sup>

Asylum seekers personally interviewed in 2023 reported suffering from extreme temperature fluctuations due to being left stranded in precarious housing situations, a result of U.S. policies. They include Jose, a 19-year-old Venezuelan asylum seeker, who spent more than a month in a tent next to the river in Matamoros and endured record-high temperatures in summer 2023 while waiting for an appointment through the CBP One mobile app. Jose said that unbearable heat made it impossible to sleep. The family was swarmed with mosquitos, and children who were traveling with the family broke out in rashes due to the heat.<sup>124</sup>

Others suffered from exposure to unseasonably cold winter temperatures. Numerous asylum seekers who were personally interviewed in January 2023 reported that their family members became sick after moving from extremely hot temperatures in the south of Mexico to cold winter conditions in Tijuana, Baja California. In this same area weeks earlier (in late December 2022), a cold front that had been projected to bring “gusts of wind of 70 to 90 km per hour with

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119. Isacson, *Weekly U.S.-Mexico Border Update*, *supra* note 97.

120. Morgan Chesky et al., *Thousands Wait in Tent Camps in Mexico for a Chance to Cross the Border*, NBC (Dec. 22, 2022, 4:28 PM), <https://www.nbcnews.com/news/latino/thousands-wait-tent-camps-mexico-chance-cross-border-rcna63026> [https://perma.cc/X6C4-ER].

121. *See Q&A: US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8 2021, 4:15 PM), <https://hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border> [https://perma.cc/7CEM-USJD].

122. *Migrants Face Freezing Christmas at US-Mexico Border*, AL JAZEERA (Dec. 24, 2022), <https://aljazeera.com/news/2022/12/24/migrants-face-freezing-christmas-at-us-mexico-border> [https://perma.cc/U395-6NE8].

123. Sandra Sanchez, *Unseasonable 100-Degree Heat in South Texas Border Worries Migrant Aid Workers*, THE BORDER REPORT (Mar. 2, 2023, 4:54 PM), <https://www.borderreport.com/hot-topics/unseasonable-100-degree-heat-in-south-texas-border-worries-migrant-aid-workers/> [https://perma.cc/Q7T8-3VPT].

124. Interview with Anonymous Asylum Seeker, in N.Y.C, N.Y. (Aug. 2023).

dust clouds” and “conditions of sleet and snow”<sup>125</sup> led the Mexican government civil protection agency (Coordinación Nacional de Protección Civil) to recommend that residents refrain from spending prolonged time outside to avoid developing respiratory illnesses.<sup>126</sup> A Guatemalan woman fleeing threats by gang members said her young children became sick due to cold winter temperatures at the border near the Pacific Coast.<sup>127</sup>

*B. Impacts of Migration Enforcement Externalization South of the U.S. Border*

Policies restricting freedom of movement in Mexico have left people seeking U.S. protection stranded in precarious conditions where they are exposed to violent crime, exploitation, and natural hazards. Several asylum seekers interviewed in 2023 reported experiencing climate-related challenges in Mexico, before reaching the U.S. border, due to increased enforcement.<sup>128</sup> Two Central American asylum seekers said their families were denied entry at the Mexican border and forced to return to Guatemala. They were left with no choice but to walk through mountains and swim across a dangerous river to enter Mexico, where both families were robbed. The young children of the Guatemalan family nearly drowned. The mother said that the water was at a high level and very rough.<sup>129</sup>

Since Mexico began requiring humanitarian visas for onward travel, including in public buses, migrants and asylum seekers have been forced to wait for weeks or months in southern Mexico, where many have lacked access to safe shelter and other resources for survival.<sup>130</sup> For instance, a Guatemalan woman reported that she and her children had to wait three months in the southern Mexican city of Hidalgo to obtain humanitarian visas to continue traveling north in November 2022. Without anywhere to stay, they were forced to sleep outside on park benches, where they were exposed to heavy rains and extreme heat.<sup>131</sup> In addition, a Salvadoran family fleeing death threats by gang members

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125. *New Cold Front Could Bring Snow to Baja California This Week*, SAN DIEGO RED (Dec. 27, 2022), <https://www.sandiegored.com/en/news/233307/New-cold-front-could-bring-snow-to-Baja-California-this-week> [<https://perma.cc/8QNH-C9ZZ>].

126. *La Ola de Frío que Hiela México, en Imágenes*, EL PAÍS (Dec. 26, 2022, 1:19 PM), <https://elpais.com/mexico/2022-12-26/la-ola-de-frio-que-hiela-mexico-en-imagenes.html> [<https://perma.cc/3FK2-KAYW>].

127. Interview with Anonymous Asylum Seeker, in Tijuana, Mex. (Jan. 2023).

128. *See* Interviews with Anonymous Asylum Seekers, in Tijuana, Mex. (Jan. 2023); *see also* Kuhner & Arvey, *supra* note 75, at 3.

129. Interview with Anonymous Asylum Seeker, in Tijuana, Mex. (Jan. 2023).

130. NEUSNER & KIZUKA, *FATALLY FLAWED*, *supra* note 55, at 14; *see* Kuhner & Arvey, *supra* note 75; *see* Carranza, *supra* note 117.

131. Interview with Anonymous Asylum Seeker, in Tijuana, Mex. (Jan. 2023).



endured extreme heat conditions in southern Mexico, where they had to wait for weeks until they could obtain documents to continue traveling north by bus.<sup>132</sup>

Those unable or unwilling to wait must continue to entrust their lives to brutal criminal smuggling organizations or continue their journey by foot. A Salvadoran woman said after she and her family were unable to board buses in Mexico without immigration documents, they spent several nights sleeping outside in extreme heat. A heavy rainstorm caused trees to fall, further delaying their trip.<sup>133</sup> A Central American asylum seeker reported that after Mexican police stopped him at a checkpoint and extorted him, he had to walk hours in extreme desert heat. Numerous migrants and asylum seekers have also reported in interviews reviewed by Human Rights First that “Mexican police officers ordered them to exit public buses, extorted them, and left them to continue on foot through harsh, desert terrain.”<sup>134</sup>

Restrictions on safe travel avenues through Mexico have led some migrants and asylum seekers to risk their lives atop the dangerous freight train, known as “la bestia”<sup>135</sup> (the beast), where they are likely to confront serious injury or death and where already-difficult conditions are made more intolerable by extreme heat and cold.<sup>136</sup> Todd Miller describes the train as “an example of ‘Prevention Through Deterrence,’ with the implicit threat of bodily harm or even death.”<sup>137</sup> This Author interviewed two asylum seekers from Venezuela who described surviving sweltering heat while exposed atop “the beast” freight train with their young children. One of them said that he could not lift his face to look ahead of him without feeling overwhelmed by the intensity of the heat, and that there was nowhere to go to find shade and escape the sun. He also said that he did not sleep for the entire three-day journey to protect his family from armed robbers who often prey upon migrants. At one point, someone tried to kidnap his two-year-old daughter, nearly managing to rip her from his arms.<sup>138</sup>

The tightening restrictions on visa issuance for air travel to Mexico have led to a significant increase in travel through the perilous Darién Gap. In July 2023, the Panamanian government reported that “almost 250,000” people had crossed the Darién Gap “in the first seven months

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132. Interview with Anonymous Asylum Seeker, in Tijuana, Mex. (Jan. 2023).

133. *Id.*

134. NEUSNER & KIZUKA, *FATALLY FLAWED*, *supra* note 55, at 14.

135. Rodrigo Dominguez Villegas, *Central American Migrants and “La Bestia”: The Route, Dangers, and Government Responses*, MIGRATION POL’Y INST. (Sept. 10, 2014), <https://www.migrationpolicy.org/article/central-american-migrants-la-bestia> [<https://perma.cc/6F9P-Z8QB>].

136. Kitroeff & Cegarra, *supra* note 33.

137. MILLER, *STORMING THE WALL*, *supra* note 47, at 33.

138. Interview with Anonymous Asylum Seeker, in N.Y.C., N.Y. (Aug. 2023).

of 2023, surpassing the number that crossed in all of 2022.”<sup>139</sup> This was double the record crossings of “nearly 250,000 people [who] crossed into the country compared to some 133,000 [people] in 2021.”<sup>140</sup> Venezuelan nationals have comprised fifty-five percent of people crossing the jungle to date in 2023.<sup>141</sup> In the wake of visa restrictions that the Mexican government imposed, at the behest of the United States, Venezuelans who previously could have purchased a flight into Mexico can now no longer enter Mexico without a visa<sup>142</sup>

The journey through the Darién Gap presents a myriad of hazards, including landslides, extreme heat and humidity, rugged mountains, and swift rivers, resulting in injuries and fatalities among migrants and asylum seekers attempting to cross.<sup>143</sup> IOM reported that at least thirty-six people died crossing the Darién in 2022, but this is significant undercount, as most deaths in the jungle are not reported and bodies are never recovered.<sup>144</sup> As climate change impacts weather patterns, the Darién Gap has been battered by heavy rains, which pose further challenges.<sup>145</sup> One father said that when the rain was too heavy, they had to wait for it to pass before they could proceed.<sup>146</sup> Their reports are consistent with what a CBS News reporter observed as he followed migrants and asylum seekers through the harrowing passage: “One of the things that makes Dari[é]n Gap so dangerous for migrants, aside from the untamed wilderness, is the rain. This is one of the wettest

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139. *Nearly 250,000 Migrants Crossed Panama’s Darien Gap So Far This Year, More Than in All of 2022*, AP NEWS (July 31, 2023, 6:09 PM), <https://apnews.com/article/panama-migration-darien-gap-record-d2488cab2a80f2c8b94eb5a4cff7e3c0> [<https://perma.cc/P675-MQZ6>].
140. *Number of Migrants Who Embarked on the Dangerous Darien Gap Route Nearly Doubled in 2022*, INT’L ORG. FOR MIGRATION (Jan. 17, 2023), <https://www.iom.int/news/number-migrants-who-embarked-dangerous-darien-gap-route-nearly-doubled-2022> [<https://perma.cc/HUJ6-33WM>].
141. *Record Crossings of Perilous Darién Gap Underscores Need for Safe Migration Pathways*, U.N. NEWS (Aug. 2, 2023), <https://news.un.org/en/story/2023/08/1139377> [<https://perma.cc/732Q-PTAU>].
142. *See Mexico/Central America: New Visa Restrictions Harm Venezuelans*, *supra* note 78; *see also supra* Section III(B).
143. Julie Turkewitz, ‘A Ticket to Disney’? Politicians Charge Millions to Send Migrants to U.S., N.Y. TIMES, <https://www.nytimes.com/2023/09/14/world/americas/migrant-business-darien-gap.html> [<https://perma.cc/N8E4-YMKW>] (Sept. 14, 2023).
144. *Number of Migrants Who Embarked on the Dangerous Darien Gap Route Nearly Doubled in 2022*, *supra* note 140.
145. Roy, *Crossing the Darién Gap*, *supra* note 80; *See Adam Yamaguchi, The Darien Gap—Reporter’s notebook*, CBS NEWS (Oct. 9, 2017, 9:00 AM), <https://www.cbsnews.com/news/the-darien-gap-reporters-notebook/> [<https://perma.cc/PXH6-NFWX>].
146. Interviews with Anonymous Asylum Seekers, in N.Y.C, N.Y. (Aug. 2023).

places in the world and when it closes in, it everyone down in the camp for awhile.”<sup>147</sup>

This Author interviewed many individuals who described horrific environmental conditions in the Darién Gap jungle.<sup>148</sup> A former police officer, who fled government persecution in Venezuela recalled, among many other horrors, witnessing a five-year-old Haitian boy drown after falling from his father’s shoulders. Several other Venezuelans expressed in interviews that crossing the Darién Gap was the worst part of their trip. One father who carried his two-year-old child in a sling across his chest expressed that the trek was grueling and the trail was hot, wet, and covered in bugs. At the start of the trip, armed bandits surrounded his group, and stole all the food the family had brought. He told this Author that many people die in the Darién jungle and his family feared they would not survive the trek. The man recalled seeing the body of a deceased young girl on the side of the trail.<sup>149</sup>

## V. RIGHTS VIOLATIONS AND LEGAL IMPLICATIONS

As the previous section details, U.S. policies that limit freedom of movement and asylum access have harmed displaced people. These policies raise critical legal questions that implicate rights protected under international law. This section discusses 1) U.S. obligations not to return people to countries where their lives are in danger, 2) potential rights violations associated with climate-related deaths and injuries in U.S. territory, and 3) U.S. responsibility for rights violations in third countries arising from U.S. policies.

U.S. policies that block asylum access at the border and result in pushbacks and forced returns of asylum seekers and migrants to Mexico implicate U.S. refugee protection and nonrefoulement obligations under international law.<sup>150</sup> Title 42 and the *Circumvention of Lawful Pathways* rule that succeeded it have resulted in the forced return of asylum seekers to Mexico and the countries they fled.<sup>151</sup> UNHCR has warned that countries cannot use the pandemic to flout international refugee protection obligations, and that turning people away at the border

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147. Roy, *Crossing the Darién Gap*, *supra* note 80; see Yamaguchi, *supra* note 145.

148. Interviews with Anonymous Asylum seekers in N.Y.C, N.Y. (Aug. 2023).

149. Interview with Anonymous Asylum Seeker, in N.Y.C, N.Y. (Aug. 2023).

150. See *U.S. Asylum and Border Policies Resulting in Human Rights Violations*, HUM. RTS. FIRST (Mar. 1, 2022), <https://humanrightsfirst.org/library/u-s-asylum-and-border-policies-resulting-in-human-rights-violations/> [https://perma.cc/B6LQ-3C7Q].

151. *Id.*

without first conducting individualized protection screenings violates international law.<sup>152</sup>

International and domestic laws compel the United States to protect asylum seekers and refugees within its territory, regardless of their manner of entry. U.S. law defines a refugee as a person who is “unable or unwilling” to return to their country of origin due to “persecution or a well-founded fear of persecution” because of their “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>153</sup> This definition aligns with the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which the Refugee Act of 1980 incorporated into U.S. law.<sup>154</sup> U.S. policies that restrict asylum access at ports of entry endanger individuals seeking protection, and implicate U.S. refugee protection obligations under international and domestic laws.

Those who arrive at the U.S.-Mexico border and do not qualify as refugees, including many displaced because of climate change, are nonetheless protected from forced return to harm under international law. The 1951 Refugee Convention establishes the principle of non-refoulement, which forbids nations from sending refugees back to a place where their life or freedom is threatened.<sup>155</sup> This principle has evolved under customary international law to extend not only to people considered refugees under the 1951 Convention, but to all people in transit who could encounter irreversible harm including torture or violations of their right to life upon being repatriated or deported.<sup>156</sup>

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152. U.N. High Comm’r for Refugees, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, ¶¶ 1, 3, 6, 8 (Mar. 16, 2020); Press Release, U.N. High Comm’n for Refugees, UNHCR Warns Asylum Attack at Europe’s Borders, Urges End to Pushbacks and Violence Against Refugees (Jan. 28, 2021); Press Release, U.N. High Comm’n for Refugees, Inclusion Key to Protecting Refugees and Their Hosts Amid Covid-19 Pandemic (Nov. 4, 2020).

153. 8 U.S.C. § 1101(a)(42).

154. Convention Relating to the Status of Refugees, art. 1, ¶ A(1), July 28, 1951, 189 U.N.T.S. 137; United Nations High Commission for Refugees [UNHCR], Protocol to the Convention Relating to the Status of Refugees, art. 1, ¶ 1-2, Jan. 31, 1967, 606 U.N.T.S. 287; Refugee Act of 1980, Pub. L. 96-212, § 201, 94 Stat. 102, 102-103; *Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline> [https://perma.cc/VM5N-3DET].

155. U.N. High Commissioner for Refugees [UNHCR], Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, § 1¶ 5 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf>; Convention Relating to the Status of Refugees, *supra* note 154, art. 1.

156. See U.N. High Commissioner for Human Rights [UNHCR], The Principle of Non-Refoulement Under International Human Rights Law, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/>

This obligation applies to any person within the state's territory, regardless of their immigration status or manner of entry.<sup>157</sup> The question of whether the principle of non-refoulement extends to threats to health and safety arising from climate-related environmental conditions will become ever more prescient as the planet continues to warm.

In addition, several international and foreign tribunals have found that deteriorating environmental conditions caused by climate change could potentially endanger rights protected by the International Covenant on Civil and Political Rights (ICCPR).<sup>158</sup> In *Terioto v. New Zealand*, the U.N. Human Rights Committee (HRC) found that significant environmental deterioration could violate an individual's right to life as outlined in Article 6; it clarified that the obligation to not extradite, deport, or transfer in accordance with Article 6 of the ICCPR may provide broader protection than the nonrefoulement principle.<sup>159</sup> The HRC upheld the ruling by a New Zealand court to expel Ioane Teitiota, an individual from Kiribati who had been displaced due to climate-related reasons.<sup>160</sup>

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ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf;  
*see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

157. *See* G.A., Exec. Comm. of the High Comm'r Programme, Note on International Protection, A/AC 96/951, at 5–6 (Sept. 13, 2001); *see also*, GLOB. CONSULTANTS ON INT'L PROT., SUMMARY CONCLUSIONS: THE PRINCIPLE OF NON-REFOULEMENT 178–79 (2003); *see also*, U.N. High Comm'r for Refugees, UNHCR Intervention Before the European Court of Human Rights in the Case of T.I. v. the United Kingdom, Application No. 43844/98, ¶ 5–6, 8, 10–11 (2000).
158. Hum. Rts. Comm., Views Adopted by the Committee under Art. 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) [hereinafter *Teitiota v. New Zealand*]; Verwaltungsgerichtshof of Baden-Württemberg [VGH] [Higher Administrative Court of Baden-Württemberg] Nov. 29, 2019, A 11 S 2040/20 (Ger.) (ruling in 2020 that the state of the environment plays a role in deciding whether deporting a non-citizen would breach Article 3 of the European Convention on Human Rights, which prohibits the expulsion of a non-citizen facing inhumane or degrading treatment or punishment in their home country.); Cass., sez. II, 12 novembre 2020, n. 5022, Giur. it. 2021 (It.) (ruling that in deportation cases, adjudicators should consider environmental degradation, climate change, and unsustainable development in the individual's country of origin, as these factors could impede their ability to fully enjoy the right to life and the right to a life with dignity.).
159. *Teitiota v. New Zealand*, *supra* note 158, at 9.3–9.4 (observing that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”).
160. *Id.* at 9.14–10.

However, the HRC indicated that “without robust national and international efforts, the effects of climate change in receiving states may expose individuals to violations of their rights . . . thereby triggering the *non-refoulement* obligations of sending states.”<sup>161</sup> The HRC also observed that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>162</sup>

The decision cites the HRC’s *General comment no. 36, Article 6 (Right to Life)*, where the HRC clarifies,

The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.<sup>163</sup>

This language suggests that the United States may be violating the rights of migrants and asylum seekers by expelling them to and trapping them in Mexico, where in addition to targeted violent crime, they are left without stable housing and exposed to harsh environmental conditions, including extreme heat and storms.

Increased enforcement efforts in Mexico also implicate U.S. non-refoulement implications by putting people returned to Mexico by the United States at risk of chain refoulement, or onward return, to the countries they fled. When the Title 42 expulsion policy was in place, UNHCR advised that the policy “increases the risk of chain *refoulement* – pushbacks by successive countries – of vulnerable people in danger, in contravention of international law and the humanitarian principles of the 1951 Refugee Convention.”<sup>164</sup> For instance, in August 2021 the Mexican government expelled hundreds of migrants and asylum seekers by plane to the southern Mexican border, where many were forcibly pushed into Guatemala without access to asylum.<sup>165</sup> In response, various

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161. *Id.* at 9.11.

162. *Id.* at 9.4.

163. U.N. Hum. Rts. Comm, General Comment No. 36, ¶ 30, CCPR/C/GC/35 (Sept. 3, 2019); *see, e.g.*, *Teitiota v. New Zealand supra* note 158, ¶ 9.6; *see e.g.*, *N.A. v. United Kingdom*, App. No. 25904/07, ¶ 115 (July 17, 2008), [<https://perma.cc/TBJ5-SUCW>].

164. Press Release, Matthew Reynolds, UNHCR, UNHCR Concerned Over U.S. Expulsion Flights Under COVID-19 Asylum Restrictions (Aug. 11, 2021).

165. Kevin Sieff, *Mexico has Pushed Hundreds of Migrants Expelled from the U.S. on to Guatemala, Stranding Them in a Remote Village far from*

U.N. agencies<sup>166</sup> and the Inter-American Commission on Human Rights issued statements indicating that the expulsion flights may constitute violations of refugee law.<sup>167</sup> The UNHCR expressed concern that the policy “increases the risk of chain refoulement by successive countries: of vulnerable people in danger, in contravention of international law and the humanitarian principles of the 1951 Refugee Convention.”<sup>168</sup>

These policies also raise questions about the United States’ obligations to mitigate physical harm to migrants subjected to extreme heat and other climate-related conditions within its territory as well as in third countries. The ICCPR, which the United States has ratified,<sup>169</sup> protects rights implicated by cross-border movement, including the right to life (Article 6) and the right to life with dignity (Article 10).<sup>170</sup> The Special Rapporteur on human rights in the context of climate change writes, “[t]he process of moving across international borders is fraught with rights violations. Large numbers of people displaced across borders die or go missing every year at both land and sea borders.”<sup>171</sup> In the U.S. borderlands, Border Patrol agents have been known to slash migrants’ water supplies, refuse medical care for people suffering heat-related illnesses, and to forcibly push back migrants and asylum seekers to Mexico.<sup>172</sup> The impacts on migrants and asylum seekers’ health and

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*Their Homes*, WASH. POST (Aug. 10, 2021, 9:12 PM), <https://www.washingtonpost.com/world/2021/08/10/mexico-deport-guatemala/> [<https://perma.cc/LZ9W-TV9H>].

166. UNHCR, *Agencias de la ONU Expresan Preocupación Frente al Deterioro de las Condiciones Humanitarias de las Personas Migrantes y Solicitantes de Asilo en las Fronteras Norte y sur de México*, (Aug. 11, 2021), <https://www.acnur.org/mx/noticias/agencias-de-la-onu-expresan-preocupacion-frente-al-deterioro-de-las-condiciones> [<https://perma.cc/4A2M-EFNJ>]; Reynolds, *supra* note 164.
167. *See, e.g.* CIDH – IACHR (@CIDH), X (Aug. 12, 2021, 9:54 AM), <https://twitter.com/CIDH/status/1425818014650351616> [<https://perma.cc/CLR6-99C8>].
168. Reynolds, *supra* note 164.
169. U.N. Hum. Rts. Treaty Body Database, *Ratification Status for CCPR - International Covenant on Civil and Political Rights*, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR) [<https://perma.cc/XZ2P-93K8>].
170. G.A. Res. 2200A (XXI), *The International Covenant on Civil and Political Rights*, arts. 6, 10 (Dec. 16, 1966).
171. Fry, *supra* note 6, at ¶¶ 16–17.
172. *See generally* NO MORE DEATHS, PART 2: INTERFERENCE WITH HUMANITARIAN AID 1 (2018); issue Hilary Beaumont, *The Ghoulish, Bipartisan Tradition of Death at the Souther Border*, NEW REPUBLIC (Feb. 26, 2021), <https://newrepublic.com/article/161490/ghoulish-bipartisan-tradition-death-southern-border> [<https://perma.cc/VE6S-RSGS>].

safety, as the previous section of this Article details, implicate Article 6's right to life.

With regard to rights violations in third countries, the U.N. Special Rapporteur on the human rights of migrants has clarified that:

the transnational nature of some State actions in the context of governing international borders does not exempt States from fulfilling positive human rights obligations, nor from accountability; rather, the responsibility of multiple States may be implicated in certain cases, for instance on the high seas, and elsewhere when States act extraterritorially.<sup>173</sup>

This suggests that the United States bears responsibility for human rights violations that occur in Mexico as a consequence of U.S. policies that trap migrants and asylum seekers in danger there. Frelick et al. recommend that civil society groups “promote accountability for those migration-control externalization policies and practices that violate human rights by, among other things, bringing legal challenges to border externalization in domestic courts and international and regional human rights bodies whenever externalization policies contravene international or national law.”<sup>174</sup>

## VI. CONCLUSION

As rising temperatures make deserts hotter, waterways more unruly, and jungles more treacherous, moving across borders grows deadlier by the day.<sup>175</sup> The mounting death toll, moreover, is not a sign of the U.S. system malfunctioning, but the intended consequence of restrictions meant to maximize difficulties refugees and asylum seekers must confront, with the goal of deterring people in need of protection from accessing U.S. territory. The migrant search-and-rescue organization No More Deaths writes, “[f]ar from constituting an accidental tragedy, we find that Border Patrol’s practice of abandoning people to die in US territory lies at the heart of contemporary border enforcement strategy.”<sup>176</sup> As long as the U.S. government prioritizes limiting migration over the welfare of people driven to seek protection, harsh conditions for displaced people are unlikely to improve.

U.S. policies limiting border and asylum access endanger rights protected under international and domestic refugee protection laws and have resulted in the refolement of climate-displaced people to the danger they fled. Policies that externalize migration enforcement to

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173. Morales, *supra* note 7, ¶ 38.

174. Frelick et al., *supra* note 27, at 210.

175. NEUSNER ET AL., *Climate of Coercion*, *supra* note 5, at 2.

176. NO MORE DEATHS & LA COALICIÓN DE DERECHOS HUMANOS, *supra* note 12, at 68.



third countries have resulted in higher rates of climate-related injuries and deaths in transit, which implicate the right to life, the right to life with dignity, and other rights guaranteed by the International Covenant on Civil and Political Rights. Acknowledging the connection between restrictive immigration policies and deadly crossings, in August 2023, UNHCR and IOM called upon the United States to create more safe and regular migration pathways.<sup>177</sup> The U.N. Special Rapporteur on human rights in the context of climate change has also affirmed that “[t]here are simply insufficient pathways for persons displaced . . . due to climate change to move regularly across borders,” and that “the international community has a duty of care to such people.”<sup>178</sup> Safe and regular migration pathways are essential to protect people on the move from the intensifying effects of climate change.

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177. *Record Crossings of Perilous Darién Gap Underscores Need for Safe Migration Pathways*, U.N. NEWS (Aug. 2, 2023), <https://news.un.org/en/story/2023/08/1139377> [<https://perma.cc/732Q-PTAU>].

178. Fry, *supra* note 6, ¶ 65.