

**EXPERT RESPONSE TO THE FINAL EMERGENCY INTERIM REPORT OF THE CBP FAMILIES AND CHILDREN CARE
PANEL OF THE HOMELAND SECURITY ADVISORY COUNCIL**



Photo: Rio Grande Valley, March 2019

Focus on Processing not Enforcement

The DHS Advisory Council Panel on Families and Children Care Emergency Interim Report (April 16, 2019) (“the Report”) proposes an enforcement-based approach to the current situation at the border that focuses on detention, limitations on access to asylum, restrictions on due process and a presumption that arriving Central American families present a threat. Such an enforcement focus is unwarranted and is doomed to be ineffective.¹

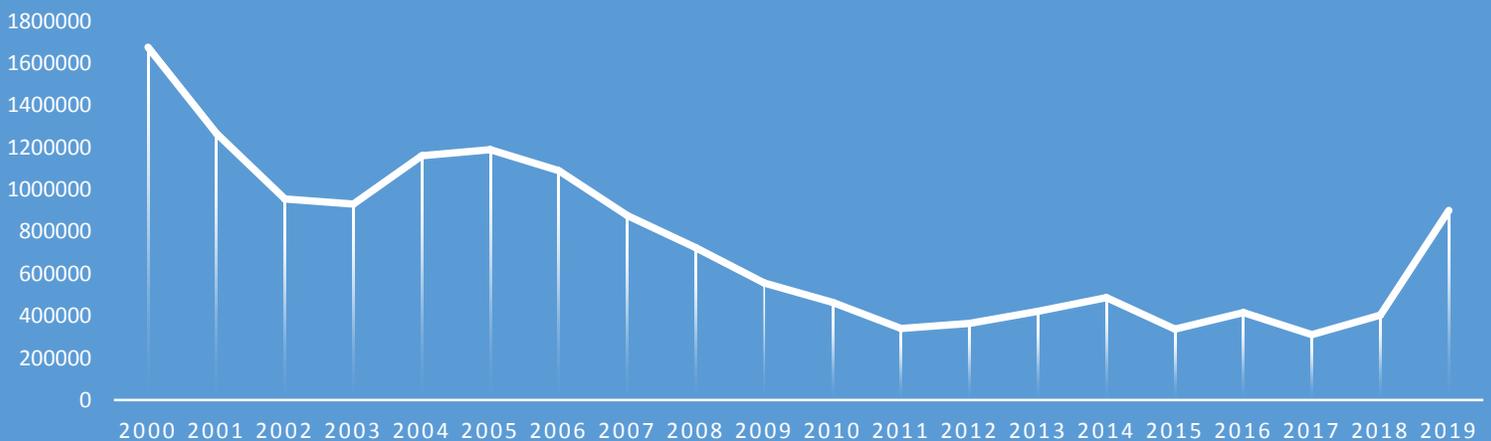
A vastly more effective border policy would recognize the humanitarian challenges presented at the border and would focus on approaches that allow the government to fairly and efficiently process Central American families, many of whom are fleeing violence and are likely to qualify for asylum if the law is properly interpreted. At the same time, an effort should be made to develop long-term solutions so that Central Americans do not need to leave their home countries in large numbers to save their lives.

These responses would be in line with our international and domestic obligations to offer safe haven to those fleeing persecution. For more than 50 years, the United States has been a party to the 1967 Protocol to the UN Refugee Convention. The resulting obligations were codified into U.S. law in 1980 through the creation of a well-developed asylum system that mandates protection for those who arrive in the U.S. and meet the refugee definition.² Now is not the time to turn our backs on that system or on Central American families seeking the rule of law and protection in this country.

An Enforcement Focus is Unjustified

There is no security crisis at the border, and many of the current tensions are exacerbated by a continued focus on border infrastructure and enforcement, rather than investment in humanitarian measures. With better resource allocation and preparedness planning, the United States can handle the increased numbers of recent border crossers, a majority of whom are families and unaccompanied minors fleeing some of the most violent countries in the world in order to seek protection in the form of asylum.

BORDER APPREHENSIONS U.S. CUSTOMS AND BORDER PATROL DATA



¹ Numerous aspects of the proposals set out in the Report are likely to be unlawful under the relevant statutes and the United States Constitution. This response does not take up those specific questions of lawfulness.

² Refugee Act of 1980 (Public Law 96-212); Immigration and Nationality Act § 208.

- **The numbers of irregular border crossers are still low compared to historical levels.** In 2000, there were 1.6 million apprehensions at the border. The number of migrants crossing the border without authorization remained at or above 1 million for most of the following six years.³ The Report predicts that the number may reach 900,000 for 2019 but does not provide the assumptions underlying this prediction. In any case, looking at patterns over two decades, 2019 will not present dramatic new levels of migration.

- **The demographics demonstrate that border arrivals present no danger and instead create an opportunity for the United States to stand as a leader in processing asylum claims.**
 - A majority of those crossing are family units.⁴ They present unique processing considerations that were not present when the vast majority arriving at the border were single men seeking to work in the United States. However, the United States is equipped to address these processing challenges once it is recognized that these families are seeking protection under the law and present no threat.
 - Also, a majority of those crossing are Central American asylum seekers. These asylum seekers are fleeing some of the most violent countries in the world.⁵ Many were targeted in their home countries because of their support for the rule of law and their opposition to gang control in their communities. The United States has a long tradition of providing safe haven in such instances.
 - Sensible solutions are available to address these demographic realities and strengthen the current framework, including by bolstering logistical and humanitarian support for processing asylum seekers.



Photo: Los Ebanos port of entry, March 2019

- **The U.S. government has the capacity to process the families arriving at the southern border of the United States to seek asylum.**
 - The numbers of asylum claims filed by families are not overwhelming. The Report suggests that 500,000 family members arriving in family units may seek asylum at the border in 2019. This is a speculative number; the current rate of arrivals may well not continue given fluctuations in

³ U.S. Border Patrol, Monthly Apprehensions, available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf>.

⁴ U.S. Border Patrol, Southwest Border Apprehensions FY 2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

⁵ Council on Foreign Relations, Central America's Violent Northern Triangle (June 26, 2018), available at <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>.

- migration patterns. Even if 500,000 asylum applications are filed by parents or children, however, existing processing systems can handle these numbers.
- In the mid-1990s, several hundred thousand asylum applications were filed each year.⁶ The United States also previously resettled hundreds of thousands of refugees, arriving from abroad each year, particularly when the Refugee Act first passed in 1980.⁷ These numbers were handled with fewer resources and less well developed processing systems than we have today.
 - A comparison of the United States to other countries demonstrates U.S. ability to process larger numbers of asylum claims given its infrastructure, territory and resources. In 2015 alone, Germany received 900,000 new asylum seekers on its territory. Germany has now processed almost all of those claims and has granted asylum to many. In 2016 alone, Germany issued decisions on 695,733 asylum applications granting protection in 62% of cases.⁸
 - Enormous expenditures are taking place to deter and detain asylum seekers (approximately \$22 billion proposed for the next budget year for border enforcement⁹). These expenditures could be diverted to processing and adjudication to allow for efficient use of taxpayer dollars and U.S. leadership in asylum processing.
 - Historical trends establish that fair and complete processing of asylum claims, with sufficient resources for adjudication, will make it possible to process large numbers of claims and will also lead to a downward trend in new claims.¹⁰ A focus on adding resources to asylum adjudication in the mid-1990s led to just such a result.
 - The Report cites a purported 15% grant rate for asylum to argue that a focus on processing asylum claims is not justified since the final asylum grant rates are low. There are multiple problems with the claim, including the reality that the asylum grant rate has come down dramatically pursuant to new restrictive interpretations of asylum law and pressure on the Immigration Courts to reject Central American claims.¹¹ As a comparison point, for example, between 2012 and 2016, 48% to 63% of asylum seekers were granted asylum or related relief; even defensive asylum applicants (such as those apprehended at the border) received asylum approximately 30% of the time during that same period.¹² In fact, new restrictive policies have

⁶ Congressional Research Service, *Asylum and Credible Fear Issues in U.S. Immigration Policy* (2011). Even if 900,000 asylum applications were filed in 2019 and granted, these asylees would be fewer than the number of Lawful Permanent Residents admitted each year based on family and work connections and would make up less than .1% of the population.

⁷ Migration Policy Institute, *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, available at <https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united>.

⁸ German Federal Office for Migration and Refugees & European Migration Network, *The Changing Influx of Asylum Seekers in 2014-2016: Responses in Germany* (2018), available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a_germany_changing_influx_final_en_0.pdf.

⁹ DHS FY 2019 Budget in Brief, available at <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf>.

¹⁰ DOJ, *Asylum Reform: Five Years Later* (Feb. 1, 2000), available at <https://www.uscis.gov/sites/default/files/files/pressrelease/Asylum.pdf>.

¹¹ Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR) (Sept. 10, 2018) (“the vast majority of the current asylum claims are not valid under the law”), available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

¹² U.S. DOJ, Executive Office for Immigration Review, *FY 2016 Statistics Yearbook*, at K3, K5, available at <https://www.justice.gov/eoir/page/file/fysb16/download>.

- put asylum grant rates are at a nearly 20-year low.¹³ In any case, the 15% (or more) of applicants who receive asylum even under today's restrictive rules deserve protection from any U.S. law, international law, and ethical standpoint. The Report proposes measures that would speed towards deportations even for these families, rather than offering processing improvements.
- The Report asserts that the numbers overwhelm border facilities and detention centers. However, in many parts of the border, processing facilities and family detention centers are not full,¹⁴ and in any case, detention of asylum seekers after initial processing at the border is neither necessary nor desirable.¹⁵ Similarly, a more flexible adjustment in resources and investment in processing capacity could alleviate any pressures that arise.
 - The Report also asserts a diversion of Border Patrol attention, noting that 40% of Border Patrol officers are assigned to processing family units and unaccompanied minors. [Yet processing of border crossers has historically been a task of the Border Patrol, and the percentage of Border Patrol involved with families remains proportionate to arrests. In FY 2019 to date, 62.4% of total southwest border apprehensions are combined family units and unaccompanied youth, and 52.5% are family units¹⁶—more than the 40% of personnel assigned.] It is nonetheless appropriate to consider using other personnel to relieve the pressure on Border Patrol and better serve the goal of processing families and children. Screening and care of children is best performed by state-licensed professionals with child welfare experience and expertise, rather than law enforcement officers. Such professionals, who could be hired using existing funds, can screen children for protection needs, identify concerns related to safety or parentage, and oversee children's care in custody.
 - Finally, while border communities indeed feel the demands of assisting asylum-seekers in their short-term transit to final destination, these border communities by and large welcome with open hearts this commitment. In El Paso, for example, the County, City, and non-profit sector have come together enthusiastically to support asylum-seekers, as seen in joint funding of a volunteer coordinator position in the United Way.¹⁷ Border communities need more humane and less chaotic government processing, and more support for logistics and basic humanitarian measures (health, transportation, etc.).

An Enforcement Focus is Ineffective

¹³ Migration Policy Institute, Trump Administration's Unprecedented Actions on Asylum at the Southern Border Hit Legal Roadblock, available at <https://www.migrationpolicy.org/article/trump-administrations-unprecedented-actions-asylum-southern-border-hit-legal-roadblock>.

¹⁴ See Strauss Center, Asylum Processing and Waitlists at the U.S./Mexico Border (Dec. 2018), available at https://www.strausscenter.org/images/MSI/AsylumReport_MSI.pdf. The Karnes family detention center, with over 1000 beds, was recently emptied of all family units and converted into a detention center for adult women asylum seekers.

¹⁵ See, e.g., UNHCR Detention Guidelines, available at <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

¹⁶ Calculated from U.S. Border Patrol, Southwest Border Apprehensions FY 2019, op. cit.

¹⁷ El Paso Times, Migrant influx: Annunciation House seeks larger facility, city to fund United Way position (March 25, 2019), available at <https://www.elpasotimes.com/story/news/2019/03/25/el-paso-city-council-approves-migrant-services-position-through-united-way/3272652002/>.

The various enforcement policies recommended in the Report are focused on asylum seeking families and children. A border approach that metes out detention and other punitive actions will be ineffective in addressing arrivals by asylum-seeking families.¹⁸

- **Enforcement-based approaches fail to deter arrivals of asylum-seeking families.**
 - Families seeking safety will not be deterred by U.S. enforcement measures in the face of immediate danger in their home countries. In-depth empirical research by the Congressional Research Service almost a decade ago found that “conditions in . . . source countries . . . were likely the driving force behind asylum seekers.”¹⁹ This same conclusion holds true today. A scientific examination of survey evidence across Honduras, Guatemala, and El Salvador finds that migrants are driven by violence in the home region and are not deterred by knowledge of heightened U.S. deterrence efforts.²⁰
 - The data demonstrates the lack of deterrent effect. Since the inception of widescale family detention in 2014 and in the wake of the 2018 family separation policies that sought to deter Central American asylum seeking families, the numbers of families arriving at the southern border has *increased*.²¹
 - Similarly, even during the height of the family separation policy, between April and July 2018, family arrivals remained constant at approximately 9,000 persons per month.²²
 - The data also shows that an effort to eliminate Flores protections for families would have little to no deterrent effect. Although the federal court decisions clarifying that the Flores settlement applies to children arriving with their families and requiring release from detention after a short period were issued in the summer of 2015, family arrivals did not increase at a significant rate again until a full year later. A rigorous statistical analysis by political scientist Tom K. Wong finds that “there is no evidence that the 2015 Flores ruling had an effect on the number of families arriving at the border.”²³
 - Heightened enforcement at the border creates the conditions in which smugglers and organized criminal groups can profit from the need to overcome barriers to entry into the United States, benefitting smugglers without deterring migration.²⁴ Current metering practices at ports of entry, which turn away asylum seekers seeking to present themselves to U.S. authorities for processing, particularly benefit smugglers. These metering practices drive asylum-seekers to

¹⁸ Many of the proposed actions are very similar to measures adopted in the 1980s during the Central American refugee flow resulting from civil wars in the region. See, e.g., U.S. Comm. For Refugees, *Refugees at our Border: The U.S. Response to Asylum Seekers* (Sept. 1989); New York Times, *Judge Halts Rule Stranding Aliens in Rio Grande Valley* (Jan. 10, 1989), available at <https://www.nytimes.com/1989/01/10/us/judge-halts-rule-stranding-aliens-in-rio-grande-valley.html>. These policies were also ineffective and unlawful and so were abandoned.

¹⁹ Congressional Research Service, *Asylum and Credible Fear Issues in U.S. Immigration Policy* (June 29, 2011).

²⁰ Jon Hiskey, et al., *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 *Latin American Research Review* 429–447 (2018), available at <http://doi.org/10.25222/larr.147>

²¹ U.S. Border Patrol Total Monthly Family Unit Apprehensions by Sector (FY 2013 - FY 2018), available at <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf>.

²² *Id.*

²³ Tom K. Wong, *Did a 2015 Flores Court Ruling Increase the Number of Families Arriving at the Southwest Border?* (2018), available at <https://www.americanprogress.org/issues/immigration/news/2018/10/16/459358/2015-flores-court-ruling-increase-number-families-arriving-southwest-border/>.

²⁴ Bryan Roberts, et al., DHS Working Paper, *An Analysis of Migrant Smuggling Costs along the Southwest Border* (2010), available at <https://www.dhs.gov/xlibrary/assets/statistics/publications/ois-smuggling-wp.pdf> (noting incentives for involvement of smugglers and lack of information about deterrence).

non-port of entry points that smugglers know and control, in turn creating a profit for smugglers and organized crime.

- Governmental efforts to prevent families from leaving their home countries are not only ineffective but violate fundamental values. Just as nobody has questioned the need for Syrians to leave Syria during the conflict, without regard to individual eligibility for asylum, there should be no question that many Central Americans must leave their home countries to save their lives. The world community does not allow for the possibility of trapping individuals in dangerous situations in their home countries.²⁵
- **Enforcement-based approaches will harm rather than protect children.**
 - The Report asserts, without any empirical data regarding trafficking or use of children by migrants to enter the United States, that its proposals are designed to protect children from danger. In fact, there is no evidence that normal law enforcement efforts would be ineffective at addressing individual cases of trafficking that might arise.
 - In any case, the proposed measures will not protect children from these risks but will instead expand detention, limit access to the U.S. asylum process, restrict eligibility for asylum and accelerate adjudications without adequate procedural guarantees.
 - It is well established that detention harms children.²⁶ Limits on access to a fair and full asylum adjudication also harm children. These restrictions make it likely that children, who should receive protection under the law, will instead be returned expeditiously to their home countries where they may be harmed or killed. The Report's policies would directly endanger children.
- **Detention is not necessary to ensure appearance for asylum adjudications.**
 - International refugee law and U.S. caselaw mandate that immigration detention, especially of children, should be used only where the government shows that it is truly necessary.²⁷ Most families arriving in the United States have relatives willing to sponsor them and help ensure that they appear for subsequent hearings so that detention is unnecessary.
 - Over 90% of families with asylum claims appear for hearings, when not detained, and appearance rates are even higher if legal representation is secured.²⁸ Those families who do not appear for hearings often have not received information about the hearings and proceedings that they must undergo, which is a situation that can be addressed through the provision of more complete information to families.
 - Before 2014, families were regularly released at the border with a Notice to Appear. Even after the buildup of family detention, many families were released after basic processing at the border. While asserting repeatedly that families abscond at high rates, the government has provided no evidence establishing that fact.

²⁵ International Covenant on Civil and Political Rights, art. 12(2), 999 U.N.T.S. 171. Ratified by the United States, June 8, 1992; entered into force for the United States, Sept. 8, 1992.

²⁶ American Academy of Pediatrics, Detention of Immigrant Children, Pediatrics (2017), available at <https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>; Declaration of Luis H. Zayas (Dec. 2014), available at https://chu.house.gov/sites/chu.house.gov/files/documents/Declaration%20of%20Luis%20Zayas_0.pdf.

²⁷ UNHCR Detention Guidelines, available at <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>; Zadvydas v. Davis, 533 U.S. 678 (2001).

²⁸ Ingrid Eagly, et al., Detaining Families: A Study of Asylum Adjudication in Family Detention, 106 Calif. L. Rev. 785, 848 (2018).

- Further, if appearance rates were truly the concern, there are effective cost-efficient ways to ensure that asylum seekers appear in court, such as providing legal counsel, offering case management support and delivering simple reminders of upcoming court dates.²⁹

Other Measures More Effectively Address the Challenges at the Border

As the U.S. government acknowledges, the situation at the border involves larger than usual numbers of Central American families seeking protection under U.S. and international law. This humanitarian situation is best handled by deploying resources and innovative systems that will support these families and allow for full and fair adjudication of their claims. In doing so, the United States would address the humanitarian challenges in a deliberate rather than ad hoc manner, which could serve as a model for the world. At the same time, such an approach would free up resources and policy capacity to take on the larger human rights issues in the home countries leading to high levels of forced migration.³⁰

- **Detention of families should be allowed only for the briefest period of time in highly exceptional circumstances where there is a true concern regarding the familial relationship or the possibility for trafficking.** Notices to Appear should be issued to families immediately after processing at the border. Billions of dollars in detention, transportation and credible fear proceedings would be saved, which could be spent on adjudication of claims and implementation of policies to address the situation in Central America.
- **Government funding for legal representation should be provided in all cases of asylum-seeking families wherever they reside in the country.** As discussed previously and as empirical data demonstrates, representation would increase appearance rates and court efficiency, resulting in fewer continuances and more prompt and accurate adjudication.
- **Significant additional resources should be provided for adjudication.** The backlog in Immigration Court cases is problematic for all. Additional judges should be hired, in an unbiased process, and encouraged to decide cases promptly but not hurriedly, while respecting full due process. Additional legal clerks and administrative staff should be hired as well so that all parties can access information regarding cases and make filings without difficulty.
- **Specially trained officials with child welfare experience and expertise should conduct screening of all children at the border and provide specialized care.** Hiring officials with appropriate child welfare expertise will not only improve conditions for children, it will ease the burden on CBP by ensuring that agents have the time to devote to law enforcement duties in line with their expertise.
- **Recent restrictive reversals of established asylum law designed to thwart Central American claims, including the Attorney General’s precedential decision in Matter of A-B-, should be reversed.** Instead claims should be evaluated on a case-by-case basis with recognition of the viability of claims

²⁹ Marie Van Nostrand, et al., State of the Science of Pretrial Release Recommendations and Supervision (2011), available at <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/State-of-the-Science-Pretrial-Recommendations-and-Supervision-5.pdf>; Women’s Refugee Commission, Backgrounder: Family Case Management Program, available at <https://www.womensrefugeecommission.org/images/zdocs/Backgrounder-FCMP.pdf>.

³⁰ These proposals work in tandem and should be adopted all together. Other systemic changes, such as the removal of asylum adjudication from the adversarial deportation process in Immigration Court, could be considered as well.

based on domestic and gang violence in appropriate instances. Such changes would conform with guidance issued by the UN High Commissioner for Refugees, the international body charged with interpreting the Refugee Convention, which was codified into U.S. law.³¹ They would also be consonant with previous precedent decisions of the Board of Immigration Appeals and the federal appellate courts, which have recognized the viability of many common Central American asylum claims, subject to an individualized factual inquiry and determination in each case.³² In this same vein, government officials should stop prejudging Central American claims and announcing them to be invalid. Proper interpretation of the law and fair adjudication will allow many Central American families and unaccompanied children to secure asylum. As a result, families will have greater incentives to trust the system and appear for their hearings. This recognition of valid asylum claims will allow the United States to offer protection to vulnerable families who can then integrate more readily into the United States and contribute to the economy and social fabric of our communities. Acknowledgment that these families and children are refugees should also alleviate concerns about their presence in the United States created by the current rhetoric.

- **The U.S. should support an intense regional collaboration effort to address the human rights situations causing increased migration.** Rather than withdrawing aid from Central America, the United States should seek to address root causes of migration out of Central America. United States policies in Central America have contributed to the current instability and violence that cause families to flee (e.g. deportations of gang members from the United States in the 1990s leading to the growth of gangs in Central America, U.S. support for the 2009 Honduran coup that has led to persistent disorder), and so the United States has a special role to play in the long-term solution.³³ The United States should work with other countries in the Americas to improve the situation in Central America so that migrants will not be forcibly displaced. In the short term, the United States must process the asylum seekers fleeing as a result of violence but, in the longer term, improvements in Central America will reduce the need for such processing as migration slows.

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³¹ UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador (2016), available at <https://www.refworld.org/docid/56e706e94.html>; UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras (2016), available at <https://www.refworld.org/docid/579767434.html>.

³² See, e.g., *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947 (4th Cir. 2015); *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Cabrera v. Sessions*, -- F.3d -- (5th Cir. 2018), 2018 WL 210662125; *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Iruegas-Valdez v. Yates*, 846 F.3d 806 (5th Cir. 2017).

³³ Cecilia Menjivar, et al., ed., *The Oxford Handbook of Migration Crises* (2019); Cecilia Menjivar & Nestor Rodriguez, eds., *When States Kill: Latin America, the U.S. and Technologies of Terror* (2005).

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