

*International Human Rights Violations of  
the United States With Concern to the  
Regulation of Migration*

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*For Leah Duckett.  
I am a better lawyer and person for having known you. Your compassion and guidance will  
never be forgotten.*

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## **Introduction**

Nearly 65 million people around the world have been displaced by war, conflict, and persecution since 2014.<sup>1</sup> Immigrants, regardless of whether they are fleeing displacement, voluntarily immigrating, or forced to relocate for economic or safety reasons (often referred to as ‘pushed’ migration)<sup>2</sup>, all will face significant stress before and after their arrival into a new country. “The immigration experience itself has been shown to threaten individual and family well-being due to separation from family, exposure to traumatic events, discrimination, and loss of social status.”<sup>3</sup> The path of an asylee or refugee can be especially trying, considering the experiences that lead up to migration by force, and not necessarily by choice.

Where asylees and refugees may have the same reasons for migrating, those who have sought permission to arrive to another country based upon persecution in their home country may be referred to as refugees, where those who flee and apply only upon arrival to a country are asylees. Upon arrival to the United States, “ an asylum applicant is characterized by a lack of control over one’s fate, which is going to be determined by the U.S. government.”<sup>4</sup> For refugees, this means months if not years awaiting a decision from the U.S. government, where a refugee may wait in a camp or foreign country in limbo. For many asylum seekers as well, it is a loss of control over one’s fate, and for many if not most, the fear of life and death hanging in the balance. Asylum applicants face long waits in uncertainty, unsure if they will be able to remain in the United

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<sup>1</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 19 March 2018].

<sup>2</sup> Hunter, A., Stewart, A., Lykes, M., & Hershberg, R. (2015). Continuities and Discontinuities in Human Rights Violations: Historically Situating the Psychosocial Effects of Migration. *71*(2), 244. Page 254.

<sup>3</sup> Siemons, R., Raymond-Flesh, M., Auerswald, C., & Brindis, L. (2017). Coming of Age on the Margins: Mental Health and Wellbeing Among Latino Immigrant Young Adults Eligible for Deferred Action for Childhood Arrivals (DACA). *Journal of Immigrant and Minority Health*, *19*(3), 543-551. Page 543.

<sup>4</sup> Utržan, D., & Northwood, A. (2017). Broken Promises and Lost Dreams: Navigating Asylum in the United States. *Journal of Marital and Family Therapy*, *43*(1), 3-15. Page 11.

States, or will be returned to a country they fear. This limbo may also be compounded by a fear of deportation, lack of access to healthcare and other basic necessities, slow upward mobility. Refugees may wait in a third country that is not their own, but also not one where they can yet settle. In a nation which had previously prided itself as a melting pot of immigrants and diverse cultures, the United States has contributed to human rights violations of immigrants, including displaced refugees and asylees.

The more recent rhetoric in the United States refers to those seeking refuge not as asylees or refugees, or even humanitarian migrants seeking their legal rights under international law to claim asylum, but as ‘illegal immigrants’, ‘aliens’, and ‘economic migrants’. The United States had violated international human rights law in many ways, including with respect to the laws of migration. The country has wrongfully denied the entry of asylum seekers against international law; the country has wrongfully detained migrants, and has and continues to deport those currently in our country. With concern to the rights of immigrants, the United States has violated its own due process laws, as well as the customary international law principle of non-refoulement.

The United States, like Greece, has become a prominent detainer of those seeking refuge from their countries of origin; however, the detention of refugees violates international human rights norms. “The detention of asylum-seekers is an example of how intern procedures of the countries can oppose their commitments to human rights and to international protection: it is an usual practice during the process of refugee status determination, punishing the person forced to leave his/her country and seek international protection, introducing him/her into the penal system or into a prison-like system and, thus, systematically violating the rights of people who only seek

the guaranty of their rights.”<sup>5</sup> Throughout other areas of Europe, including in Germany, refugees have been allowed to enter the country, but only to face other obstacles in violation of their human rights.

In addition to those seeking entry into the United States, immigrants currently present in the country have increasingly faced the possibility of removal. There are approximately 11 to 16 million immigrants living in the United States without a permanent or fixed status,<sup>6</sup> whom many refer to as ‘undocumented’ or ‘illegal’. The current political rhetoric only confuses the general population, and reinforces a false idea that refugees are illegitimate, that they are not human beings deserving of protections under customary international law or basic human rights. The United States’ current immigration policies push towards deterring asylum applications in violation of international law, and the removal of immigrants in violation of the principle of non-refoulement. “Although deportation is traditionally considered as an attribute of the state inherent to its territorial sovereignty, this prerogative may degenerate into an international crime.”<sup>7</sup> The United States has been increasingly responsible for violations of basic human rights through the forced removal and deportation of immigrants. Those who are undocumented, or in a status subject to removal, often face constant fear of deportation and authority; struggle emotionally and economically, often subject to the lowest paying jobs and sometimes lacking basic needs.<sup>8</sup> This

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<sup>5</sup> Thaiz Silva Menezes. (2012). THE DETENTION OF ASYLUM-SEEKERS IN THE UNITED STATES: FROM FORCED MIGRATION TO PUNISHMENT. *Universitas: Relações Internacionais*, 10(1), Universitas: Relações Internacionais, 01 September 2012, Vol.10(1).

<sup>6</sup> Hunter, A., Stewart, A., Lykes, M., & Hershberg, R. (2015). Continuities and Discontinuities in Human Rights Violations: Historically Situating the Psychosocial Effects of Migration. *71(2)*, 244. Page 245.

<sup>7</sup> Chetail, V. (2016). Is there any blood on my hands? Deportation as a crime of international law. *Leiden Journal of International Law*, 29(3), 917-943.

<sup>8</sup> Siemons, R., Raymond-Flesh, M., Auerswald, C., & Brindis, L. (2017). Coming of Age on the Margins: Mental Health and Wellbeing Among Latino Immigrant Young Adults Eligible for Deferred Action for Childhood Arrivals (DACA). *Journal of Immigrant and Minority Health*, 19(3), 543-551. Page 543.

causes these people, human beings, to suffer as individuals, where as a collective country the United States is allowing for a precedent to violate international human rights.

This paper will analyze current U.S. migration laws, and their violation of international human rights laws. Included will be a focus on the violation of non-refoulement for asylum and refugee seekers, as well as the other rights of refugees and the treatment of these migrants by the United States as well as other nations. There will be a comparison with those migrants in the United States facing possible removal with those whose entry into the United States is refused. Then, there will be concluding observations for migration reforms in accordance with international laws.

## **I. The United States' Violations of Customary International Law with Concern to Migration, Compared with Other Nations**

### **A. Greece**

Greece is presently experiencing an influx of migrants, primarily refugees, escaping turmoil in their home country, which has lead to a situation dubbed by the United Nations High Commissioner for Refugees (“UNHCR”) as a “humanitarian crisis”.<sup>9</sup> The Grecian Government, not too far removed from the United States, has struggled with a broken asylum system, inhumane detention conditions and other human rights abuses with concern to its many migrants. Of the 106,200 migrants that entered the European Union in 2009, Greece became the entry point for approximately three quarters of those migrants; the following year that percentage rose to nearly every four out of five migrants.<sup>10</sup> These numbers have caused Greece to become overwhelmed in its refugee processing. To combat this crisis, the government began offering temporary housing in empty apartments and limited cash assistance. This was not without controversy, however, as

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<sup>9</sup> Varia, N. (2010). Rights on the line : Human Rights Watch work on abuses against migrants in 2010. New York, NY: Human Rights Watch. Page 22.

<sup>10</sup> *Id.*

Grecians may have lacked these necessities themselves. These resources for migrants were limited, and soon resulted in a lack of resources and makeshift refugee camps well below humanitarian standards.

Greece and the United States share an unfortunate policy of substandard conditions under international standards for the detention facilities of migrants, as well as no government sponsored legal assistance for unaccompanied minor migrant children. Migrants in Greece may also “live in destitution or on the streets, at risk for exploitation and trafficking.”<sup>11</sup> Asylees arriving in the United States are often dependent on family members, friends, or organizations for housing and basic necessities, where the only government ‘housing’ involves forced detention in prison-like camps where liberties and freedom are limited, or actual prisons and jails themselves. Similarly, they are not eligible for most public benefits nor work authorization for at least several months or years, if at all, while their applications are pending. This may lead some to work unlawfully, facing exploitation and poverty as well.

## **B. Germany**

Germany is the largest recipient of asylees in Europe. In 2013, Europe received approximately 400,000 requests for asylum, where Germany alone received approximately one quarter of these refugees.<sup>12</sup> Many refugees fleeing Syria have often traveled through Greece, and have ended their present search for safety in Germany. Among the nations of the European Union, Germany has been one of the most accepting countries of refugees. With concern to violations of non-refoulement in the European Union, “Schengen visas, carrier sanctions, and maritime patrols

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<sup>11</sup> Varia, N. (2010). *Rights on the line : Human Rights Watch work on abuses against migrants in 2010*. New York, NY: Human Rights Watch. Page 22.

<sup>12</sup> Hamdan, E. (2016). *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (International studies in human rights ; v. 7)*. Leiden ; Boston: Brill Nijhoff. Page 1.

pay, however, insufficient attention to the specific situation of the forcibly displaced.”<sup>13</sup> While it is difficult to deny entry to asylees given Greece’s geographical location, as most refugees arrive by sea traveling from Africa and the Middle East, Germany’s physical borders make it exponentially more difficult to arrive at without arduous travel and documentation.

“The very essence of the right of asylum accorded in Article 16 (2) (2) of the Constitution of the Federal Republic of Germany consists in prohibition against forcible return of a politically persecuted alien to a country of persecution.”<sup>14</sup> “The field of application of sec. 14 of the Aliens Act has been further defined in the 1967 *Allgemeine Verwaltungsvorschrift zur Ausführung des Ausländergesetzes* (AuslVwV), which makes it clear that the prohibition against forcible return does not only concern those who already have been recognized, that it is not necessary that the latter are lawfully in the country, that they in general must not be removed until there is a final (negative) decision on their request for asylum, and that removal must be used only as an *ultima ratio* measure.”<sup>15</sup>

Where Germany welcomed nearly one million refugees to temporarily settle in 2015, just a few years later many Syrian refugees are traveling to other countries still. Germany granted many temporary asylum, but current policies do not allow for family reunification, or having family members follow to join.<sup>16</sup> This “limited asylum, based on a 2011 EU directive and instituted in

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<sup>13</sup> Moreno Lax, V. (2017). *Accessing asylum in Europe : Extraterritorial border controls and refugee rights under EU law* (First ed., Oxford studies in European law). Oxford: Oxford University Press. Page 247. *Referring to:* the Schengen Borders Code, Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016 OJ L 77/1 (“SBC”).

<sup>14</sup> Stenberg, G. (1989). *Non-expulsion and non-refoulement : The prohibition against removal of refugees with special reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Studies in international law (Stockholm, Sweden) ; 9). Uppsala: Iustus Förlag : Almqvist & Wiksell International, distributor outside Sweden. Page 188.

<sup>15</sup> *Id.* at 189. *Referring to* AuslVwV 7 July 1967 (GMBI. S. 231), paras. 1-3 to sec. 14.

<sup>16</sup> DW. April 12, 2018. “Syrian refugees leaving Germany over family reunification policy”. Available at: <http://www.dw.com/en/syrian-refugees-leaving-germany-over-family-reunification-policy/a-43358055>. Last accessed May 31, 2018.

German asylum law in 2016, called ‘subsidiary protection,’ which offers less protection than awarded via the 1951 Geneva refugee convention.”<sup>17</sup>

### **C. Other Nations**

Many European nations have been taking tough lines with concern to refugee migration, where the United States is not alone with concern to violating the provisions of non-refoulement. The European Union has attempted to limit the influx of refugees through difficult provisions, where “[t]he notion of the safe third country, the extended visa obligations, and the reinforced carrier sanctions all aim at denying access to the territory or the procedure.”<sup>18</sup> Quite recently, the United States has also attempted to make bids to categorize Mexico as a safe third country, thus trying to give the United States the ability to deny entry of refugees at the U.S.-Mexico border and not violate the principle of non-refoulement, as the United States would be violating if they did so today.<sup>19</sup> Although this is not in place today, the possibility of the implementation of Mexico as a safe third country would have horrendous effects on refugees, given that Mexico can argue not meet the protection needs of asylees and assurances that the principle of non-refoulement will not be violated.

Canada’s procedures for allow refugees differs vastly from the United States, but could be used as an example of adaptations to be made by the United States. In Canada, “two-person panels are used to determine access to the asylum process, where at least two interviewers are present, including one CBP Officer and another individual outside the agency to ensure that the rights of

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<sup>17</sup> DW. April 12, 2018. “Syrian refugees leaving Germany over family reunification policy”. Available at: <http://www.dw.com/en/syrian-refugees-leaving-germany-over-family-reunification-policy/a-43358055>. Last accessed May 31, 2018.

<sup>18</sup> Bayefsky, Fitzpatrick, Helton, Bayefsky, Anne F, Fitzpatrick, Joan, & Helton, Arthur C. (2006). Human rights and refugees, internally displaced persons, and migrant workers : Essays in memory of Joan Fitzpatrick and Arthur Helton (Refugees and human rights ; v. 10). Leiden ; Boston: M. Nijhoff. Page 121.

<sup>19</sup> Walters, Karolina. June 1, 2018. “United States Seeks to Reject Asylum Seekers by Designating Mexico a Safe Third Country”. American Immigration Council. Available at: <http://immigrationimpact.com/2018/06/01/asylum-seekers-mexico-safe-third-country/>. Last accessed June 1, 2018.

the refugee and customary international law are respected. One of the panel members is an immigration inspector and the other is a member of the Convention Refugee Determination Division who has received special training.”<sup>20</sup> Presently in the United States it is possible that only one border patrol officer, not trained or specializing in asylum law, may be the decider in an asylee may present their claim for protection, as will be discussed further below.

## **II. Current U.S. laws and policies**

U.S. immigration laws are regulated by the Immigration and Nationality Act (“The INA”) and by U.S. Family Code (“FAM”). The INA was subsequently modified in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which still remains in effect to date. U.S. Citizenship and Immigration Services (“USCIS”), a branch of the Department of Homeland Security (“DHS”), is in charge of processing immigration related petitions and applications. In contrast, the Executive Office for Immigration Review (“EOIR”) the immigration court system, and is charged with removal (*formerly* deportation) cases. While USCIS is a branch of DHS, EOIR is administered by the U.S. Department of Justice.

The United States became a party to the 1967 United Nations Protocol relating to the Status of Refugees in the late 1960s.<sup>21</sup> The Protocol was a determined effort to secure basic rights for refugees, but it took a dozen years before U.S. Congress then passed the Refugee Act of 1980. “The entry into force of the Refugee Act of 1980 signified an important change in the applicability *ratione personae* of sec. 243 (h) of the INA”, where this section “no longer requires the alien to be

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<sup>20</sup> Lawyers Committee for Human Rights, Lawyers Committee for International Human Rights, & Human Rights First. (1990). *Refugee refoulement : The forced return of Haitians under the U.S.-Haitian interdiction agreement*. New York, N.Y.: Lawyers Committee for Human Rights. Page 8.

<sup>21</sup> *Id.* at 7.

‘within the United States’”.<sup>22</sup> Before the adoption of the Act, it was not regarded in the United States to prohibit rejection at the border, nor for refugees who were physically present in the United States be prohibited from a forcible return if they had only been paroled into the United States, but not yet admitted as a refugee.<sup>23</sup> Under the Act, the burden of proof is on the asylum seeker to prove, with direct and/or circumstantial evidence, that he or she has been persecuted, or faces persecution, on an account of one of the statutory grounds, which include: race, religion, nationality, membership in a particular social group, or political opinion. This is often a difficult burden, as “those motives are only in the mind of the persecutor”.<sup>24</sup> In the United States, the applicant must convince an asylum officer or immigration judge that he or she has been persecuted or faces severe persecution in their home country, and their country’s government is either unwilling or unable to protect them. Originally when the Refugee Act was conceptualized, it was imagined that the persecutor would be a government actor. Although not required, the applicant must still prove that the persecution falls under the above listed statutory grounds, regardless of the identity of the persecutor.

The definitions of asylee and refugee are very similar, referring to “someone who is outside his or her country of origin and unwilling to return, based on a well-founded fear of persecution due to race, religion, nationality, and/or membership in a particular social group or political opinion”.<sup>25</sup> The fear of persecution can be one of already suffered past persecution, or a reasonable likelihood of future persecution. While an asylee is a person who is physically present in the United

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<sup>22</sup> Stenberg, G. (1989). Non-expulsion and non-refoulement : The prohibition against removal of refugees with special reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees (Studies in international law (Stockholm, Sweden) ; 9). Uppsala: Iustus Förlag : Almqvist & Wiksell International, distributor outside Sweden. Page 198. *Referencing* Pub. L. 96 - 212 of 17 March 1980, 94 Stat. 109.

<sup>23</sup> *Id.* at 197.

<sup>24</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 297.

<sup>25</sup> UNHCR, 1951; 8 U.S. Code, Section 1101.

States or at the border requesting entry, a refugee is a person who has requested a legal status outside of the United States. In order to physically arrive in the United States as an asylee, one must present themselves at a port of entry and risk detention, or arrive with another type of visa or permission, or, enter unlawfully. The United States is attempting to limit unlawful entry through a physical barrier of a wall at the Southern border.

### **A. The Border Wall**

A wall on the border of the United States and Mexico (“the border wall”), has been a heavily pushed policy of the Trump campaign as a means anti-immigrant rhetoric, one in which the borders of the United States would somehow become more secure and all migrants would refrain from attempting to come to the United States if there were a brick physical barrier. After billions of dollars spent and little deterrence for migration, it seems that the concept of a physical wall is deep in the American psyche as a representation of an anti-immigrant mentality. The concept of a border wall is not new to the Trump era; there have been decades of “the ‘militarization’ of the U.S.-Mexico border, a project that began in earnest under President Ronald Reagan and picked up pace under the Clinton administration”, which is only once again picking up steam in the Trump administration.<sup>26</sup> The U.S.-Mexico border has long been patrolled by U.S. military personnel and civilian law enforcement, as well as by Customs and Border Patrol (CBP) through the U.S. Department of Homeland Security (*formerly* INS, Immigration and Naturalization Services). However, the increase in militarization of the border has led to a corresponding increase in human rights violations. Militarization of the border has created an increase in deaths of immigrants who attempt to enter the United States. Immigrants have been killed by border officials and military personnel. The militarization of the border has also caused

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<sup>26</sup> Palafox, Jose. (2000). Opening Up Borderland Studies: A Review of U.S.-Mexico Border Militarization Discourse. *Social Justice*, 27(3), 56. Page 57.

a lack of access to basic needs to prevent the loss of life for immigrants. Humanitarian organizations and private citizens have been denying access to the patrolled border areas, and are unable to attend to vital needs such as water and life-saving medical attention. As a result, hundreds of immigrants die each year at the U.S.-Mexico border, for even such basic preventable reasons such as dehydration.

The border wall and other anti-immigrant policies are violations of an immigrant's right to life. These and other abuses amount to crimes against humanity with concern to migrants arriving and present in the United States through mass incarceration including of children and pregnant women, the use of solitary confinement, sexual abuse, and separation of families.

Previous attempts by the United States at a physical barrier at the border with Mexico have resulted in horrendous consequences. Since the United States implemented its policy of "Operation Gatekeeper" in 1994, over five thousand migrants from all over the world have died at the U.S.-Mexico border.<sup>27</sup> The concept behind this policy that of controlling migration through a deterrence rationale, which resulted in migrants continuing to enter or attempt to enter the United States without inspection, but in more dangerous crossings.<sup>28</sup> The number of deaths due to dehydration, sunstroke, and freezing temperatures has only increased nearly every year, where 477 people were discovered dead at the border in 2012.<sup>29</sup> The head of INS admitted in 2000 that this strategy had failed in deterring unauthorized migration; "[N]onetheless, the strategy has remained

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<sup>27</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 3 : Understanding the controversies and tragedies of undocumented immigration.* Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page 326.

<sup>28</sup> *Id.* at 326-327.

<sup>29</sup> *Id.* at 327.

in place and has expanded significantly since 1994, while deaths of unauthorized border crossers have risen sharply.”<sup>30</sup>

The “heightened loss of life has become the most glaring human rights problem in U.S. border enforcement, constituting a sort of structural, (mostly) indirect form of violence.”<sup>31</sup> Unfortunately, these deaths are only a piece of the human rights abuses at the U.S.-Mexican border. Other abuses include “unjustified shootings, sexual assault, beatings and physical abuse, inhumane detention conditions, denial of due process, verbal and psychological abuse, and destruction of property by law enforcement officials, the Border Patrol most notably.”<sup>32</sup> The prevention of asylum seekers from being able to request asylum, including through the physical instrument to prevent their entry, (such as, through a wall), is in violation of international human rights law, specifically the principle of non-refoulement,<sup>33</sup> as well as other norms of international law that cannot be derogated from, including deportation or forcible transfer of population without grounds permitted under international law. The border wall is unfortunately just one example of the application of refoulement against international law. The United States also applies a policy of intercepting asylum seekers at sea, especially in the Caribbean with concern to Haitians and Cubans.<sup>34</sup> Asylum seekers at land and at sea are often refused entry into the United States, and thus refused even the ability to seek safety. Asylees who are able to physically arrive at a U.S. border may face a violation of their human rights through prolonged and forced detention.

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<sup>30</sup> Simmons, Mueller, Simmons, William Paul, & Mueller, Carol McClurg. (2014). *Binational human rights : The U.S.-Mexico experience* (1st ed., Pennsylvania studies in human rights). Philadelphia: University of Pennsylvania Press. Page 73.

<sup>31</sup> *Id.* at 76.

<sup>32</sup> *Id.* at 77.

<sup>33</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 288.

<sup>34</sup> *Id.* at 303.

## **B. Prolonged and Forced Detention**

The U.S. Constitution's Fifth Amendment protects all persons physically in the United States with the right to due process; however, non-citizens may have limited due process rights if they are classified as "arriving aliens" at a U.S. border. Arriving aliens may be detained and processed, which can be in accordance with international law. A nation does have the right to secure its borders, but it cannot unlawfully detain an individual for an indefinite amount of time. Frequently, arriving aliens are detained and placed in removal proceedings; however, they are often not released or given a bond in order to be released. Although an arriving alien may be physically present in the United States, they have not been admitted legally to the country, and different right may attach under U.S. law. One of the violations of these rights is forced and prolonged detention, which is not consistent with the United States' obligations under the Refugee Convention and under the ICCPR.

The U.S. Supreme Court recently ruled in *Jennings v. Rodriguez* that Sections 1225(b), 1226(a) and 1226(c) of Title 8 of the U.S. Code do not give aliens the right to periodic bond hearings during the course of their detention.<sup>35</sup> Thus, even after more than 180 days of detention without a bond, detained immigrants are still not guaranteed a right to a redetermination of their custody. While they fight their immigration case to request to remain in the United States, even during the pendency of an asylum application in accordance with international law, they are not afforded the right to a bond. This leads to a prolonged and indefinite time of detention, in violation of customary international law. The *Jennings* decision calls into question the case of *Rodriguez v. Robbins*, which previously discussed the presumptive limit for the detention of asylum seekers before they must receive a bond hearing to determine the legality of their

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<sup>35</sup> *Jennings v. Rodriguez*, 583 U.S. \_\_\_\_ (2018). See also *Zadvydas v. Davis*, 533 U.S. 678 (2001) (prohibiting the unlimited detention of migrants pending their removal from the U.S. following the entry of a removal order).

continued detention is six months.<sup>36</sup> The detention is not the only rights' violation, when the conditions of such detention are also considered.

### **C. Poor Conditions of Detention Facilities**

Many in U.S. immigration custody are treated as if they were violent criminals, although their only 'crime' may have been to be present in the United States without authorization; and sometimes not even this, as asylees have a right to arrive at the border and request asylum under customary international law, and the United States obligations under several conventions and treaties. It is not uncommon for detained immigrants in the United States to have hands and feet shackled, and deprived of meals and medical care while in custody.<sup>37</sup> Migrants, including refugees, are often housed alongside violent criminals. A study by the United States Commission on International Religious Freedom found alarming statistics, including that:

“More than half (13/18) of the facilities where male aliens were detained reported that they housed detainees both with and without criminal convictions. Similarly, more than half of the facilities that housed female aliens (10/13) had detainees who had been convicted of one or more criminal offense as well as those who had none. Of the facilities that housed male or female detainees who had criminal convictions with detainees who had non. 11 not only allowed some contact or interaction between both groups but also provided for shared sleeping quarters where both groups were co-mingled. Along the 8 facilities that housed non-DHS jail inmates (either sentenced or awaiting trial), 7 permitted some contact between them and the detained aliens and, in the case of 4 facilities, this included shared sleeping quarters.”<sup>38</sup>

There is a general lack of access to health care and medical attention within detention facilities, which has led to even deaths of immigrants while in custody. Despite the loss of human life, these same facilities continue to operate, where even private prisons and facilities run on a for-profit

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<sup>36</sup> *Rodriguez v. Robbins*, 715 F. 3d 1127 (9<sup>th</sup> Cir. 2013).

<sup>37</sup> Hunter, A., Stewart, A., Lykes, M., & Hershberg, R. (2015). Continuities and Discontinuities in Human Rights Violations: Historically Situating the Psychosocial Effects of Migration. *71*(2), 244. Page 254.

<sup>38</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Page 184.

model, paid by the U.S. government. This is a clear violation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Perhaps one of the most grossly shocking aspect of these detention policies and facilities is the lack of awareness and attention to the trauma already endured by many refugees.

The inherent definition of a refugee is one who is seeking safety following persecution. Given that refugees in the United States are nearly always housed in private prison or detention facilities, often alongside criminals, the above reference study found that “staff at very few of the facilities were given any specific training that was designed to sensitize them to the special needs or concerns of asylum seekers, and in even few facilities did they receive any training to enable them to recognize or address any of the special problems for which victims of torture and other forms of trauma might suffer or the special difficulties they might experience in the course of their detention.”<sup>39</sup> The mere act of detaining refugees within these confines and conditions creates conditions reminiscent of punishment and inhuman treatment.

The ultimate violation of human rights and dignity is the death of a migrant. Alarming, deaths in U.S. immigration detention are reported each year. Although natural deaths *can* be possible, deaths in ICE custody are too often the result of deplorable conditions and indifference or perhaps malicious intent. Most recently on May 25, 2018, a transgender woman from Honduras seeking asylum in the United States died in U.S. government custody in New Mexico, having shown ““symptoms of pneumonia, dehydration and complications associated with HIV,” before dying of cardiac arrest”.<sup>40</sup>

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<sup>39</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Pages 184-85.

<sup>40</sup> Da Silva, Chantal. (May 30, 2018). “Transgender Woman Dies in ICE Custody, Sparking Outrage Over ‘Deplorable and Inhumane’ Conditions”. NEWSWEEK. Available at: <http://www.newsweek.com/transgender-woman-dies-ice-custody-sparking-outrage-over-inhumane-conditions-949861>. Last Accessed May 30, 2018.

Deaths in U.S. government immigration custody “should be treated as authentic violations of the human rights of the victims, because these migrants, who have been directed to places of high risk by unilateral immigration policies, have an inherent right to life.”<sup>41</sup> The tragedy of these deaths could be avoided in many ways, beginning with not placing vulnerable immigrants in detention facilities. There are other forms of assuring an structured process of adjudication of deportation defenses, including an alternatives to detention program that *already* exists. Alternatives have included electronic ankle monitors, check-ins, and other such programs, which have also shown to have high success rates in terms of ensuring immigrants continue to appear and comply with immigration proceedings, all at a fraction of the financial and humanitarian cost of detention. “Aside from reducing costs and mitigating concerns about compliance and appearance, ATD [alternatives to detention] programs can lead to positive results such as reducing wrongful detention and respecting human rights of noncitizens by addressing their welfare and liberty interests.”<sup>42</sup>

#### **D. Violations of Due Process**

CBP Officers at the U.S. borders have specific duties outlined under Section 235(b) of the INA (8 U.S.C. 1225(b)) (INA) with respect the treatment and processing of migrants who present themselves at ports of entry, or who attempt to enter without inspection. Several issues of concern are with respect to certain types of conduct, including:

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<sup>41</sup> Simmons, Mueller, Simmons, William Paul, & Mueller, Carol McClurg. (2014). *Binational human rights : The U.S.-Mexico experience* (1st ed., Pennsylvania studies in human rights). Philadelphia: University of Pennsylvania Press. Page 34.

<sup>42</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 2 : Understanding the controversies and tragedies of undocumented immigration*. Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page 58.

- “A) Improperly encouraging such aliens to withdraw their applications for admission.
- B) Incorrectly failing to refer such aliens for an interview by an asylum officers for a determination of whether they have a credible fear of persecution (within the meaning of section 235(b)(1)(B)(v) of such Act).
- C) Incorrectly removing such aliens to a country where they may be persecuted.
- D) Detaining such aliens improperly or in inappropriate conditions.”<sup>43</sup>

The United States has also violated due process with concern to refugees in international waters. During the 1980s there was an influx of migrants from Haiti seeking refuge, or at least attempting to, in the United States. To prevent asylees from arriving on U.S. territory and thus triggering certain laws of protection regarding non-refoulement, the U.S. government intercepted vessels carrying refugees before they could arrive at the U.S. border. In *Chris Sale, Acting Commissioner, INS et. al. v. Haitian Centers Council Inc. et. al.* [1993] 509 US 155, the Supreme Court in this decision reflects the “only illustration of an express refusal by a court to apply to refugees the principle of *non-refoulement* beyond territorial borders, excluding the applicability of both the Refugee Convention and domestic constitutional guarantees in relation to a series of Coast Guard operations resulting in the interception and direct return of asylum seekers to their country of origin from the high seas.”<sup>44</sup> This decision has been rejected by most bodies regulating customary international law, including the U.N. High Commissioner for Refugees, where subsequent U.S. jurisprudence has also contradicted *Sale*.<sup>45</sup> Following this logic, attempting to control the movement of migrants, including refugees, before they arrive within the nation’s territorial borders, is incompatible with customary international law and human rights. These actions can, however, be governed of State Parties to the Refugee Convention.

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<sup>43</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Page 48.

<sup>44</sup> Moreno Lax, V. (2017). *Accessing asylum in Europe : Extraterritorial border controls and refugee rights under EU law* (First ed., Oxford studies in European law). Oxford: Oxford University Press. Page 255.

<sup>45</sup> *Id.* at 258.

## **1. Criminalization of reentry**

Under U.S. Federal Code, immigrants who have been previously removed from the United States may face federal criminal charges upon an unlawful reentry into the country. The United States has stated that the rationale behind criminal prosecutions for unlawful entry and reentry into the country was to “help deter illegal immigration and keep dangerous criminals outside the United States...To the extent that the current approach is advancing important goals, moreover, its successes should be weight against its costs.”<sup>46</sup> Despite the continuing and even extending use of federal prosecution, the limited deterrent effect and high financial costs, is hard pressed to be outweighed by the cost of humanitarian rights and customary international law.

The criminalization of immigration laws thus results in consequences under both immigration law and federal criminal law for the attempted reentry, or in some cases simply the first entry, into the United States. This is of grave concern with regard to human rights, where the UN special rapporteur on the human rights of migrants has specifically called out the United States, stating that “[I]rregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security”.<sup>47</sup> United Nations human rights experts have advised against the use of criminal procedures against migrants, where “[t]he breadth and scope of criminal prosecutions for illegal entry and reentry, moreover, have led to procedural shortcuts, including rapid-fire group trials in Operation Streamline, that imperil the due process rights of immigrant defendants.”<sup>48</sup>

Many who reenter the United States illegally do so to reunite with family members, including U.S. citizens and lawful permanent residents, including parents, spouses, and children.

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<sup>46</sup> Meng, G. (2013). *Turning migrants into criminals : The harmful impact of US border prosecutions*. New York]: Human Rights Watch. Page 69.

<sup>47</sup> *Id.* at 4.

<sup>48</sup> *Id.* at 5.

The U.S. federal code has tried to adapt to this reality. “Defendants who grew up in the US from a young age, whose entire families are in the US, and who have no ties to the countries of their birth are so common, the US Sentencing Commission in 2010 amended the sentencing guideline to recognize ‘cultural assimilation’ as a valid reason for granting a lower-than-guideline sentence, to be considered in cases where, in part, ‘those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States.’”

Although the intention of these guidelines is meant to take into consideration the humanitarian concerns of returning migrants, it still does not address the inherent violations of human rights with concern to family unity and reunification. Migrants can be returned to a country they may not even know, and if they return to the United States, they can be subjected to lengthy federal prison sentences simply for their return. Defense attorneys have even noted that although the sentencing guidelines are meant to mitigate the time to be served, “judges sometimes see these very ties as evidence that the defendant is likely to come back and should be more harshly sentenced in order to provide a stronger deterrent.”<sup>49</sup>

The criminalization of illegal entry can also result in prosecution of migrants fleeing violence and persecution. Protections for under international law must include those that are seeking protections, but have not yet had their asylum request adjudicated; without such a concept, genuine refugees could be denied under Article 31(1) of the 1951 Refugee Convention.<sup>50</sup> In some instances, however, the United States has violated A federal criminal proceeding “can delay asylum applications, exacerbate trauma or psychological problems, and potentially discourage

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<sup>49</sup>Meng, G. (2013). Turning migrants into criminals : The harmful impact of US border prosecutions. New York]: Human Rights Watch. Page 51.

<sup>50</sup> 1951 Refugee Convention. art. 31(1). Referring to: “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 in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

people from pressing their asylum claims at all.”<sup>51</sup> The focus for a migrant can thus turn from seeking safety to that of being labeled a criminal and bargaining with a prosecutor to avoid being in prison. Thus, “charging such individuals with illegal entry or reentry contravenes a fundamental principle of international refugee law: asylum seekers should not be penalized for using improper means to enter the country where they are seeking asylum.”<sup>52</sup>

## **2. Rapid processing without due process**

Before asylees are able to present their claim for protections, their claims may be blocked from being presented; and if they are presented, they may be processed quickly without a complete consideration of their merits. “Vulnerable populations crossing borders, including asylum-seekers, refugees, trafficking victims, and unaccompanied children often get caught up in migration policies that fail to adequately distinguish between the ‘mixed flows’ crossing borders. Instead of being offered special status and protections, governments may treat such individuals as immigration offenders through summary deportation, or re-victimization through systems of immigration arrest, detention, and deportation.”<sup>53</sup> This rapid and systematic processing also includes previously discussed criminalization of entry and reentry.

The current U.S. Attorney General Sessions has begun a review of current immigration law precedent by re-determining case law precedent. As the Attorney General, he has the authority over the U.S. Department of Justice, and thus over both the Executive Office for Immigration Review and the Board of Immigration Appeals (“BIA”). The Attorney General is attempting to reshape who qualifies for asylum, where his presumed intent is to determine that asylum seekers

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<sup>51</sup> Meng, G. (2013). *Turning migrants into criminals : The harmful impact of US border prosecutions*. New York]: Human Rights Watch. Page 63.

<sup>52</sup> *Id.* at 64.

<sup>53</sup> Varia, N. (2010). *Rights on the line : Human Rights Watch work on abuses against migrants in 2010*. New York, NY: Human Rights Watch. Page 3.

are not entitled to a hearing before the immigration judge of their application for asylum. The Attorney General has recently vacated a four-year precedent of the Board of Immigration Appeals decision, which held that immigrants applying for asylum or withholding of removal are entitled to a full hearing on their application.<sup>54</sup> Previously, asylum applicants were eligible to request asylum before the asylum office. If their case was denied, the applicant was then referred to the EOIR courts, and given an opportunity to have their petition reviewed once more before the immigration judge; the immigration judge thus had the authority to overrule an asylum office's denial of an application. By calling into question this BIA precedent, the U.S. is opening itself to violations of customary international law. Under this new proposal by the Attorney General, asylum officers, who may not even be attorneys, could thus make determination of the law as to whether an asylee meets the burden of asylum, and this determination would not be subject to appeal or review.

### **3. Deportation as a violation of international law**

Nations must screen migrants to ensure that they do not meet the definition of refugee before attempting to return them to their country of origin through deportation. The principle of non-refoulement holds that a person who qualifies as an asylee or refugee has the right to seek refuge in the country, and therefore cannot be returned to his or her country of origin.<sup>55</sup> The United States, however, "tends to make narrow interpretations of the concept of refugee, limiting in that way the right of asylum, and, consequently, the right to not be subject to Refoulement".<sup>56</sup> An individual with a well-founded fear of persecution "may be subject to refoulement if he or she is not able to show that the (i) central reason the persecutor had for threaten[ing] applicant's life or integrity was

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<sup>54</sup> *Matter of EFHL*, 27 I&N Dec. 226 (AG 2018), reopening *Matter of EFHL*-, 26 I&N Dec. 319 (BIA 2014).

<sup>55</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 285-286.

<sup>56</sup> *Id.* at 286.

one of the statutory grounds, (ii) his or her testimony is *credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee*, (iii) evidence, in case the adjudicator consider[s] his or her testimony is not enough”.<sup>57</sup> These are difficult burdens to prove, especially for those who have fled their home country, often with nothing – including no identification, let alone physical proof of their persecution, if it even ever existed.

In 2012, approximately 400,000+ immigrants were deported from the United States.<sup>58</sup> Some of these immigrants were placed into removal proceedings or detained through ICE raids, including at workplaces. These systematic, military styled raids are generally vastly disproportionate to the threat that these immigrants pose. Those residing undocumented in the United States are also largely working class, having resided in the United States for a decade or more, often with U.S. citizen children and other lawfully residing family members.<sup>59</sup> Removing such immigrants calls into question the values and priorities of the United States, as well as whether they are ultimately in line with customary international and humanitarian laws. Numerous treaties signed by the United States, including the United Nations Human Rights Committee, express the international right to family unity, where the United States should not be deporting migrants if doing so would destroy family unity.

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<sup>57</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 303.

<sup>58</sup> Hunter, A., Stewart, A., Lykes, M., & Hershberg, R. (2015). Continuities and Discontinuities in Human Rights Violations: Historically Situating the Psychosocial Effects of Migration. *71(2)*, 244. Page 245.

<sup>59</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 1 : Understanding the controversies and tragedies of undocumented immigration.* Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page viii.

### **III. Asylum and Refugee Seekers**

#### **A. U.S. violations of international law with concern to asylees at land and sea borders**

##### **1. Refusal of Entry of Asylees**

The State has the power to grant asylum.<sup>60</sup> An asylee does not necessarily have the right to be granted asylum, however, this does not give the State the permission to violate international human rights in the process. “One of the major doctrinal problems has been whether or not an alien who presents himself at the frontier post and requests determination of his refugee status and protection against being sent to a country of persecution is protected by Article 33 of the 1951 Convention.”<sup>61</sup> Customary international law has come to agree that this article “must be considered to include non-rejection at the frontier.”<sup>62</sup> The procedures in place at the U.S.-Mexico border, however, are inadequate to properly identify refugees in need of protection.

With concern to asylees, many who arrive to the U.S. border and request asylum, in accordance with international law, and detained by U.S. Customs and Border Patrol (“CBP”). Countries are “not allowed to ‘catch; individuals who are trying to enter their borders, and return them to their countries where there exists the possibility they will face persecution”.<sup>63</sup> Not surprisingly, however, this is exactly how the U.S. system has been set up, especially with concern to the treatment of asylees arriving to the U.S.-Mexico border. CBP often refuses entry of asylum seekers, preventing them from legally requesting asylum under customary international law; thus, returning refusing their entry, “without an analysis of whether or not their life or personal integrity

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<sup>60</sup> Stenberg, G. (1989). *Non-expulsion and non-refoulement : The prohibition against removal of refugees with special reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Studies in international law (Stockholm, Sweden) ; 9). Uppsala: Iustus Förlag : Almqvist & Wiksell International, distributor outside Sweden. Page 16.

<sup>61</sup> *Id.* at 176.

<sup>62</sup> *Id.*

<sup>63</sup> Arenilla, S. (2015). *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 286.

will face any danger”.<sup>64</sup> Asylum seekers can also not “be prevented from being able to request protection, even if they enter unlawfully, or if they are on the border”.<sup>65</sup> CBP Officers may briefly ask asylees if they have a fear of return. Many of these interviews are conducted within ear-sight of other migrants, thus not allowing the asylee to perhaps feel safe to disclose their fears for return, or the facts necessary to determine if they are a genuine refugee. The current process of questioning may not be sufficient to elicit the details necessary for a CBP Officer to make a proper determination as to refugee status, including the ability to investigate the motivations, beliefs, and background of the migrant.

Upon an expression of a fear of return to a migrant’s native country, the CBP Officer should refer the migrant to an asylum officer for a credible fear interview; if the migrant has been previously removed from the United States, they may only be eligible for “withholding of removal”, in which case the migrant faces the more difficult burden through a reasonable fear interview. Both asylum and withholding of removal require that the applicant show a history of past persecution, or possible future persecution, under the previously mentioned protected grounds. Withholding of removal requires the additional higher standard that this persecution be *more likely than not*; asylum requires the lower burden of a well-founded fear of persecution.

Asylees with a positive credible fear finding are unlikely to abscond, given that an asylum officer has already determined there is a possible claim for asylum. However, as previously mentioned, asylees are considered arriving aliens, and are presently detained, and frequently not given a bond, or are given a bond that is too high to post. The asylee, even having passed the first burden in the long process, may be detained for months or even years in the United States as they

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<sup>64</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 286.

<sup>65</sup> *Id.* at 288.

seek relief entitled to them under customary international law. Under current U.S. practices, those who are only eligible for withholding of removal due to a previous deportation or removal order have not been given a bond whatsoever, and thus are mandatorily detained until the adjudication of their proceedings.

## **2. Expedited removal at ports of entry**

The concept of expedited removal, or an accelerated deportation order without the right to seek review by an immigration judge, was codified in IIRIRA in 1996. This process may easily lead to violations of the 1951 Refugee Convention with concern to refoulement for genuine asylum seekers, as this administrative decision is made in a hasty manner with little review. Expedited Removal was meant as an administrative means for Customs and Border Patrol to quickly expel immigrants, or ‘aliens’ who entered the United by fraudulent means, misrepresentation, or without proper travel documents. The current process in the United States allowing for an expedited removal is reminiscent of the Haitian Refugee influx into the United States by sea in late 1970s. Further litigation proved that that program caused, “inadequate legal representation, incomplete asylum applications, insufficient consideration of claims, poor translation -- all this culminated in a program, which ‘in its planning and executing [was] offense to every notion of constitutional due process and equal protection.’”<sup>66</sup>

Allowing for an expedited removal can mean that an asylum seeker, who sought entry into the United States in accordance with customary international law and international human rights treaties, could be forcibly removed from the United States simply by not having a valid visa to enter the country, and even then, by simply a refusal of entry by a border officer. INA Section

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<sup>66</sup> Lawyers Committee for Human Rights, Lawyers Committee for International Human Rights, & Human Rights First. (1990). *Refugee refoulement : The forced return of Haitians under the U.S.-Haitian interdiction agreement*. New York, N.Y.: Lawyers Committee for Human Rights. Page 51. *Quoting Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980).

235(b)(B)(iii)(I) states that “[F]or purposes of this subparagraph, the term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208”.<sup>67</sup>

The United States violates international customary law, as this section thus allows an asylee who is requesting asylum to be removed without further review if the officer determine that he or she does not have a credible fear of persecution. This determination is made only with the statements made by the alien and the facts that are known to the officer.<sup>68</sup> It should be noted that rarely, if ever, is a border officer an attorney, or even a necessarily a person with any higher educational background, yet they are single-handedly entrusted with applying the law with possible life-threatening consequences for bona-fide refugees. This decision is subject to review if the alien requests the review; the alien must be heard by the immigration judge; and the review shall be concluded within 24 hours and no later than 7 days.<sup>69</sup> The process is often done with such haste that asylees may be unaware of their right to seek a review by a judge, or are fearful given their reasons for fleeing their home country.

### **3. Subsequent bars to asylum; withholding only proceedings**

A previous expedited removal or deportation order serves as a bar to receiving a grant of a subsequent asylum application. Thus, those immigrants who have been previously deported or expedited removed are only eligible for the higher burden of withholding of removal or protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). This can even occur when an immigrant is denied entry into

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<sup>67</sup> INA Section 235(b)(1)(B)(iii)(I).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

the United States and expedited removed by one border patrol officer, only to return to the United States, even hours later, and a different officer allows for a credible/reasonable fear interview. Although the underlying circumstances of the asylee's claim for asylum have not changed, he or she is no longer eligible for permanent relief of asylum, but rather only the temporary relief of withholding of removal.

Migrants with a previous deportation order, including from an expedited removal, have also been referred for criminal prosecution for criminal reentry instead of being considered for a reasonable fear interview and a possible claim for withholding of removal or protections under the CAT.<sup>70</sup> “In addition to the trauma criminal prosecution and incarceration may impose on asylum seekers, an asylum seeker who is not given a credible fear interview before being prosecuted and deported faces significant challenges to seeking refugee protection, including longer waits in detention and a higher standard of proof” for withholding of removal only instead of asylum.<sup>71</sup>

Withholding of removal does not allow for a permanent residence in the United States, although it may be continued indefinitely. However, unlike those granted asylum status, withholding of removal does not allow for the petitioning of any qualifying family members. Thus, the a migrant loses many benefits by not being able to qualify for asylum status. Withholding is also more difficult to win over asylum, as the applicant must prove that persecution is more probable than not, in comparison to asylum's burden of a “well-founded fear” of persecution.<sup>72</sup> And with this even higher standard of burden of proof, the applicant has much less to gain than if he or she were eligible to present an asylum claim.

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<sup>70</sup> Meng, G. (2013). *Turning migrants into criminals : The harmful impact of US border prosecutions*. New York]: Human Rights Watch. Page 65.

<sup>71</sup> *Id.* at 67.

<sup>72</sup> Schoenholtz, Schrag, Ramji-Nogales, Schrag, Philip G., & Ramji-Nogales, Jaya. (2014). *Lives in the balance : Asylum adjudication by the Department of Homeland Security*. New York: New York University Press. Page 42.

## **B. Family detention**

The United States has become a widespread user of detention facilities for migrants both at borders of entry and within the country. As a DHS Agency policy, asylum seekers with a credible fear of persecution should be released, provided that the agency has determined that the migrant does not pose a risk to the community, and is not likely to abscond from removal proceedings.<sup>73</sup> “A decision to detain an asylum seeker who meets the release criteria or to an asylum seeker who does not meet the criteria would be considered an improper use of DHS discretion.”<sup>74</sup> In 2014, in part due to an influx of migrants at the U.S.-Mexico border, the United States began a “no-release” policy for women and children detained at the border<sup>75</sup>; the vast majority were migrants from Central America seeking asylum in the United States. This process of no-release was and continues to be rife with human rights violations such as arbitrariness, abuse, and a lack of due process. The initial idea by the United States had been that of deterrence of asylum seekers,<sup>76</sup> believing that if others in Central America heard of women and children being detained while seeking their right under customary international law to request asylum, that this would deter asylum seekers. Detention, however, should never be used as a means to thwart other asylum seekers from asserting their rights under customary international law in the arrival country.

While the detention of asylees may not *per se* be against international law, the United States is violating international human rights law in its arbitrary and prolonged detention, and unlawful

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<sup>73</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Page 50. *See also* INS Memorandum, *Expedited Removal: Additional Policy Guidance* (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in 75 Interpreter Releases 270 (Feb. 23, 1998).

<sup>74</sup> *Id.*

<sup>75</sup> Meili, S. (2015). Do human rights treaties matter? Judicial responses to the detention of asylum seekers in the United States and the United Kingdom. *New York University Journal of International Law and Politics*, 48(1), 209-258. Page 210.

<sup>76</sup> *See R.I.L.-R et. al. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. Feb. 20, 2015).

deprivation of liberty, including that of children, in unacceptable conditions, for indefinite periods of time. A short period of detention until identity can be established would be permissible; however, once it has been determined that the migrant (*for example*, a pregnant mother and her child, neither with any criminal history or ties) are not a threat to national security, indefinite detention is not appropriate. However, UNHCR has taken detention under the Refugee Convention to be only as a, “last resort, with liberty being the default position”, with detention only for “public order, public health, or national security”.<sup>77</sup>

### **1. Separation of families**

When a family is apprehended at the U.S. border or port of entry and requests asylum, it is possible that the family will be separated, even while claiming the same relief based on the same fear of persecution. There are presently no ‘family’ facilities for men or men with children; thus, all men are separated from the family. This has even been the case where male teenage children are separated. The men may be placed in separate facilities in different states, where often they have no contact with their remaining family, nor even knowledge of their whereabouts. If a single father arrives at the border, he may be detained alone, while his children are placed in essentially group-type homes in care of the Office for Refugee Resettlement. Recently outraged has ensued following the seeming misplacement of over 1,500 children whom were placed with ‘sponsors’, no longer tracked or monitored by the U.S. government.<sup>78</sup> Sponsors may not be family members, and the lack of tracking of this children leaves fears that they could be exploited and/or trafficked.

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<sup>77</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 19 March 2018].

<sup>78</sup> Nixon, Ron. “*Federal Agencies Lost Track of Nearly 1,500 Migrant Children Placed With Sponsors*”. *The New York Times*: April 28, 2018. <https://www.nytimes.com/2018/04/26/us/politics/migrant-children-missing.html>.

Once parents and children or other family members are separated, they can become lost in the overwhelmed U.S. immigration system. Women and children may be detained together, but often their immigration court files are not linked with their separated family members. Their claims to asylum may be stronger if taken as a whole family, versus looking at only one individual. It is also not uncommon for one family member to receive a positive credible fear determination, and thus be able to continue with an asylum application, while another family member, with a different asylum officer, may be determined to have a negative fear and thus referred for removal.

## **2. Prolonged and indefinite detention of women and children, often without the right to bond**

The IIRIRA demands mandatory detention for asylum seekers pending a final determination of credible fear of persecution and if found not to have such a fear, until removal<sup>79</sup> of that person. The INA, adopted first in 1952, does allow for parole of any migrant who is not a flight risk, or risk to the national security. Following IIRIRA, those migrants subject to mandatory detention increased dramatically, including migrants who have been expedited removed.<sup>80</sup>

The INA provides that any alien subject to Expedited Removal procedures “shall be detained pending a final determination of credible fear of persecution and, if found to have such a fear, until removed.”<sup>81</sup> Detention after a positive credible fear is found is, however, not mandatory, where “ICE District Directors may parole at their discretion those aliens who meet the credible fear standard, can establish identity and community ties, and who are not subject to possible bars to asylum involving violence or other misconduct.”<sup>82</sup>

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<sup>79</sup> INA Section 235(b)(1)(B)(iii)(IV); 8 U.S.C. 1225 (b)(1)(B) (2004).

<sup>80</sup> 8 U.S.C. § 1225(b) (1)(B) (iii) (IV) (2015); 8 C.F.R. § 235.3(b) (2) (iii) (2012).

<sup>81</sup> INA Section 235(b)(1)(B)(iii)(IV); 8 U.S.C. 1225 (b)(1)(B) (2004).

<sup>82</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Page 180.

Migrant detention, especially that of families, children, and even the separation of families, will have long-term psychological and emotional consequences to these especially vulnerable populations. For some refugees, the sheer basis of their claim may be the unlawful detention in their country of origin, where the detention in the United States, especially when prolonged or indefinite, may cause severe psychological and physical damage, as well legal consequences. “[S]ome of those subjected to the Expedited Removal process may decide to terminate their asylum application, despite credibly fearing return to their home country, because they are traumatized and disheartened by their experiences in detention.”<sup>83</sup>

### **C. Denial of asylum applications**

The denial of a legitimate claim to asylum can have severe and even deadly consequences if one is a bona-fide refugee.<sup>84</sup> The 1951 Convention does not contain a right to asylum, however, “nations are not free to reject at the frontier, and they must adopt measures to guarantee the principle of Non- Refoulement if they are not prepared to grant asylum, such as the removal to a safe third country or temporary protection or refuge”.<sup>85</sup> Article 33 of the Convention does not require that the State grant asylum, but if the migrant is a bona-fide refugee, they cannot be sent back to the country of persecution.<sup>86</sup> Either the State can find a third country to accept the refugee, or the refugee must remain in the arriving State. Under IIRIRA, the United States imposes a one

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<sup>83</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Page 197.

<sup>84</sup> Schoenholtz, Schrag, Ramji-Nogales, Schrag, Philip G., & Ramji-Nogales, Jaya. (2014). Lives in the balance : Asylum adjudication by the Department of Homeland Security. New York: New York University Press. Page 49.

<sup>85</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 292, *citing* Lauterpacht and Bethlehem, *op. cit.*, p. 113. *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge University Press, June 2003, p. 93. <http://www.refworld.org/docid/470a33af0.html>.

<sup>86</sup> Stenberg, G. (1989). Non-expulsion and non-refoulement : The prohibition against removal of refugees with special reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees (Studies in international law (Stockholm, Sweden) ; 9). Uppsala: Iustus Förlag : Almqvist & Wiksell International, distributor outside Sweden. Page 178.

year deadline for filing a formal written request for asylum; those immigrants who seek have legitimate claims for asylum, if not requested within a year, may be denied and exposed to refoulement.

Asylees and refugees differ from other categories of migrants, in that the denial of their application and return to their country of origin can have grave consequences to their safety. “While expulsion for generally preventive reasons is allowed in the case of an ordinary alien, a refugee can be expelled only if it can be considered that he, himself, constitutes a danger to public security or public order.”<sup>87</sup>

### **1. Affirmative and defensive filings**

An applicant for asylum in the United States may file an affirmative application within one year of arrival to the country, or within a reasonable period of changed and/or “extraordinary” circumstances.<sup>88</sup> Applications passed the one year deadline may be rejected if they do not fit the limited criteria for an exception, and are thus then only considered for withholding of removal and CAT in the alternative. The one year bar thus can cause violations of the bar against non-refoulement, as bona-fide claims to asylum can be rejected simply based on a procedural bar set by Congress, with no consideration for the legitimacy of the claim. This can lead “to arbitrary and disparate outcomes” and can deter bona fide claims.<sup>89</sup>

Defense asylum claims are presented while an alien is in removal proceedings, following apprehension, or after a referral from the asylum office after a denial of an affirmative asylum application by an asylum officer. “An immigration judge can review the asylum officer’s

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<sup>87</sup> Stenberg, G. (1989). *Non-expulsion and non-refoulement : The prohibition against removal of refugees with special reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees (Studies in international law (Stockholm, Sweden) ; 9)*. Uppsala: Iustus Förlag : Almqvist & Wiksell International, distributor outside Sweden. Page 163.

<sup>88</sup> Schoenholtz, Schrag, Ramji-Nogales, Schrag, Philip G., & Ramji-Nogales, Jaya. (2014). *Lives in the balance : Asylum adjudication by the Department of Homeland Security*. New York: New York University Press. Page 45.

<sup>89</sup> *Id.*

determination that the alien does not have a credible fear of persecution, but there is no other administrative or judicial review of CBP, USCIS, or ICE actions in Expedited Removal.”<sup>90</sup> When an immigration judge is hearing an initial defensive application for asylum, the alien’s assessment made by the CBP Officer become part of that alien’s record and is considered in the removal proceedings. These comments and writings by an officer who is not necessarily trained in asylum can greatly influence the immigration judge’s decision.

“Immigration judges responsible for assessing credibility and ruling on the merits of the case must content with an administrative record that is deeply flawed when purporting to convey the alien’s prior ‘statements’. The forms filled out by inspectors and asylum officers for screening purposes are often regarded as though they contain comprehensive if not verbatim transcripts of the alien’s asylum claim. The alien’s own complete and considered testimony is then all too often seen as self-serving embellishment, lacking in credibility. The result is that aliens seeking asylum in Expedited Removal face serious obstacles to establishing their credibility that other asylum seekers do not, obstacles put in their path by the Expedited Removal process itself.”<sup>91</sup>

Another concerning aspect of this process is that there is no right to representation. While an alien may consult with an attorney or representative at their own expense, given the often lack of knowledge of the complex asylum process, and detention in facilities with scant access to counsel, it is extremely difficult for a refugee to benefit from often much needed legal advice. “While an alien/asylum seeker will not have access to counsel at the primary or secondary inspection process, or likely not even at the credible fear determination, the alien is asked to sign legal documents which will have a bearing on a subsequent claim for asylum.”<sup>92</sup> The same application for asylum have different findings in different immigration courts. Although the Federal law is universal

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<sup>90</sup> United States Commission on International Religious Freedom. (2005). Report on Asylum Seekers in Expedited Removal. Volume II: Expert Reports. Washington, D.C.: United States Commission on International Religious Freedom. Page 53.

<sup>91</sup> *Id.* at 88.

<sup>92</sup> *Id.* at 238.

across the country, its application and interpretation can vary greatly, especially with concern to definitions of particular social groups. Membership in a particular social group can be the or one of the grounds for granting of asylum status, however, the definition of what consists of a group is inconsistent across the country. What may be an acceptable social group in one Circuit may not be in another; this may vary but Circuits, and can then become the difference between asylum or removal.

#### **D. Refusal of entry of certain refugees against international law**

##### **1. U.S. violations of proposed laws with concern to the “Muslim Bans”**

A large part of the Trump Administration’s call with concern immigration involved the ban of certain categories of people, based initially on their religion. Through several failed proposed ban by the President’s executive orders, the U.S. Supreme Court has been asked to review the legal authority under U.S. law. Although the President had initially proposed the refusal of entry of certain aliens, including both those with immigrant and non-immigrant intent, based solely on their religion (those being Muslim or of the Islamic faith). Given the clear violation of U.S. law of such a ban, the Administration attempted several bans of any aliens from select countries, including initially countries only with a Muslim majority population. During the pendency of the legality determination of the most recent travel ban, applicants for U.S. visas abroad have been able to file for waivers, or essential pardons of any grounds that would allow them to lawfully enter the United States. Although on its face these waivers are available to be requested, the U.S. government has questionably be denying most applications or refusing to adjudicate them, making the option to apply an essential farce.

### **III. Migrants presently in the United States facing possible removal**

The United States has a history of granting temporary legal statuses to migrants, only to then rescind sometimes from one day to the next. The Chinese Exclusion Act of 1882 for example, Chinese immigrants whom had just two decades prior been recruited to work in agriculture in the United States quickly became undesirable. When there were no workers in the United States, migrant workers filled and continue to fill this gap to maintain these economies. Where the United States had actively recruited Chinese workers in the 1860s, by the 1880s they were discriminated against and denied entry and legal status due to their country of origin.<sup>93</sup> Japanese Americans were sent to internment camps with the fears of World War II. Mexican workers recruited in the beginning of the 1942 Bracero Program became illegal migrants instantly with the program's repeal in 1964.<sup>94</sup>

Deferred Action in U.S. immigration law refers to a system of prioritization within immigrants who may be subject to removal. Given millions of migrants without a fixed status and the sheer lack of resources of the U.S. government, the State must choose priorities for removal. Those migrants who are determined to not be at the top of the list can be given delayed action, and possible conditional temporary legal statuses until (and if) their priority for removal changes. However, deferred action is temporary. Only certain categories of deferred action may request permission to travel abroad; protections do not extend to any other family members; and the lack of permanency leaves many in limbo.

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<sup>93</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 1 : Understanding the controversies and tragedies of undocumented immigration.* Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page x.

<sup>94</sup> *Id.*

## **A. Deferred Action for Childhood Arrivals**

Deferred Action for Childhood Arrivals (DACA) is one of the newest forms of this temporary status, which was introduced by USCIS in 2012. Applicants must meet strict criteria, including having arrived in the United States before age 16, and other educational and moral requirements. For many, deferred action can “legitimize or delegitimize”<sup>95</sup> their legal standing in the United States. Unfortunately, for some, a conviction of a non-violent crime, including simply a felony criminal reentry into the United States, will bar a migrant from qualifying for DACA.

The United States has over one million children and youth growing up undocumented.<sup>96</sup> Other sources find this closer to two million, where an estimated 1.26 million youth qualify for DACA, with another 500,000 who have not yet turned 15 years old in order to apply.<sup>97</sup> U.S. law has found that unauthorized youth deserved equal protection under the law by virtue of their residence and personhood.<sup>98</sup> However, this law is not universally applied within the United States, where federal and state policies interact to affect access to membership for young adult immigrants in states with very different political climates. Undocumented children are caught between advocates respecting the rights of the child, against those pushing for securing borders and tough immigration policies. “Although piecemeal policies including DACA offered youths a stepping stone toward inclusion, without the security of comprehensive immigration reform and the promise of citizenship, undocumented youths remained vulnerable and largely excluded from full

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<sup>95</sup> Gonzales, Roberto G, Sigona, Nando, Burciaga, Edelina Muñoz, Cebulko, Kara, & Silver, Alexis. (2016). Navigating DACA in Hospitable and Hostile States. *American Behavioral Scientist*, 60(13), 1553-1574. Page 1553.

<sup>96</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 2 : Understanding the controversies and tragedies of undocumented immigration.* Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page 145.

<sup>97</sup> *Id.* at 174. *Children under the age of 15 may only apply for DACA, assuming they meet all other qualifications, if they are in removal or deportation proceedings.*

<sup>98</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

membership in the United States.”<sup>99</sup> While living undocumented, youth especially begin to feel exclusion in sometimes the only home they have really known. Without social security numbers they can often not obtain driver’s licenses, apply for jobs, nor rely on financial aid for higher education.

Although DACA is one of the most recent categories of deferred action, other forms of humanitarian relief have been available in the United States for a temporary reprieve from deportation. Another form of deferred action includes prosecutorial discretion, including allowing immigration judges and government attorneys within immigration to place removal cases on temporary hold, or to perhaps not even move forward with a removal case, often based on humanitarian reasons.

#### **B. TPS Recipients (Temporary Protective Status)**

The United States has allowed for temporary protective status for immigrants from certain nations, whom have found themselves physically present in the United States, and Congress has deemed that they may be afforded a short-term reprieve from removal due to conditions in their home country. This has been granted in the past due to natural and political disasters, such as a devastating earthquake or a terrorizing civil war.

The United States is not unique in allowing a temporary status. Following the Balkans War, several European states allowed for a temporary protective status, only to subsequently have it withdrawn.<sup>100</sup> The United States has begun to withdraw its classification of certain designations of TPS, with unknown but foreseeable consequences to come. The withdrawal of TPS in the Balkan

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<sup>99</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 2 : Understanding the controversies and tragedies of undocumented immigration.* Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page 259.

<sup>100</sup> Bayefsky, Fitzpatrick, Helton, Bayefsky, Anne F, Fitzpatrick, Joan, & Helton, Arthur C. (2006). *Human rights and refugees, internally displaced persons, and migrant workers : Essays in memory of Joan Fitzpatrick and Arthur Helton (Refugees and human rights ; v. 10).* Leiden ; Boston: M. Nijhoff. Page 39.

states “resulted in the return of individuals (in areas where they were in the majority) and exacerbated and complicated the resolution of an existing problem of internal displacement on the ground”.<sup>101</sup> Instead of these refugees being able to resettle in their home countries, it can lead to a refugee to become an internally displaced person, in need of the same protections, failing to recognize that from some “protection in-country is an inadequate remedy”.<sup>102</sup> While the right to return to one’s home country is rooted in international law, it does not mean that forcing a return will not simultaneously violate customary international human rights.

### **C. Stays of Removal**

The United States allows for temporary stays of removal, left to the discretion of the local Immigration and Customs Enforcement (ICE) District with jurisdiction over the migrant. Each District has its own discretion to decide whether or not to continue forward with the physical removal of an alien who is under a previously decided order of removal. For generally humanitarian reasons, an alien may be allowed to temporarily continue to live and work in the United States for a designated period of time. Generally stays of removal are given in six month or one year increments, but there is currently no regulation limiting the number of stays that can be granted.

The United Kingdom allows for a similar provisions, including ‘discretionary leave’ and ‘humanitarian protection’.<sup>103</sup> Discretionary leave is granted when the applicant requires medical, social or other forms of assistance being provided in the United Kingdom, or if returning the

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<sup>101</sup> Bayefsky, Fitzpatrick, Helton, Bayefsky, Anne F, Fitzpatrick, Joan, & Helton, Arthur C. (2006). Human rights and refugees, internally displaced persons, and migrant workers : Essays in memory of Joan Fitzpatrick and Arthur Helton (Refugees and human rights ; v. 10). Leiden ; Boston: M. Nijhoff. Page 39.

<sup>102</sup> *Id.* at 58.

<sup>103</sup> U.K. Visas & Immigration Guidance, Asylum Policy Instruction: Discretionary Leave, HOME OFFICE 8-13 (2013), <https://www.gov.uk/government/publications/granting-discretionary-leave>. See also Meili, S. (2015). Do human rights treaties matter? Judicial responses to the detention of asylum seekers in the United States and the United Kingdom. *New York University Journal of International Law and Politics*, 48(1), 209-258. Page 236.

applicant to his or her home country would result in a flagrant denial of a right under the European Convention on Human Rights. Humanitarian protection is available where there are substantial grounds for believing that there is a real risk of serious harms if the applicant is returned to her home country, including death penalty or execution, unlawful killing, torture, systematically and life-threatening prison conditions, and general levels of violence and other severe humanitarian conditions.<sup>104</sup> While the United States basis the general concept of a stay of removal on these ideals, the United States should consider expanding its implementation across the country.

#### **IV. Proposed Migration Reform in Accordance with International Laws**

*Jus cogens* human rights norms are those protections from such atrocities as genocide and torture, and include the right to life of the person. “Other basic protections that are *not* considered on nationality or immigration status are

the right to a name, registration of birth, and nationality (UDHR 1948, art. 15[1]-15[2]);

the right of access to primary and secondary education (UDHR 1948, art. 28[1]-28[2]); ICESCR 1966, art. 13; ICRMW 1990, art. 30);

the right to preserve one’s cultural identity (UDHR 1948, art. 23[1]; ICESCR 1966, art. 15; ICRMW 1990, art. 31);

the right to just and favorable conditions of work (ICESCR 1966, art. 9);

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<sup>104</sup> Operational Policy and Rules Unit, Operational Systems Management, Humanitarian Protection, HOME OFFICE, 4-6 (May 15, 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257431/huma-prot.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257431/huma-prot.pdf). See also Meili, S. (2015). Do human rights treaties matter? Judicial responses to the detention of asylum seekers in the United States and the United Kingdom. *New York University Journal of International Law and Politics*, 48(1), 209-258. Page 236.

the right to health (art. 10), including the right to emergency medical care (UDHR 1948, art. 25[1]; ICRMW 1990, art. 28);

Social Security (ICESCR 1966, art. 9);

special protection for the family and for children (art. 10);

adequate food, clothing, and housing (art. 11);

the right to enjoyment of the highest attainable standard of physical and mental health (art. 12);

the right to freely leave and return to one's country of origin (ICRMW 1990, art. 9);

the right to freedom of thought, expression, conscience, and religion (arts. 12-13);

the right to privacy (art. 8); the right to property (art. 15);

the right to liberty and freedom from arbitrary arrest or detention (UDHR 1948, art. 9); ICRMW 1948, art. 11[1]; ICRMW 1990, art. 9);

and the right to a fair and public hearing with all the guarantees of due process (UDHR 1948 art. 11[1]; ICRMW 1990, arts. 16-20).<sup>105</sup>

The United States, however, is not a signatory to all of these treaties. Most international treaties not focused on migrants' rights specifically tend to refer to migrants only with concern to excluding them certain rights or even from a state party, not with the rights of a migrant to remain in that country. The United States should, ratify, and uphold the rights under these already existing treaties, and implement language in its domestic laws to specifically protect the rights of migrants.

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<sup>105</sup> Lorentzen, L. (2014). *Hidden lives and human rights in the United States. Volume 1 : Understanding the controversies and tragedies of undocumented immigration.* Santa Barbara, California: Praeger, an imprint of ABC-CLIO, LLC. Page 130.

General recommendations for the United States with concern to migrants:

1. Allow for specific provisions in international human rights treaties, with explicit language protecting the rights of migrants, regardless of whether or not they are lawfully present in the state;
2. The United States Department of Homeland Security should allow for supervised released instead of indefinite and/or prolonged detention of refugees. The United States remains inconsistent with its obligations under international human rights law against not detaining migrants for only minimal periods of time as necessary;
3. The United States should pass a comprehensive immigration reform, in line with customary international law and human rights law.

Article 33(1) of the Convention defines the principle of non-refoulement, where:

“No contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion.”<sup>106</sup>

The idea of non-refoulement was created to be so compelling that no reservations were allowed by signatory states;<sup>107</sup> this shall include the United States, regardless of the Refugee Convention of 1980. “Even if Article 33 of the Protocol is not self-executing and therefore not the ‘law of the land’, the principle of non-refoulement is a peremptory norm of customary international law, and as such, is part of U.S. law.”<sup>108</sup>

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<sup>106</sup> Protocol, Art. VII; Convention, Art. 42.

<sup>107</sup> Lawyers Committee for Human Rights, Lawyers Committee for International Human Rights, & Human Rights First. (1990). *Refugee refoulement : The forced return of Haitians under the U.S.-Haitian interdiction agreement*. New York, N.Y.: Lawyers Committee for Human Rights. Page 56.

<sup>108</sup> *Id.* at 57. See also Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1406 (D.D.C. 1985).

Several international treaties clearly establish the Principle of Non-Refoulement, including the U.N. Convention Relating to the Status of Refugees, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Covenant on Civil and Political Rights (ICCPR). The United States is a party to these both former treaties, and to the U.N. Convention Relating to the Status of Refugees, but only with concern to the 1967 Protocol. In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees. The United States has codified the Protocol through its domestic passing of the Refugee Act of 1980.<sup>109</sup>

The United States often relies on national court decisions and statutory interpretations to define immigration laws, instead of also looking to international human rights treaties for guidance.<sup>110</sup> The United States should recommend clear language in the Convention and Protocol against prolonged detention of asylum seekers under Article 31(2). The United States could modify its 1980 Refugee Convention to prohibit arbitrary and prolonged detention.

The 1951 Convention Relating to the Status of Refugees arose heavily in part due to the large number of people facing persecution and displacement following World War II. Originally the 1951 Convention referred only to European refugees, but was extended to refugees in all parts of the world with the 1967 Protocol relating to the Status of Refugees. At the core of the 1951 Convention and the 1967 Protocol is the establishment of Article 33, the Principle of Non-Refoulement. This principle has since become one of customary international law.<sup>111</sup> This

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<sup>109</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.A.). *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). (According to the U.S. Supreme Court, one of Congress' primary purposes in passing the Refugee Act was to bring the U.S. into compliance with the Refugee Convention.)

<sup>110</sup> Meili, S. (2015). Do human rights treaties matter? Judicial responses to the detention of asylum seekers in the United States and the United Kingdom. *New York University Journal of International Law and Politics*, 48(1), 209-258. Page 213.

<sup>111</sup> Arenilla, S. (2015). Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States. *Anuario Mexicano De Derecho Internacional*, 15(1), 283-322. Page 285. *See also*: Meili, S. (2015). Do human rights

principle is obligatory for all nations, where the Convention does not permit reservations, and has evolved into a norm of *jus cogens*, as it is not subject to derogation.<sup>112</sup> The 1951 Convention on Article 33 (2) allows two exceptions to the Principle of Non-Refoulement: (1) in the case of threat to the national security of the host country; and (2) in the case their proven criminal nature and record constitute a danger to the community.<sup>113</sup> However, crimes in and of themselves, when not a specific threat to national security, cannot be used as a basis of denial of asylum; thus, they should only be very serious and specific crimes to fall into this category allowing refoulement. A test weighing the crimes and threat to the community must thus be contrasted with the consequences for the refugee if they must be returned to their home country.

Article 31 of the Refugee Convention limits a State's ability to punish an individual for seeking asylum and prohibits unnecessary restrictions on that individual's liberty:

1. 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 in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>114</sup>

The U.S. asylum policies shown clearly violate the principle of non-refoulement established in Article 33 of the 1951 Convention of Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. Article 38 of the Convention states that disputes

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treaties matter? Judicial responses to the detention of asylum seekers in the United States and the United Kingdom. *New York University Journal of International Law and Politics*, 48(1), 209-258. Page 222.

<sup>112</sup> *Id.* at 288.

<sup>113</sup> *Id.* at 294.

<sup>114</sup> Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

arising from the application of the Convention, (for example, as to whether a state party is violating the Principle of Non-Refoulement), which cannot be settled by other means can be solved by the International Court of Justice (ICJ). Thus, any state party could take the United States to the ICJ to address its violations. Due to perhaps many political reasons and concerns of international relations, no country has yet to do so.

#### **A. In Consideration of the United Nations Commissioner for Refugees (UNHCR)**

The current definition of refugee is ambiguous, and could also be expanded to include broader categories of migrants, to allow for them to also seek protections under certain international conventions. Refugee at this time omits “those who have not yet crossed an international border, but are internally displaced”, where this definition thus, “denies protection to an equally vulnerable group”.<sup>115</sup> Migrants who also fall outside the present definition of refugee lose out on possible international protections. This would include internally displaced people, and those extraterritorially displaced due to other forces, such as armed conflict, civil warfare, and other internal country issues; merely because they are not displaced because of an individualized prosecution, they are not considered refugees under current law.<sup>116</sup>

The Report of the UN Office of the High Commissioner for Refugees of 1986 also finds that individuals, “may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence”, and should not be separated or deported when in the interests of family unity. Any State Party to the Refugee Convention may cause the application of Article 33(1) CSR51, such as “denying visas, rejecting boarding, or interdicting a migrant boat at sea”,

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<sup>115</sup> Bayefsky, Fitzpatrick, Helton, Bayefsky, Anne F, Fitzpatrick, Joan, & Helton, Arthur C. (2006). Human rights and refugees, internally displaced persons, and migrant workers : Essays in memory of Joan Fitzpatrick and Arthur Helton (Refugees and human rights ; v. 10). Leiden ; Boston: M. Nijhoff. Page 7.

<sup>116</sup> *Id.*

thus triggering a violation of “the principle of non-refoulement contained in the Convention and constitute a violation thereof, if it causes refugees to return to persecution.”<sup>117</sup>

### **B. In Consideration of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**

Article 3 of the CAT is interpreted to include the most wide range of migrants against the principle of non-refoulement, where the CAT view this as an absolute principle. Article 3 of the CAT protects terrorist suspects, as well as criminal suspects, from being returned to torture, regardless of the gravity of their crimes. Thus, there is no balance of the risk of torture to that of the harm the migrant would cause to nation state, as non-refoulement under CAT has no exceptions.<sup>118</sup>

### **C. In Consideration of the International Covenant on Civil and Political Rights (ICCPR)**

The United States signed the ICCPR in 1977, but it was not ratified until 1992, and has yet to incorporate it into its domestic law. Article 9(1) of the ICCPR states that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>119</sup>

Article 9(1) of the ICCPR states that detention shall not be arbitrary, such it has been in the United States with concern to women and children seeking asylum. This article would in fact appear to limit the detention of an asylum seeker only until a legitimate claim for asylum can be established. In the case of the United States, the credible/reasonable fear interview is the migrant’s

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<sup>117</sup> Moreno Lax, V. (2017). *Accessing asylum in Europe : Extraterritorial border controls and refugee rights under EU law* (First ed., Oxford studies in European law). Oxford: Oxford University Press. Page 265.

<sup>118</sup> Hamdan, E. (2016). *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (International studies in human rights ; v. 7). Leiden ; Boston: Brill Nijhoff. Page 24.

<sup>119</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

first hurdle, where a ‘positive’ credible fear is determined by a trained U.S. asylum officer following interviewing and analysis of the asylee’s claim.

Article 12(1) limits the “liberty of movement and freedom to choose [one’s] residence” to individuals “lawfully within the territory of a State.”<sup>120</sup> Asylees should be considered lawfully within the territory, and thus under the purview of this protection.

#### **D. In Consideration of the European Convention on Human Rights (ECHR)**

The ECHR was adopted by the Council of Europe in 1950. Article 3 of the ECHR does not expressly state the principle of non-refoulement, however, it has arise through further caselaw. Although not a signatory to the ECHR, nor the possibility of such designation, the United States can compare its treatment of refugees to those in Europe. Article 5 of the ECHR protects the rights to liberty of the person, going into more detail regarding the withholding of liberty, than does ICCPR’s Article 9.

### **Conclusion**

As one of the world’s leaders in accepting refugees, the United States has a long way to go to be a pillar example in its human rights obligations to those who seek safety in its borders. Many nations, including the United States, tend to focus on preventing migration at their borders, instead of addressing the broader underlying policies and circumstances that lead to migration. A more humanitarian agenda would be better suited preventing human rights abuses with concern to migrants and their families.

It is imperative for human rights to preserve and facilitate a refugee’s right to flee their home state and seek protection abroad. According to Article 14 of the Universal Declaration of

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<sup>120</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Human Rights, which is considered reflective of customary international law, the right to seek and enjoy asylum is recognized as a basic human right.<sup>121</sup> States should not just disregard these rights with an excuse that migrants are arriving *en masse*, thus disregarding that individuals can be refugees in any number. In the same light, not naming refugees for what they are will remove the obligations of states to protect these migrants who have been displaced. The principle of non-refoulement is one of customary international law, and cannot be derogated from by any state, regardless of whether or not that state is party to any convention. The roots of the word asylum refer to something or someone that ‘cannot be seized’. In assessing what can and should be done to prevent these human rights violations by the United States and our treatment of other human beings, one must be reminded of the reasons why migrants would be driven to leave their home, and how they can be made as whole again as possible through welcoming protections by their receiving country.

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<sup>121</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 st 71 (1948), art. 14.

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