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The Changing Landscape of Asylum and Refugee Laws and Human Rights: The Diminishing Role of the United States?

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The Changing Landscape of Asylum and Refugee Laws and Human Rights: The Diminishing Role of the United States?

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I. Introduction

The notion that peoples fleeing hardship should be afforded a welcome in foreign lands is one that has been articulated and applied in many spheres of human life, including ancient traditions on hospitality, religious doctrine, and philosophical teachings. This principle has been applied for thousands of years across all regions of the world, cultures, and time.

More recently, the twentieth century saw the principles of protections for forcibly displaced people enshrined in several international legal instruments and declarations. An important milestone was Article 14(1) of the Universal Declaration of Human Rights (“UDHR”), adopted in 1948, providing that “[e]veryone has the right to seek and enjoy asylum from persecution.”¹ This groundbreaking document was soon followed by the 1951 Convention Relating to the Status of Refugees (“1951 Convention”), defining a refugee as someone who left his or her country of origin and is unable or unwilling to return because of a

¹ Frances Nicholson & Judith Kumin, *A Guide to International Refugee Protection and Building States Asylum Systems*, *Inter-Parliamentary Union & United Nations High Commissioner for Refugees* Vol. 27, at 27 (2017), <https://www.unhcr.org/3d4aba564.pdf> [<https://perma.cc/Z462-HDST>].

serious threat to life or freedom.² Refugees are entitled to protection from being forcibly returned to their country of origin—the principle of non-refoulement.³ The 1967 Protocol to the Convention (“1967 Protocol”) provided further protection by removing the temporal and geographic limits to refugee status found in the Convention.⁴

Today, international legal protections for refugees are more relevant than ever. Fueled largely by armed conflict—and particularly an increase in intrastate conflicts—the number of forcibly displaced people has grown exponentially since 2007, from 42.7 million to 70.8 million.⁵ Conflict has forced people across international borders, creating a global refugee population of 25.9 million people.⁶ The number of displaced people is now higher than at any time in human history.⁷ This cultural context requires

² *Id.*

³ *Id.* There is a difference between a refugee and an asylum seeker. The latter is the general designation for one seeking international protection. In some countries, it is a legal term for someone who has applied for refugee status and not yet received a final decision on his or her claim.

⁴ *Id.*

⁵ *Global Trends 2017*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (last visited Sep. 10, 2021), <https://www.unhcr.org/globaltrends2017/> [<https://perma.cc/DP4D-VPAR>]; *Global Trends 2018*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (last visited Sept. 10, 2021), <https://www.unhcr.org/globaltrends2018/> [<https://perma.cc/NSE7-LWEA>].

⁶ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Worldwide displacement tops 70 million, UN Refugee Chief urges greater solidarity in response* (June 18, 2019), <https://www.unhcr.org/en-us/news/press/2019/6/5d03b22b4/worldwide-displacement-tops-70-million-un-refugee-chief-urges-greater-solidarity.html> [<https://perma.cc/5MQ6-W2MZ>].

⁷ Upon the establishment of the Office of the United Nations High Commission for Refugees in 1951, there were roughly one million refugees under its control. That number in 1993 was about 17.5 million refugees, plus another 2.5 million refugees under the auspices of the United Nations Relief and Works Agency for Palestine refugees in the near East and over 25 million internally displaced persons. See United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No. 20, Human Rights and Refugees*, REFWORLD (1993) [hereinafter *Fact Sheet 20*], <https://www.refworld.org/docid/4794773f0.html> (last visited Sept. 10, 2021) [<https://perma.cc/X496-G57U>]. Per UNCHR, in 2017, there were 19.6 million refugees worldwide, an increase from 9.9 million in 2012. See *An Overview of U.S. Refugee Law and Policy*, AMERICAN IMMIGRATION COUNCIL (Jan. 5, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_us_refugee_law_and_policy_0.pdf [<https://perma.cc/L657-93DF>]. At the end of 2020, 82.4 million people were forcibly displaced due to conflict, persecution, violence, and human rights violations. See *Global Trends in Forced Displacement - 2020*, UNITED NATIONS HIGH COMMISSIONER FOR

revisiting the role of the United States, a historical shaper of international legal norms on displacement and a key destination country for refugee seekers.

The United States endorsed the UDHR and, though it is not a signatory to the 1951 Convention, signed onto the 1967 Protocol, which incorporates by reference the 1951 Convention's tenets.⁸ The country has long held a strong reputation for refugee resettlement.⁹ However, this perception has been increasingly challenged recently with the enactment of a series of restrictions ostensibly aimed at reducing refugee movement into the United States.¹⁰ Apart from reducing quotas for accepting resettlement, other measures have been undertaken that slow down the resettlement process, including extra security measures for screening applicants.¹¹ This amendment resulted in long waiting periods before the refugees' claims were processed and before a determination was made as to their legal status.¹² As discussed below, in many cases, these refugees were required to wait in a third country while the United States considered their applications for asylum.¹³ Consequently, as reported by human rights groups, some of these refugees were exposed to dangerous situations in these third countries.¹⁴

REFUGEES, <https://www.unhcr.org/en-us/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html> (last visited Sept. 10, 2021) [<https://perma.cc/CFR5-BH4N>].

⁸ Human Rights First, *Asylum Law and Procedure, Human Rights First*, <https://www.humanrightsfirst.org/asylum/asylumlaw-and-procedure> (last visited April 21, 2021), [<https://perma.cc/R6LF-ZMSK>].

⁹ See Brittany Blizzard & Jeanne Batalova, *Refugees and Asylum in the United States-Migration Policy*, MIGRATION POLICY INSTITUTE, (June 13, 2019), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2018> [<https://perma.cc/X7X6-G6BX>].

¹⁰ *An Overview of U.S. Refugee Law and Policy*, American Immigration Council (Jan. 5, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_us_refugee_law_and_policy_0.pdf [<https://perma.cc/L657-93DF>].

¹¹ See *id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* In carrying out restrictive measures against refugees, the then administration entered into agreements with third countries whereby the third country would keep the migrant in their country while he or she was seeking asylum in the United States. For example, the United States, in collaboration with Mexico, created programs in Mexico with the goal of stopping asylum seekers from Central America from ever getting to the United States border. Most of these countries did not only lack the infrastructure to harbor

Subsequently, in 2017, the United States settled a far lower number of refugees (in proportion to size) than the rest of the world.¹⁵

This article delves into the issues surrounding the United States government's policy change towards the rights of displaced people. First, I will analyze the legal foundations for restricting refugees and examine whether these restrictions represent possible contraventions of international treaties and domestic policies. Second, I will explore the deterrence policies used by States to undermine refugee laws and the principle of non-refoulement, as well as the processes and strategies to lessen these policies. Finally, I will review what lessons have been learned to avoid repeating the recent mistakes and scandals that led to mass detentions on the United States' southern border of children and their families fleeing violence in South America.

II. The International Legal Framework for Protecting Refugees

A. *The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*

As indicated above, the core of international refugee law is embodied in the 1951 Convention Relating to the Status of Refugees. Per the definition of a refugee under the 1951 Convention, refugee status is granted only to people who became refugees because of events occurring before January 1, 1951.¹⁶ But States were given the discretion to extend that definition to encompass events that occurred in Europe as well as in other parts of the world.¹⁷ However, because the refugee crisis grew in the 1950s and 1960s, it became obvious that the limitation of the temporal and geographical reach of the 1951 Convention was inadequate.¹⁸ This realization resulted in the adoption of the 1967

asylum seekers, but were also unsafe because of violence, gangs, drug cartels, which all subjected these migrants to unsafe living conditions. See Ariel G. Ruiz Soto, *One Year after the U.S.-Mexico Agreement: Reshaping Mexico's Migration Policies*, MIGRATION POLICY INSTITUTE (June 2020) <https://www.migrationpolicy.org/sites/default/files/publications/OneYearAfterUS-MexAgreement-EN-FINAL.pdf> [<https://perma.cc/6JPZ-M5XX>].

¹⁵ American Immigration Council, *supra* note 10.

¹⁶ Nicholson & Kumin, *supra* note 1, at 16.

¹⁷ *See id.*

¹⁸ *Id.*

Protocol to the Convention (“1967 Protocol”).¹⁹ The effect of the 1967 Protocol was to eliminate the temporal and geographical barriers in the 1951 Convention. The 1967 Protocol expanded the 1951 Convention to deal with “new refugees” who met part of the 1951 Convention’s definition but would become refugees only because of actions that took place after January 1, 1951.²⁰ Consequently, State parties acceding to the 1967 Protocol were not bound by temporal or geographical limitations of the 1951 Convention, but would apply all Protocol Articles (1-34) to all persons to whom the refugee definition would otherwise apply.²¹ In other words, the 1967 Protocol eliminated the “previously existing temporal and geographical restrictions on refugee classification.”²² Given that most of the States tend to accede to the 1951 Convention and the 1967 Protocol, it reinforces that States find them crucial to international refugee protection.²³

B. Definition of Refugee per the 1951 Convention

A refugee under Article 1 of the 1951 Convention is a person who (1) has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group, or political opinion; (2) is outside his or her country of origin or habitual residence; (3) is unable or unwilling to avail him or herself of the protection of that country, or to return there, because of fear of persecution; and (4) is not explicitly excluded from refugee protection or whose refugee status has not ceased because of circumstances.²⁴ Thus, one would automatically become a refugee if the criteria above is met, rather than the status being based on a positive decision following an application. As such, the status as a refugee is declaratory.²⁵

C. Distinction between a Refugee and an Asylum Seeker

A refugee, as defined above, is someone “who has left his or her country of origin and is unable to return or unwilling to return there

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 17.

²⁴ *Id.* at 18.

²⁵ *Id.*

because of a serious threat to his or her life or freedom.”²⁶ A refugee has rights under the 1951 Convention, including rights based on the principles of non-refoulement.²⁷ This principle protects refugees from forcibly being returned to their country of origin where there is a substantial likelihood that the person will be in danger.²⁸

Although the word asylum is not defined in international law *per se*, asylum seeker is the umbrella term for someone seeking international protection. In some countries, asylum is “a legal term referring to a person who has applied for refugee status and has not yet received a final decision on his or her claim.”²⁹ Thus, it is worth noting that not every asylum seeker ultimately winds up as a refugee, though States should ensure due process is given to asylum seekers and ensure that asylum seekers are not simply returned to their countries of origin.³⁰

The word migrant is also sometimes conflated with refugee, but the two should be distinguished, as they have different implications. A migrant is one who deliberately exercises the choice to move for personal reasons, such as education, family reunion, or to find work, but not from the threat of persecution in their country of origin.³¹ Consequently, migrants are free to go back to their countries of origin and enjoy whatever protections their governments may provide.³²

International refugee law does not operate in isolation. The legal scheme is inextricably intertwined with international human rights law and various conventions. Thus, it is necessary to address the 1948 Universal Declaration of Human Rights and two other applicable conventions.

²⁶ *Id.* at 17.

²⁷ *Id.*

²⁸ *Id.* Article 33 of the Convention provides that “no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” United Nations High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, REFWORLD (Nov. 1997), <https://www.refworld.org/docid/438c6d972.html> [<https://perma.cc/5K9C-EUGE>].

²⁹ Nicholson & Kumin, *supra* note 1, at 17.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

D. The 1948 Universal Declaration of Human Rights

With the painful memories of violence and mass suffering from two world wars, drafters the Charter of the United Nations urged the signatories to “save succeeding generations from the scourge of war.”³³ The United Nations was asked to help achieve “international cooperation in solving international problems of an economic, social, or humanitarian character.”³⁴ Likewise, the United Nations was tasked with encouraging respect for human rights and protecting fundamental freedoms for all without distinction as to race, sex, language, or religion.³⁵ Consequently, an issue of prime importance for the United Nations was the plight of “refugees, displaced persons, stateless persons and returnees, all uprooted by war and in need of assistance.”³⁶ The plight of these refugees was therefore not only an international refugee problem, but also a humanitarian one.³⁷

In 1946, the General Assembly established the International Refugee Organization (“IRO”), which received an interim mandate to “register, protect, resettle and repatriate refugees.”³⁸ However, the IRO’s role was short-lived due to post war political issues and inadequate funding.³⁹

The IRO was superseded by the Office of the United Nations High Commissioner for Refugees, which was created “to provide protection to refugees and to seek durable solutions for refugees by assisting governments to facilitate the voluntary repatriation of refugees, or their integration within new national communities.”⁴⁰ In so doing, the tenets of the Universal Declaration of Human Rights play an essential and integral role in effectuating that goal.

The UDHR is a landmark document in the history of human rights. The importance of the UDHR’s principles is embodied not only in what States do, but also in the foundation for the International Bill of Rights and several other essential human rights

³³ Fact Sheet 20, *supra* note 7, at 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 3.

³⁷ *Id.* at 2.

³⁸ *Id.*

³⁹ *Id.* at 3.

⁴⁰ Fact Sheet 20, *supra* note 7, at 3.

agreements.⁴¹ In December 1948, the United Nations General Assembly proclaimed the UDHR a common standard of achievements for all peoples and all nations.⁴² The UDHR holds that “[a]ll Human Beings are born free and equal in dignity and rights.”⁴³ Article 14 provides for the right to seek asylum, stating that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”⁴⁴ Article 13(2) also articulates this right by stating that “everyone has the right to leave any country, including his own.”⁴⁵ While the UDHR is not a legally binding instrument, it is an authoritative expression of customary international law as it pertains to human rights.⁴⁶ Notably, as a Resolution of the U.N. General Assembly, UDHR’s provisions are not legally binding on Member States, especially given that these provisions are not to be signed by United Nations Members. However, the UDHR, while not a treaty per se, is still very influential in human rights.⁴⁷

⁴¹ Article 1 of UDHR provides that “All human beings are born free and equal in dignity and rights.” Many recognized and major treaties, were ratified thanks to their origins to the UDHR, and they include:

- The International Convention on the Elimination of Racial Discrimination (1965).
- The International Covenant on Economic, Social and Cultural Rights (1966).
- The International Covenant on Civil and Political Rights (1966).
- The Convention on the Elimination of All Forms of Discrimination Against Women (1979).
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
- The Convention on the Rights of the Child (1989).

Claude Welch, *Universal Declaration of Human Rights: Why does it matter?*, UB Now (2015), http://www.buffalo.edu/ubnow/stories/2015/12/qa_welch_udhr.html [<https://perma.cc/E8KQ-TXR6>].

⁴² See G.A. Res 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁴³ *Id.* at art. 1.

⁴⁴ *Id.* at art. 14.

⁴⁵ *Id.* at art. 13(2).

⁴⁶ A rule or norm of Customary International law is one that is binding on all states whether it is found in a treaty to which the State is a party. Human rights are generally viewed as “norms of Customary International Law” and more so, provisions of the UDHR are considered a part of customary international law. United Nations Office of the High Commissioner for Human Rights, *Human Rights and Refugee Protection (RLD 5)*, at 22 (Oct. 1995) [hereinafter RLD 5] [<https://www.unhcr.org/3ae6bd900.pdf>] [<https://perma.cc/R6ZQ-LV5X>].

⁴⁷ The purpose of the UDHR was “to provide an authoritative understanding of the

E. The Office of the United Nations High Commissioner for Refugees

The U.N. General Assembly, in its Resolution 319A of December 3, 1949, created the Office of the United Nations High Commissioner for Refugees (“UNHCR”).⁴⁸ Per Article 1 of the Statute, the function of the High Commissioner is “to provide protection to refugees and to seek durable solutions for refugees by assisting governments to facilitate the voluntary repatriation of refugees, or their integration within new national communities.”⁴⁹ The task under the auspices of the High Commissioner under the statute is broadly classified as “humanitarian and social and of an entirely non-political character.”⁵⁰ State parties, per Article 35(1)

human rights guaranteed in the U.N. Charter; it is the most well-known U.N. catalogue of Human Rights, and it includes civil and political, as well as economic, social and cultural rights; and its importance has been consistently reaffirmed in resolutions of General Assembly, and many national constitutions make reference to it or incorporate its provisions.” *See id.*

⁴⁸ Fact Sheet 20, *supra* note 7, at 3.

⁴⁹ *Id.*

⁵⁰ G.A. Res. 428(v), Statute of the Office of the High Commissioner for Refugees, (Dec. 14, 1950). The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application, and proposing amendments thereto;

(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;

(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;

(e) Endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;

(f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;

(g) Keeping in close touch with the Governments and intergovernmental organizations concerned;

(h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;

(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

Id.

of the 1951 Convention “undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”⁵¹ In exercising this supervisory role, the UNHCR has propagated its own interpretation of the 1951 Convention provisions as well as provided its opinion to national courts all over the world.⁵²

The work of the High Commissioner and the United Nations in safeguarding human rights is a symbiotic fusion in the protection of human dignity. Examining some international organizations relevant to refugee protection and human rights would be illuminating to the benign symbiotic relations between and amongst these organizations.

III. International Treatises/Conventions Related to Refugees’ Protections and Human Rights

A. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) was adopted by the U.N. General Assembly in 1966 and came into force in 1976.⁵³ The preamble states the following:

[T]hese rights derive from the inherent dignity of the human person . . . in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.⁵⁴

The ICCPR compels governments to take administrative, judicial, and legislative measures to protect the rights embodied in the treaty, which include the “right to life; the right to liberty and security of person; to liberty of movement within the State” and “the right not to be subjected to torture, cruel, inhuman or degrading

⁵¹ United Nations High Commissioner on Human Rights, *Human Rights and Refugee Protection, Self-Study Module 5*, Vol. 1, at 24 (Dec. 15, 2006), <https://www.unhcr.org/45a7acb72.pdf> [<https://perma.cc/CD7E-AFD5>].

⁵² *Id.*

⁵³ *Id.* at 34.

⁵⁴ International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

treatment.”⁵⁵ The ICCPR is the appropriate and specific treaty that relates to asylum litigation. The Human Rights Committee, a monitoring body established by the ICCPR, receives State Party complaints, then issues comments as necessary or applicable.⁵⁶ The ICCPR, the International Covenant on Economic, Social and Cultural Rights (“ICESR”), and the UDHR are together known as the International Bill of Human Rights.⁵⁷

B. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The importance of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) to refugee law lies in the fact that many applications for refugee status are often a result of torture and others means of maltreatment. This treaty bans the forced return of persons to places where there is a likelihood of torture to be encountered (refoulement). That is, non-refoulement is a fundamental principle under which a person running away from persecution should not be expected to leave his or her country of origin and enter another in a normal or usual manner. Thus, the principle of non-refoulement prohibits any measure that would result in a refugee being sent back into the arms of their persecutors.⁵⁸ The non-refoulement provision of the CAT is not limited to persons already recognized as refugees.⁵⁹ Thus, persons who may have missed an application deadline for refugee status, were given an erroneous denial of status, or reside where there no laws are in place to handle the refugee process may still be able to receive assistance.⁶⁰

The CAT’s non-refoulement provision is absolute and allows for no limitation or derogation from the provision, unlike the 1951 Convention provision.⁶¹

⁵⁵ Nicholson & Kumin, *supra* note 1, at 26.

⁵⁶ Inna Nazarova, *Alienating Human from Right: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 *FORDHAM INT’L L.J.* 1335, 1347 (2002).

⁵⁷ *RLD 5*, *supra* note 46, at 34.

⁵⁸ See B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 *CUNY L. REV.* 91, 100 (2017).

⁵⁹ Nicholson & Kumin, *supra* note 1, at 24.

⁶⁰ *Id.*

⁶¹ *Id.*

The CAT established a committee against torture, which was empowered to hear complaints from individuals against a State Party.⁶² However, the entertainment of the complaint by the committee derives from the acknowledgement by the State of the committee's competence to receive and act on the complaint.⁶³

C. *The Convention on the Rights of the Child*⁶⁴

The Convention on the Rights of the Child ("CRC") applies to all children in or out of their country of origin without discrimination.⁶⁵ Under the CRC, a child means "means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."⁶⁶ Ratified by virtually every country in the world, the CRC is an almost universally popular convention.⁶⁷ In addition, there are also child refugees and asylum seekers, which all fall under the auspices of the convention and its tenets. Some notable tenets of the CRC applicable to all children include: Article 2, the principle of non-discrimination; Article 3, the principle of the best interest of the child; Article 6, the right to survival and development; and, Article 12, the right to be heard.⁶⁸ As related to refugee children, this convention addresses the child's right to be with the parent and not be separated from them against their will.⁶⁹ However, child

⁶² *Id.*

⁶³ *Id.*

⁶⁴ The Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44 [hereinafter Convention on the Rights of the Child]. The Convention in Article 3 (1) states that: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration." *Id.* at art 3(1).

⁶⁵ *See id.* at art. 2.

⁶⁶ *Id.* at art. 1.

⁶⁷ The United States is one of three countries that has not ratified the United Nations Convention on the child. *25th Anniversary of the Convention on the Rights of the Child*, HUMAN RIGHTS WATCH (Nov. 17, 2014, 11:50AM EST), <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child> [<https://perma.cc/SCW7-ZHWZ>]. Its rationale for not ratifying the Convention is that it would limit its sovereignty or interfere with family life. *See* Lida Minasyan, *The United States has not Ratified the UN Convention on the Rights of the Child*, ATLAS CORPS, (Sept. 30, 2018), <https://atlascorps.org/the-united-states-has-not-ratified-the-un-convention-on-the-rights-of-the-child/> [<https://perma.cc/W4MC-4WNJ>].

⁶⁸ Convention on the Rights of the Child, *supra* note 64, at art. 2, 3, 6, 12.

⁶⁹ Nicholson & Kumin, *supra* note 1, at 24.

separation from the parents could be a viable option if in the best interest of the child per Article 9; family reunification Article 10; and the right to “special protection and assistance” by a State as identified under Article 20.⁷⁰ Article 22 also states any child requesting refugee status, or who is already a refugee, has a right to protection and humanitarian assistance to enjoy the rights as provided in the CRC.⁷¹

D. Rights of Refugees and the Principle of Non-Refoulement

Refoulement is the foundation of international refugee protection.⁷² It provides that a refugee has the right to be protected from forced expulsion/return (“refoulement”).⁷³ Article 33(1) of the 1951 Convention states “[n]o Contracting State shall expel or return [(“refouler”)] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁷⁴ This principle applies to State parties that would be involved in any manner that may place the refugee directly or indirectly at risk of being returned to the country of origin.⁷⁵ Consequently, asylum seekers whose claims have not yet been considered or formally recognized are protected under this principle.⁷⁶ Other international and human rights instruments also tend to recognize the principle of refoulement if the person is to be exposed to “torture, cruel, inhuman or degrading treatment,” regardless of the status of a person as a refugee.⁷⁷

⁷⁰ Convention on the Rights of the Child, *supra* note 64, at art. 9, 10, 20. The “best interest” term broadly describes the well-being of a child. The Convention neither provides a precise definition, nor unambiguously outlines common factors of the best interests of the child. However, it instructs that “[s]uch well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences. Its interpretation and application must conform with the Convention and other international legal norms.” See *UNHCR Guidelines on Determining the Best Interests of the Child*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 14 (May 2008) <https://www.unhcr.org/4566b16b2.pdf>.

⁷¹ *Id.*

⁷² Nicholson & Kumin, *supra* note 1, at 20.

⁷³ G.A. Res. 429 (V), at art. 33 (Apr. 22, 1954) [hereinafter *The 1951 Convention*].

⁷⁴ *Id.* at art. 33(1).

⁷⁵ Nicholson & Kumin, *supra* note 1, at 20.

⁷⁶ *Id.*

⁷⁷ *Id.* at 26. See e.g., *The Convention Against Torture and Other Cruel, Inhuman, or*

Some critics argue that most of asylum seekers are not “true refugees.”⁷⁸ Instead, they are considered economic migrants, leading to many countries rejecting applications for asylum under the literal reading of the 1951 definition of refugee.⁷⁹ However, clearly distinguishing between a refugee and an economic migrant may be challenging. From a human rights perspective, regardless of whether that person is escaping persecution, conflict or is running from abject poverty, he or she is supposed to be treated according to the basic standards of human rights.⁸⁰

It is worth saying that the prohibition on refoulement as discussed is not absolute. As indicated in Article 33(2) of the 1951 Convention, a refugee may not avail himself or herself to the prohibition on refoulement upon the occurrence of some conditions.⁸¹ For example, if “there are reasonable grounds for regarding [that refugee] as a danger to the security of the country in which he [or she] is [present or if] having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community”⁸² In such an instance, that refugee may not avail himself or herself to the prohibition on non-refoulement.

The question remains as to how effective the principle of non-refoulement under the 1951 Convention can be, especially given that some states are not parties to the Convention.⁸³ This principle has been widely accepted and, therefore, considered a norm of customary international law.⁸⁴ Thus, as a norm of customary international law, States that are not a party to the 1951 Convention must still honor the principle of non-refoulement as it is binding on all States.⁸⁵

Degrading Treatment or Punishment art. 3 Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (“No state party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

⁷⁸ Fact Sheet 20, *supra* note 7, at 8 (“[Some countries contend that the majority of asylum seekers are in fact not refugees but economic migrants.”).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See The 1951 Convention, *supra* note 73, at 176.

⁸² *Id.*

⁸³ Nicholson & Kumin, *supra* note 1, at 53.

⁸⁴ *Id.*

⁸⁵ *Id.* at 20.

IV. The United States Refugee Law and Policy

A. Historical Background

The United States acceded to the 1967 Protocol of the International Convention on Refugees in 1968.⁸⁶ Although prior to joining, U.S. law showed some resemblance to the provisions of the 1951 Convention, U.S. law did not require any compliance with the Convention or its Protocol.⁸⁷ However, the United States Congress codified the main provisions of the 1951 Convention and its Protocol through the Refugee Act of 1980 (“1980 Act”).⁸⁸ This 1980 Act adopted both the 1951 Convention’s definition of “refugee” and “refoulement,” with the latter being based on Article 33 of the Convention and referred to in the United States as “withholding of removal.”⁸⁹ Congress’ legislative intent in passing the 1980 Act was to conform U.S. law to international refugee law.⁹⁰ This intent is bolstered by the Supreme Court’s pronouncement in *INS v. Cardozo-Fonseca*⁹¹ that “one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to Status of Refugees.”⁹²

The Refugee Act of 1980 was passed as an amendment to the Immigration and Nationality Act (“INA”).⁹³ The definition of refugee under the INA is:

Any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution . . . on account of race,

⁸⁶ Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter *The 1967 Protocol*].

⁸⁷ Note, *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV L. REV. 1399, 1401 (2018) [hereinafter *American Courts and the UNHCR*].

⁸⁸ *Id.*

⁸⁹ *Id.* at 1402; See also Bhargava Ray, *infra* note 97, at 146 (stating that withholding would be an important relief especially in cases where the asylum application is not filed within one year upon arrival in the United States or the individual is “firmly resettled” in another country before arrival in the United States.).

⁹⁰ Bhargava Ray, *infra* note 95, at 140.

⁹¹ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁹² *Id.* at 437.

⁹³ Refugee Act of 1980, Pub. L. No. 96-212 § 201, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

religion, nationality, membership in a particular social group, or political opinion.⁹⁴

Thus, in the absence of any other impediment barring asylum, one would qualify for the asylum status.⁹⁵ However, this definition was amended in 1996 to include persons affected by forced population control policies.⁹⁶ Under this amendment, a person who is forced to have an abortion or undergo sterilization, or is persecuted for failure to comply with the population control policy, “has been persecuted on account of political opinion . . . [and has] a well-founded fear of persecution on account of political opinion.”⁹⁷ Only at the discretion of the Attorney General or the Secretary of Homeland Security could this relief be afforded to anyone.⁹⁸

For the most part, U.S. refugee law begins with an application for asylum, as established by the Refugee Act and the language of the 1951 Convention.⁹⁹ The application is filed affirmatively by a non-citizen with the United States Citizenship and Immigration Services (“USCIS”), a part of the Department of Homeland Security (“DHS”).¹⁰⁰ An application can also be filed defensively as a non-citizen before an immigration judge in a removal proceeding.¹⁰¹ An immigration judge reviews the decision of the USCIS, which in turn is reviewable by the Board of Immigration Appeals (“BIA”).¹⁰²

Once refugees pass their security screening and fit into the predetermined number of permitted refugees admission cap for the year, they qualify for resettlement in the United States.¹⁰³ After an

⁹⁴ 8 U.S.C. § 1101(a)(42)(A) (2012).

⁹⁵ Shalini Bhargava Ray, *Applying the U.S. Constitution to Foreign Asylum Seekers: Exposing a Curious, Inconsistent Practice in the Federal Courts*, 100 MARQ. L. REV. 137, 146 (2016).

⁹⁶ *Id.*

⁹⁷ *Id.* at n.57.

⁹⁸ *Id.* at 146.

⁹⁹ *American Courts and the UNCHR*, *supra* note 87, at 1402.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* The BIA is an immigration administrative review body within the Department of Justice’s Executive Office. Although the decisions of BIA have no precedential value per se, some decision results in the Executive’s standard practice, while others are reviewable by federal courts.

¹⁰³ *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL, at 4, (Jan. 8, 2020) [hereinafter *AIC Fact Sheet*], <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy> [<https://perma.cc/X4NZ-KYAZ>].

initial determination by the President in consultation with Congress of this numerical limitation (ceiling) for refugees admission and what that should be in a particular year, different refugee population are assessed by DHS and the State Department.¹⁰⁴ This assessment also takes into consideration the ability of the government to process them for admission.¹⁰⁵ In 2019, the ceiling for refugee admission was 30,000—lower than the previous year’s total of 45,000, which even was also considered low comparatively.¹⁰⁶ In 2018, the greatest number of refugees were from Africa with 10,459 (45.5 %); Near East/South Asia with 3,797 (16.9%); East Asia with 3,668 (16.3%); Europe with 3,612 (16.1%); and Latin America with 955 (4.2%).¹⁰⁷ In 2020, the ceiling was reduced to only 18,000.¹⁰⁸ But, according to the Refugee Processing Center, only 11,814 refugees were actually resettled, running below the projected numbers for the year.¹⁰⁹ For 2021, there was a proposal to admit just 15,000, which is the lowest level in the program’s history.¹¹⁰ From 2016 to 2020, the number of refugees admitted to the United States dropped by eighty-six percent.¹¹¹

Refugees are resettled upon admission and shepherded for necessary services by the Refugee Admission Program (“RAP”), a program which is administered by the Bureau of Population, Refugee, and Migration (“PRM”).¹¹² RAP conducts their program in conjunction with the Office of Refugee Resettlement (“ORR”), the latter being part of the Department of Health and Human Services and the former being part of the Department of State.¹¹³

The U.S. refugee program provides three major categories under which persons can seek asylum, but it does not promise that asylum-

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Silva Mathema & Sofia Carratala, *Rebuilding the U.S. Refugee Program for the 21st Century*, CTR. FOR AM. PROGRESS (Oct. 26, 2020, 9:02 AM), <https://www.americanprogress.org/issues/immigration/reports/2020/10/26/492342/rebuilding-u-s-refugee-program-21st-century/#:~:text=Every%20year%2C%20and,https://perma.cc/5MQJ-WEL3>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *AIC Fact Sheet*, *supra* note 103, at 4.

¹¹³ *Id.*

seekers will be admitted.¹¹⁴ The first category is Priority One.¹¹⁵ These are individuals referred to the United States by UNCHR or recognized by a U.S. embassy or an NGO as facing “compelling persecution needs” with no other lasting solution for them.¹¹⁶ Next is Priority Two, consisting of groups with “special concerns” to the United States as carefully chosen by the Department of State and supported by the U.S. Citizenship and Immigration Service (USCIS), UNCHR, and NGOs.¹¹⁷ The final category is Priority Three. This category includes the relatives of refugees who are already settled in the United States.¹¹⁸ The settled refugee is required to file an Affidavit of Relationship (“AOR”) that is handled by the Department of Homeland Security.¹¹⁹

Although it is the prerogative of the government to reject the application of refugees on any grounds, DHS, in January 2018, added “additional security enhancements and recommendations to strengthen the integrity of the U.S Refugee Admissions Program.”¹²⁰ Thus, required additional screening of people from “high-risk” countries is not unusual, as the government may take into consideration the risk-based nature of countries and individuals in the program.¹²¹

Once a conditional acceptance of the refugee for resettlement has been made, the Resettlement Support Center (“RSC”) requests assurance that the refugee will be placed in the United States.¹²² Then the Refugee Processing Center (“RPC”), alongside private voluntary agencies (“VOLAGs”), proceeds to establish where the refugee will be sent.¹²³ Once established where the refugee will be

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (noting that there are some people from Burma, Iraq, and the Soviet Union).

¹¹⁸ *Id.* (explaining that this includes spouses and unmarried children under 21).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 5.

¹²³ *Id.* Once the IOM receives information on the travels, VOLAG organizes the pickup and transportation of the refugee from the airport to their home destination. *Id.* Should the refugee already have a relative in the United States, that fact is taken into consideration in trying to ensure the refugee is settled in proximity to where that relative is. *Id.* The VOLAG is to make sure that the first 90 days of the refugee stay is catered for in terms of housing, food, clothing, employment and all the relevant necessities to settle

settled and medical examinations and security clearance are successfully completed, RSC and the International Organization for Migration (“IOM”) collaborate to schedule refugee travel to the United States.¹²⁴ However, the cost of the trip is not free for the refugee, as the refugee must sign a promissory note that he or she will repay the United States the incurred cost prior to leaving for the United States.¹²⁵ Although this loan is interest-free, the refugee is expected to begin making payments six months after arriving in the country.¹²⁶

A year after the refugee is admitted into the United States, the refugee may apply for Permanent Resident Status and could subsequently apply for naturalization five years later.¹²⁷ The general processing timeframe for refugee resettlement in the United States ranged, on average, from 18-24 months in 2016.¹²⁸ However, in 2017, the process of vetting and screening refugees became more complicated as DHS, under the Trump administration, raised the bar.¹²⁹

B. Policy Under the Trump Administration: The Changing Landscape of Refugee Law

Immediately after entering office in 2017, the Trump administration changed refugee resettlement in the United States unexpectedly. President Trump issued an executive order that suspended the U.S. refugee admission program for 120 days.¹³⁰ The

down. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* The loan is provided through the Department of State and the Department of Health and Human Services, in particular the State Department’s Reception and Placement (R&P) Program provides the loan. These matters are complex and handled by multiple departments-and really not unusual. *Factsheet: U.S. Refugee Resettlement*, [hereinafter *U.S. Refugee Resettlement Factsheet*], NAT’L IMMIGR. F., (Nov. 5, 2020) <https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement/> [https://perma.cc/TD6P-VXQS].

¹²⁶ *AIC Fact Sheet*, *supra* note 103, at 5; *See also U.S. Refugee Resettlement Factsheet*, *supra* note 127 (noting that HHS’s Office of Refugee Resettlement (ORR) provides the refugees with some cash, medical assistance, employment, social services, and other services after three months).

¹²⁷ *U.S. Refugee Resettlement Factsheet*, *supra* note 127.

¹²⁸ *AIC Fact Sheet*, *supra* note 103, at 5.

¹²⁹ *Id.*

¹³⁰ Ruth Ellen Wasem, *More than a Wall: The Rise and Fall of US Asylum and Refugee Policy*, 8 J. ON MIGRATION AND HUM. SEC. 246, 259 (2020).

administration also suspended the entry of Syrian refugees until further notice.¹³¹ In addition, the Trump administration reduced the 2017 refugee admission maximum ceiling from 110,000, which was the ceiling under the Obama administration, to 50,000¹³². The administration then lowered it to 45,000 in 2018 and then to 30,000 in 2019.¹³³ This change in policy was apparently intended to give DHS and the State Department sufficient time to carry out security scrutiny and review of applications and procedures for the admission of refugees.¹³⁴

The Trump refugee policies are placed into three categories: (1) policies that undermine established principles and policies, like the policy of non-refoulement and due process; (2) policies that prevent the entry of refugees and asylees; and (3) policies that tend to criminalize foreigners who are seeking asylum in the United States.¹³⁵ These policies have been referred to as the ABCs of the Trump administration's policies on refugees: A's (abandoning), B's (blocking), and C's (criminalizing) on refugees and asylees.¹³⁶ In 2018, the criminalization policy reached a peak with the "zero tolerance" policy and in 2019, the policies again brought back all the ABC policies.¹³⁷ The "zero tolerance" policy was supposedly targeted on unauthorized immigration.¹³⁸ However, under this policy, any migrant, including an asylum seeker, trying to cross the U.S. border other than at an authorized port of entry was to be apprehended and criminally prosecuted.¹³⁹

Under the Trump Administration, the ABCs were easily recognizable and obvious.¹⁴⁰ For example, the Executive Order of January 27, 2017 suspended refugee admissions for at least 120

¹³¹ *Id.*

¹³² *AIC Fact Sheet*, *supra* note 103, at 5 (stating the admissions ceiling was lowered to 15,000 in 2018 with fewer than "50 percent admitted").

¹³³ *Id.*

¹³⁴ *Id.* at 6.

¹³⁵ Wasem, *supra* note 130, at 258.

¹³⁶ *Id.*

¹³⁷ *Id.* at 259.

¹³⁸ *Id.* at 260.

¹³⁹ See Hayley Drozdowski & Fiona Chong, *The Trump Zero Tolerance Policy: A Cruel Approach with Humane and Viable Alternatives*, REFUGEES INT'L (July 31, 2018), <https://www.refugeesinternational.org/reports/2018/7/31/trump-zero-tolerance-policy> [<https://perma.cc/6WVV-VCB6>].

¹⁴⁰ See Wasem, *supra* note 130, at 259.

days, blocked Syrian nationals from refugee resettlement, banned nationals of Iran, Iraq, Libya, and Yemen for 90 days, and criminalized asylum seekers by expanding their expedited removal and detention.¹⁴¹ Although no official announcement was made, the administration turned away asylum seekers who presented themselves at the ports of entry along the United States-Mexico border.¹⁴² The following year was marked by the height of the adoption of the “zero tolerance” policy through criminal prosecutions of all arriving foreign nationals. These criminal persecutions included asylum seekers trying to enter the country without authorization, consequently resulting in the separation of children from their parents as well as criminally going after parents who crossed the border with children.¹⁴³

Similarly, policies in 2019 also embraced all three ABC principles, resulting in Fiscal Year 2020 having the lowest level of refugee admissions (18,000) since the passage of the Refugee Act of 1980.¹⁴⁴ Policy A was exemplified by third-country deals with insecure Central American countries to prevent migrants within their borders from coming to the United States.¹⁴⁵ In the same vein, any arrested foreign national who could not show proof of two years presence in the United States was removed without the government (DHS) conducting a hearing.¹⁴⁶ Policy B included denying local and state officials the ability to permit placement of refugees.¹⁴⁷ Asylum seekers who came through Mexico were denied entry by DHS, instating the Migrant Protection Protocol, which meant they should remain in Mexico.¹⁴⁸ Finally, Policy C included detainment of not only migrant families, but also of migrant children looking for asylum, empowering Border Control Officers to screen asylum claims.¹⁴⁹

Although the asylum and refugee laws are not perfect, these Trump policies demonstrate that the intent and flexible features of

¹⁴¹ *Id.*

¹⁴² *Id.* at 261 tbl.10.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Wasem, *supra* note 130, at 261 tbl.10.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

the asylum and refugee provisions passed by Congress have been effective in dealing with the flow of forced migration caused by war, repression, and persecution.¹⁵⁰ The ABC approach has deconstructed this stability and legal protection and has “weaponize[d] asylum and refugee policy.”¹⁵¹ Likewise, the Trump administration indulged in regulations that would restrict even more access to asylum.¹⁵² For example, allowing immigration judges to reject asylum cases without a hearing streamlined the categories of persons considered persecuted to exclude most victims of gender-based violence and gang-related violence.¹⁵³ Contrary to statutory provisions, the administration sought to prevent an individual who has been in the United States for over a year from applying for asylum. The administration carried out “enhanced” protections screening interviews, referred to as “credible and reasonable fear

¹⁵⁰ It has been reported by Human Rights First that as of February 2021, there are “at least 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico by the Trump Administration.” See Human Rights First, *Delivered to Danger: Trump Administration sending asylum seekers and migrants to danger* [hereinafter *Delivered to Danger*] (Feb. 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico> [https://perma.cc/Z6HX-7KSZ]. Of these attacks, are 341 cases of children returned to Mexico who were kidnapped or nearly kidnapped. *Id.* In the same vein, 68,000 individuals returned to Mexico for example have neither been interviewed or even spoken to an attorney. *Id.*

¹⁵¹ *Delivered to Danger*, *supra* note 150; see also Wasem, *supra* note 130, at 261 tbl.10.

¹⁵² Wasem, *supra* note 130, at 262.

¹⁵³ For example, [a] 15-year-old Central American boy who was cognitively impaired and had the functional development of a five-year-old was murdered and his body found mutilated after he fled across the border alone; he and his mother were twice expelled to Reynosa by DHS. According to a declaration by Jennifer Harbury, an attorney assisting the family, the boy was likely killed for failing to pay a crossing “fee” to gangs that control the area. The family fled Central America after receiving death threats by gang members who raped and kidnapped the boy’s sister. See *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, HUMAN RIGHTS FIRST at 11 (Aug. 2021) [hereinafter *Human Rights Travesty*], https://www.humanrightsfirst.org/sites/default/files/HumanRightsTravesty_FINAL.pdf [https://perma.cc/3JFZ-GULX]; see also *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS <http://www.oas.org/en/iachr/reports/pdfs/refugees-migrants-us.pdf> (last visited Apr. 20, 2021) [hereinafter IACHR Report]. For additional information, see *Human Rights Situation of Refugee & Migrant Families & Unaccompanied Children in the United States of America*, INTER-AMERICAN COMM’N ON HUM. RIGHTS, (July 14, 2015).

interviews.”¹⁵⁴ The DHS raised the level as to what must be proven at a preliminary screening interview to the asylum officers.¹⁵⁵ Such screenings are usually conducted by trained and specialized asylum officers.¹⁵⁶ The administration having CBP carry out this function was a contravention of the law.¹⁵⁷ These CBP officers were refusing asylum seekers at a disproportionate rate.¹⁵⁸ The fundamental question is whether, in so doing, the Trump administration violated domestic and international law.

C. Was There a Violation of Domestic and/or International Law Using Refugees' Deterrence Policies?

As discussed above, the possibility to seek asylum protection in the United States is a given right in international law as embodied in the U.S Refugee Act of 1980.¹⁵⁹ One who fears persecution from his or her country of origin is not guaranteed that they would not be removed in another country. However, the underlying and essential right to apply for protection from persecution and to have that claim considered is quintessential to any legal regime complying with such protection.¹⁶⁰ Unfortunately, the United States, under the Trump administration, established multiple barriers to undermine the rights of those seeking asylum.¹⁶¹

1. The Principle of Non-Refoulement Under International Law

One of the sacred and “most urgent need[s] of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted.”¹⁶² Not meeting this principle is tantamount in

¹⁵⁴ See IACHR Report, *supra* note 153, at 74.

¹⁵⁵ Drake & Gibson, *supra* note 58, at 95.

¹⁵⁶ *Id.*

¹⁵⁷ See National Immigrant Justice Center, *Asylum Seekers & Refugees*, <https://immigrantjustice.org/issues/asylum-seekers-refugees> (last visited Sept. 7, 2021) [<https://perma.cc/WCJ9-SHEJ>].

¹⁵⁸ *Id.*

¹⁵⁹ Drake & Gibson, *supra* note 58, at 102.

¹⁶⁰ *Id.* at 93.

¹⁶¹ *Id.* at 95 (stating that the interviews were made available only to those who had initially been screened and approved by the U.S. Customs and Border Protection officers (CBP) as having met the test for the expression of fear).

¹⁶² *Id.* at 97 (citing JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 279, 279 (1st ed. 2005).).

most cases to a breach of international law. Breaching refoulement is comparable to a violation of international law when a refugee is deported to his or her country of origin. In so deporting the refugee, a State flagrantly contravenes its duty to abide by the fundamental law of non-refoulement.¹⁶³ This principle, found in Article 33 of the 1951 Convention, is at the heart of international refugee law.¹⁶⁴ It established one of the most “enduring foundations of refugee protection by setting baseline principles on which the international protection of refugees was to be built.”¹⁶⁵ For example, a person running away from persecution should not be expected to leave the country of origin and enter another in a normal or usual manner.¹⁶⁶ As a result, the principle of non-refoulement prohibits any measure that would result in a refugee being “pushed back into the arms of their persecutors.”¹⁶⁷

Scholars agree that Article 33(1) applies to a host country that rejects a refugee at the frontier as the principle of non-refoulement covers not only non-return but also non-rejection.¹⁶⁸ Thus, the issue of determining whether a country is in contravention of the non-refoulement principle should be focused on whether the action of that country creates room for the return of the person to persecution as a result of a refusal of the protection sought.¹⁶⁹ The issue should not be whether the person seeking refugee status is within that country’s territory, in transit, or meets the applicable standard for

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 99.

¹⁶⁵ *Id.* These principles include: (1) the principle of nonrefoulement; (2) that protection must be extended to all refugees without discrimination; (3) The problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states; and (4) Persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, and should not be penalized for having entered into the country where they seek asylum. *Id.*

¹⁶⁶ Drake & Gibson, *supra* note 58, at 99.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 101. Article 33 also applies to rejection at the port of a potential host country, and some scholars support the principle of non-refoulement. See e.g., JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 279 (1st ed. 2005); Mark R. von Sternberg, *Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection*, 2 J. ON MIGRATION & HUM. SEC. 329, (2014); GUY S. GOODWIN-GILL, *The Refugee in International Law* 143 (2d ed. 1996).

¹⁶⁹ Drake & Gibson, *supra* note 58, at 101.

refugee status through the adjudicatory process.¹⁷⁰ Thus, ultimately the United States is required under both domestic and international law to follow the principle of non-refoulement.¹⁷¹ Yet, under the Trump administration, access to asylum was greatly undermined before getting to the borders, or even while within the State territory.¹⁷² All these obstacles to asylum seekers at the borders, including the barriers to approaching the borders, limits to due process, and the proposal of returning asylum seekers to Mexico while their proceedings are pending, tend to undermine their rights under international and domestic laws.¹⁷³ If the United States uses Mexico to refool people from the countries they have fled from, then the United States is in violation of the principle of non-refoulment, and thus of international law.¹⁷⁴ The mobility of people should not always be translated to a question of immigration and refugee law. Rather, each person should be accorded human rights for one's shared humanity, irrespective of where the person is located.¹⁷⁵ Due process for migrants is a fundamental right embraced by the international community, and it is a way to check the constraints placed on refugees attempting to obtaining protections.¹⁷⁶

Some argue that gaps or weaknesses in the 1951 Convention create room for undermining the protections due to a failure to safeguard a comprehensive refugee protection plan.¹⁷⁷ Although the principle of non-refoulement requires that States not send refugees

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 114.

¹⁷² *Id.* at 141.

¹⁷³ *See if.* At 114-15.

¹⁷⁴ *Id.* at 120 (citing Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, at 160, U.N. Doc. A/56/10 (2001) ("A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.")).

¹⁷⁵ *Id.* at 120.

¹⁷⁶ *See* Universal Declaration of Human Rights, art. 10–11, Dec. 10, 1948; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, E.T.S. No. 5; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, *supra* note 54; Convention of the Rights of the Child, *supra* note 64, at art. 12(2), 40(1).

¹⁷⁷ Eric A. Ormsby, *The Refugee Crisis as Civil Liberties Crisis*, 117 COLUM. L. REV. 1191, 1192 (2017).

to a place where they would likely face persecution, under the 1951 Convention, States are not given a direct mandate to examine a refugees' asylum application.¹⁷⁸ This discrepancy translates to States not having an affirmative duty to accept asylum seekers.¹⁷⁹ Consequently, non-refoulement really does not prevent countries that do not examine an asylum claim from then removing that refugee to another safe country, from which the cycle may continue by further removal from that third country to another.¹⁸⁰

2. *Border Externalization Issues*

Border externalization refers to the measures taken by States to prevent people from getting to their territories, such as limiting or stopping migration flow to their countries.¹⁸¹ Border externalization takes several different forms.¹⁸² These actions are often justified as necessary for ensuring national security, preventing international human trafficking, deterring migrants from making dangerous journeys, and assisting transit countries to build their own mechanism for handling migration.¹⁸³ On the other hand, border externalization is often criticized as not being designed to attain the purported goals.¹⁸⁴ For example, refusing to permit entry by a mother and child less than a mile from the U.S-Mexico border falls short in fulfilling any of those goals.¹⁸⁵ Related to this method of refugee deterrence is "cooperation based on non-entrée."¹⁸⁶ Although this political strategy may emerge in various forms, it usually tends to involve some degree of coordination between the home state and a third or transit state.¹⁸⁷ For example, the United States agreed with Mexican authorities to carry out programs in Mexico designed to keep away asylum seekers from Central

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Drake & Gibson, *supra* note 58, at 115.

¹⁸² *Id.* at 118 (noting that border externalization includes visa regimes, agreements requesting third parties to prevent movements through transit countries, and extensive airlines screenings).

¹⁸³ *Id.* at 116.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Ormsby, *supra* note 177, at 1204.

¹⁸⁷ *Id.*

America fleeing violence to get to the U.S borders.¹⁸⁸ The partnering countries are usually given incentives to foster the home country's policy such as promises of better diplomatic relations or even financial assistance.¹⁸⁹

The border externalization policy and U.S. commitment to the letter and principles of the 1951 Convention were tested earlier in *Sale v. Haitian Center Council Inc.*¹⁹⁰ In that case, many Haitians left their country to seek asylum in the United States in the late 1970s.¹⁹¹ Their exodus was in large part due to the ruthlessness and violence of the then-government in Haiti.¹⁹² The United States' initial reaction was to interdict the Haitians from making the journey on the high seas, but it later changed this strategy to one of interdiction and detention of the Haitians off shore at Guantanamo Bay, Cuba.¹⁹³ This process further changed to one whereby the United States simply returned these interdicted Haitians to their country of persecution.¹⁹⁴ The latter actions were scrutinized by the international community as running afoul of the tenets of the principle of non-refoulement under the 1951 Convention and the 1967 Protocol.¹⁹⁵ The Convention provides that "no contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."¹⁹⁶ Despite this explicit language, the U.S. Supreme Court held that neither the 1951 Convention nor the applicable U.S. law applied the duty extraterritorially.¹⁹⁷ Justice Stevens applied a

¹⁸⁸ *Id.* For example, the bilateral agreement for the Mérida Initiative, between Mexico and the U.S., intended to improve security at the Mexican Southern border through the creation of a modernized border structure with enhanced security, more patrols and check points at popular migration roads. See Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 251 (2015).

¹⁸⁹ Ormsby, *supra* note 177, at 1204.

¹⁹⁰ 509 U. S. 155 (1993). The United States, although having been very involved in the drafting of the 1951 Convention, did not ratify the Convention or become a signatory to the Protocol in 1968. Twelve year later, the United States then adopted implementing legislation that conformed its immigration policies to the Protocol. *Id.* at 177.

¹⁹¹ Ormsby, *supra* note 177, at 1207.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at 1207.

¹⁹⁶ Convention Against Torture, *supra* note 77, at art. 3.

¹⁹⁷ Ormsby, *supra* note 177, at 1207. The U.S Immigration Act of 1980 codified the

narrower interpretation of the 1957 Convention and 1967 Protocol, stating that the no return “whatsoever” in any manner “referred to only persons already in the United States.”¹⁹⁸ Therefore, the obligation of non-refoulement did not apply to these interdicted Haitians as they were not in the United States.¹⁹⁹ This interpretation makes redundant the words “expel or return” as used in the 1951 Convention, as the Court’s emphasis is only on “expel.”²⁰⁰ This decision was denounced by the UNCHR and international community as it was said to invite destination States to shut their doors to asylum seekers and shirk their responsibilities under international law.²⁰¹ The UNCHR quickly expressed concern that “a number of countries, where the admission or presence of certain groups of refugees have been perceived as incompatible with national interests or domestic concerns, have ignored or undermined the principle of non-refoulement.”²⁰²

3. *Safe Third Country Agreements Issue as a Violation*

Another effective deterrence policy utilized by States to cut back and discourage migration is the implementation of the safe “third country” or “first country of arrival” assumption. Sending back the migrant to the first country of arrival provides legal cover for a country to send back the asylum seeker from their own territory.²⁰³ The ability to send back an asylum seeker to a country that he or she only transited through may just be an expedient way to get rid of undesired asylum seekers.²⁰⁴ The problem with a safe

Refugee Convention as modified by Refugee Protocol, into domestic law. Consequently, the Refugee Convention’s definition of a refugee and made nonrefoulement mandatory. *See Sale v. Haitian Centers Council Inc.*, 509 U.S. 155, 189 (1993).

¹⁹⁸ Drake & Gibson, *supra* note 58, at 116.

¹⁹⁹ The United States Immigration and Nationality Act, § 243(h)(1), 8 U.S.C. § 1153(h)(1) [hereinafter INA] (prohibiting the return of any alien to a country where they would be persecuted).

²⁰⁰ Drake & Gibson, *supra* note 58, at 117.

²⁰¹ *Id.* at 117 n.143.

²⁰² Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT’L L. 1 (1994) (citing *United Nations High Comm’r for Refugees, Note on Int’l Prot.*, submitted to Executive Committee of the High Commissioner’s Programme on Aug. 31, 1993, at 4, U.N. Doc. A/AC.96/815 (1993).).

²⁰³ Ormsby, *supra* note 177, at 1203.

²⁰⁴ *See* Drake & Gibson, *supra* note 58, at 133 (noting that transit countries have been deemed “safe third country” or “first country of asylum” so to provide the legal cover to deter and send back undesirable asylum seekers).

third country or first country of arrival is that it could cause compounding issues, where the refugee is to face repeated or chain removals to different states.²⁰⁵ Protections against such chain removal is provided in international law through the principle of non-refoulement.²⁰⁶ What if, for example, the United States were to remove a Central American to Mexico, where he or she will likely face deportation to the unsafe country he or she is fleeing from persecution?²⁰⁷ It will be a violation of the non-refoulement principle, given that the eventual result from the first to the last removal in the chain is going back to the country of persecution.²⁰⁸ There is no hard-and-fast rule internationally or policy-wise that requires an asylum seeker seek asylum in the first country they arrive at.²⁰⁹ This view has been buttressed by UNHCR, which established that:

[A]n examination of the internationally accepted principles relating to asylum reveals that none of them suggest—much less prescribe—that the right to seek asylum has to be exercised in any particular country, or that a person who has been forced to escape his country to save his life or freedom would forfeit his right to seek asylum if he does not exercise it in the first country whose territory he has entered.²¹⁰

Multilateral and bilateral agreements may alter this rule by obliging an asylum seeker to apply for asylum in a “safe third country” or “first country” of arrival.²¹¹ Although the United States’ Immigration and Nationality Act (“INA”) clearly states the right to seek asylum in the United States,²¹² it also provides exceptions to that right. One major exception is the “safe third country” provision.²¹³ Per INA, the removal of an asylum seeker to a third country should be done based on an agreement between and amongst countries.²¹⁴ This provision means in the absence of such

²⁰⁵ See Ormsby, *supra* note 177, at 1203.

²⁰⁶ See Drake & Gibson, *supra* note 58, at 135.

²⁰⁷ *Id.*

²⁰⁸ See *id.* at 135–36.

²⁰⁹ See *id.* at 134.

²¹⁰ *Id.* at 134 (citing von Sternberg, *supra* note 168, at 336.).

²¹¹ See *id.* at 134.

²¹² 8 U.S.C. § 1158(a)(1) (2017).

²¹³ Drake & Gibson, *supra* note 58, at 136.

²¹⁴ *Id.* (citing 8 U.S.C. § 1158(a)(2)(A) (2017)).

an agreement with a third country, an asylum seeker should not be removed to the third country.²¹⁵ Canada and the United States entered into a safe third country agreement in 2002, denying those within the territory of either country the ability to make a claim for asylum in the other.²¹⁶ Likewise, the United States and El Salvador signed a bilateral agreement to fight against the flow of migrants from Central America by requiring that migrants first seek asylum there.²¹⁷

Some protections for the asylum seeker are built into the provision of the INA. For example, the agreement guarantees that the individual will not suffer any more persecution and will be given proper due process in the third country.²¹⁸ In the same vein, the regulation means there must be judicial review of any decision to remove an individual before the actual removal can occur.²¹⁹ This due process euphoria may be short lived as the legislative proposal reintroduced in January 2017 under the Asylum Reform and Border Protection Act seeks to amend the safe country provision, thus granting unbridled powers to the Secretary of Homeland Security to single-handedly proclaim a country a “safe third country.”²²⁰ The consequence of such a unilateral declaration is that access to the U.S. asylum system is prevented.²²¹ The person ends up being sent to the third country, as opposed to being able to seek asylum in the United States.

Under international law, treaties are only binding upon the parties to them, while customary international law is binding upon all nations.²²² For example, under the principles of international

²¹⁵ *See id.*

²¹⁶ *Id.* at 134 (citing Safe Third Country Agreement, Can.-U.S., Dec. 5, 2002, <https://www.refworld.org/pdfid/42d7b9944.pdf> (last visited Sep. 25, 2021) [<https://perma.cc/MM98-F22V>]).

²¹⁷ *See Asylum Seekers & Refugees, supra* note 157.

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *See Drake & Gibson, supra* note 58, at 137 (citing Asylum Reform and Border Protection Act of 2017, H.R. 391, 115th Cong. (2017)).

²²¹ *See id.*; *see also* Press Release, *Human Rights First, House Should Reject Bills that Undermine U.S. Protection of Refugees*, (Jan. 11, 2017), <https://www.humanrightsfirst.org/press-release/house-should-reject-bills-undermine-us-protection-refugees> [<https://perma.cc/KQ5V-R7YH>].

²²² Nazarova, *supra* note 56, at 1343. *See also* the Restatement (Third) which states that customary international law involves a consistent practice in which states engage out of a sense of legal obligation. Restatement Third of The Foreign Relations Law of the

customary law, all States should recognize the right to seek asylum and to be free from torture.²²³ Although there is no specific mention or mandate on custom as a part of the law of the land in the U.S. Constitution, the expectation is that U.S. courts are to interpret domestic laws consistent with international law, especially “where there is no conflicting treaty, judicial precedent or controlling executive or legislative act.”²²⁴ Thus, the United States would be compelled to follow the tenets of the UDHR as customary international law.²²⁵ In the same vein, the principle of non-refoulement is part of customary international law, and all States, whether or not a party to the 1951 Convention, must honor it.

V. The Influence of the UNHCR on Refugee Law in the United States

The UNHCR statute provides a litany of function for its office, such as “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”²²⁶ Likewise, the UNHCR helps governments handle refugee issues, foster the admission of refugees in States, collect state data on refugees, as well as help the works of private organizations dealing with refugee issues.²²⁷ Under Article 35(1), State parties “undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”²²⁸ Given the UNHCR’s depth of knowledge and expertise developed through its involvement with refugees matters throughout the world, it is only befitting that deference is given to that knowledge and interpretation prowess.²²⁹

United States section 102, 1987.

²²³ *Id.* at 1354.

²²⁴ *Id.* at 1357.

²²⁵ *Id.* at 1358.

²²⁶ Statute of the Office of the High Commissioner for Refugees, *supra* note 50, at art. 8(a).

²²⁷ *American Courts and the UNCHR*, *supra* note 87, at 1415.

²²⁸ The 1951 Convention, *supra* note 75, art. 35(1). In resolving disputes, the Convention also provides that any party may refer a dispute regarding interpretation or application of the Convention to the International Court of Justice (ICJ), should it not be possible to resolve the dispute otherwise. *Id.* at art. 38.

²²⁹ *American Courts and the UNHCR*, *supra* note 87, at 1399-1400.

In 2016, of the world's 17.2 million refugees, UNHCR was estimated to have aided about 12.9 million.²³⁰ Thus, the UNHCR stands in a better position than the individual states in harmonizing the international refugee administration.²³¹

The organization is marked by a strong history of providing its view and interpretation to courts; in other cases, the courts directly reach out to it for assistance with the interpretation of statutes.²³² Although the views and interpretation of the UNHCR are not embraced by all, many countries find its views as very persuasive.²³³ However, the 1951 Convention and the 1967 Protocol oblige State parties to “undertake to co-operate with the [UNCHR]” and “facilitate its duty of supervising the application of the provisions of [the] Convention.”²³⁴ The UNHCR embraces and refers to its mandate to harmonize the 1951 convention and 1967 Protocol at the international level:

In furtherance of its core mandate, UNHCR seeks to promote a common approach to the application of the 1951 Convention and 1967 Protocol . . . thus providing consistency and predictability in refugee determinations internationally and reducing the possibility of conflict between decisions made by different States, between decisions made by a State and the UNHCR, or both.²³⁵

UNHCR has an official published handbook which aids in the interpretation of the 1951 Convention.²³⁶ Examining the role of the UNHCR in some cases decided by the U.S. Supreme Court would be illuminating as to the influence that the UNCHR may have on the application of the Convention at the national and international level.

²³⁰ *Id.* at 1415.

²³¹ *Id.* at 1416.

²³² *Id.*

²³³ *Id.* at 417. Some scholars argue that deference to the UNCHR's view should not necessarily override the interpretation of individual states, and that embracing the UNHCR in issues of its enforcement and interpretation would encourage states to absolve themselves from their own responsibility to enforce the Convention. *See also* Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y. U. J. INT'L & POL. 391, 477 (2013).

²³⁴ *American Courts and the UNHCR*, *supra* note 87, at 1400.

²³⁵ *Id.* at 1418-19 fn. 135.

²³⁶ *See* United Nations High Commission on Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (Jan. 1992).

In the 1984 case of *INS v. Stevic*,²³⁷ Stevic came from Yugoslavia and appealed a deportation decision because of the “new[ly] mandatory withholding of removal for refugees.”²³⁸ The standard for the immigration law for deportation prior to the enactment of the Refugee Act was to simply show “a clear probability of persecution.”²³⁹ Although the Refugee Act did not clearly change the standard, the circuit court held in favor of Stevic, basing the decision in part on the UNHCR Handbook and the lesser standard of “well-founded fear” as expressed in the 1967 Protocol.²⁴⁰ On appeal, the UNHCR filed an amicus and argued that the U.S. Congress’ intent was to apply the definition in the 1951 Convention—a lower standard.²⁴¹ The Supreme Court overruled the circuit court holding and determined that an applicant has to demonstrate a level of risk amounting to a “clear probability” rather than the simple “well-founded fear” standard required for asylum.²⁴² The Court made no mention of the contrary view of the UNHCR. The case is often criticized because it apparently authorized the use of nonconforming domestic law to be used instead of the 1967 Protocol.²⁴³

Shortly thereafter, was the case of *INS v. Cardozo-Fonseca*,²⁴⁴ where the Supreme Court, instead of applying the mandatory withholding of removal as in *Stevic*, used the provision of the Refugee Act, which called for the grant of asylum on a discretionary manner by the Attorney General.²⁴⁵ In so doing, the Court not only held in favor of Cardozo-Fonseca, but also in conformity with the UNHCR recommendations, clearly citing the Handbook in its analysis.²⁴⁶ Consequently, *Cardozo-Fonseca* is touted as the Supreme Court’s deference to international norms and displays the role of UNHCR in interpreting refugee laws.²⁴⁷ So while *Stevic*

²³⁷ 467 U.S. 407 (1984).

²³⁸ *American Courts and the UNHCR*, *supra* note 87, at 1403.

²³⁹ *Id.* at 1405.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1403.

²⁴² *INS v. Stevic*, 467 U.S. 407, 430 (1984).

²⁴³ *American Courts and the UNHCR*, *supra* note 87, at 1404.

²⁴⁴ 480 U.S. 421 (1987).

²⁴⁵ *Id.* at 449–50.

²⁴⁶ *American Courts and the UNHCR*, *supra* note 87, at 1405.

²⁴⁷ *Id.*

ignored UNCHR's interpretation of Article 33 of the Convention and the Refugee Act, that same argument was made and redeemed in the *Cardoza-Fonseca* case.²⁴⁸

Another case already discussed in which the UNHCR disagreed with the Supreme Court was in the case of *Sale*, where the Supreme Court held contrary to the UNHCR view that the 1951 Convention does not apply to refugees in the high seas.²⁴⁹ The UNHCR overtly criticized the decision of the Court, stating that the decision is “a setback to modern international refugee law which has been developing for more than forty years.”²⁵⁰

In *Negusie v. Holder*,²⁵¹ the issue presented was whether the “persecutor bar” in the Refugee Act included within its reach behavior resulting from conduct under duress.²⁵² In this case, Negusie, a foreign national while in the Eritrean army, was tortured for two years. He was also compelled to guard prisoners who were also under persecution because of their membership in a protected group.²⁵³ The foreign national escaped by hiding in a shipping container bound for the United States.²⁵⁴ In its amicus brief in favor of Negusie, the UNHCR stated that for the application of the persecution bar to be effectively employed to the foreign national, that foreign national must be found individually responsible for the action, but that such action should stand if there is a defense such as duress against criminal responsibility.²⁵⁵ The Supreme Court found that the Refugee Act was ambiguous as to the issue of persecution carried out under duress and instead based its interpretation on the Board of Immigration Appeal (“BIA”).²⁵⁶ Although the majority

²⁴⁸ *Id.* at 1405–06.

²⁴⁹ *See supra* text accompanying notes 183–94.

²⁵⁰ *American Courts and the UNHCR*, *supra* note 87, at 1408.

²⁵¹ 555 U.S. 511 (2009).

²⁵² *Id.* at 514; *see also* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (“The term “refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

²⁵³ *Negusie*, 555 U.S. at 514–15.

²⁵⁴ *Id.*

²⁵⁵ *See American Courts and the UNHCR*, *supra* note 87, at 1410; Brief for the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, *Negusie v. Mukasey*, 555 U.S. 511 (No. 07-499), 2008 WL 2550609, at *4–5 [hereinafter *UNHCR Amicus Brief*].

²⁵⁶ *Negusie*, 555 U.S. at 516–17.

opinion steered away from mentioning the UNHCR, Justice Stevens' partial dissent and concurrence favorably cited the UNHCR Handbook as a source for guidance, and noted that the persecutor bar standard interpretation has been used by other ratifying countries to the Convention.²⁵⁷

The Supreme Court has yet to pronounce a clear and consistent policy towards UNHCR. The Supreme Court's position varies from no consideration of UNHCR views in *Stevic* to much consideration in *Cardoza-Fonseca*, then again to no consideration in *Sale* and *Negusie*.²⁵⁸ Consequently, the Supreme Court, as of *Negusie*, seemed to have embraced the "vague doctrine of minimal regard for the UNHCR's views."²⁵⁹ What the future holds remains to be seen. Some scholars also explain the role of the UNCHR as "fairly marginal," while others argue that even though the UNHCR's views may not always be followed by the United States, it would be disingenuous to hold that the U.S. government and officials dealing with refugee policy and decision making do not take their views seriously.²⁶⁰ While there may be inconsistencies in the views of UNCHR and the U.S. government, there are still common grounds of agreement and collaboration in many others.²⁶¹

VI. The Unaccompanied Children at the Border and the Pervasive Scandal

Under Article 1 of the Convention on the Rights of the Child ("CRC"), a child is "every human being under the age of eighteen years, unless under the law applicable to the child, majority is attained earlier."²⁶² An unaccompanied child under the U.N. Committee on the Rights of the Child is "one who is separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so."²⁶³

²⁵⁷ *American Courts and the UNHCR*, *supra* note 87, at 1410; *see also Negusie*, 555 U.S. at 536–37 (Stevens, J., concurring in part and dissenting in part).

²⁵⁸ *American Courts and the UNHCR*, *supra* note 87, at 1410.

²⁵⁹ *Id.*

²⁶⁰ Scott Busby, *The Politics of Protection: Limits and Possibilities in the Implementation of International Refugees Norms in the United States*, 15 BERKELEY J. INT'L L. 27, 30 (1997).

²⁶¹ *Id.* at 32–33.

²⁶² Convention on the Rights of the Child, *supra* note 64, art. 1.

²⁶³ U.N. Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*,

Similarly, under U.S. law, an “unaccompanied alien child” is defined as a child who: (a) has no lawful immigration status in the United States; (b) has not attained 18 years of age; and (c) with respect to whom (i) there is no parent or legal guardian in the United States or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.²⁶⁴

In 2017 and beyond, the Trump administration unleashed attacks on the U.S. immigration and asylum system through executive actions and policies.²⁶⁵ The zero-tolerance policy announced by the Attorney General in a 2018 memo sparked widespread family separations.²⁶⁶ The memo demanded that any migrants arriving in the United States, which included asylum seekers, be sent to the Department of Justice (“DOJ”) for possible “criminal prosecution for entry or reentry” into the country.²⁶⁷ This decision, which was later said to have been deliberately designed to serve as a deterrence for asylum seekers, culminated in the mass separation of families.²⁶⁸ Parents who wound up being prosecuted were carried away from their children, while the children (about 2,600 at the time) were taken into custody.²⁶⁹ Although Congress was later given the opportunity by an Executive Order to tackle the issues and a court order was issued to halt the practice, there were still reportedly ongoing family separations for about a year thereafter.²⁷⁰ Some parents were separated from their children for nebulous and uncorroborated reasons like “criminal history, gang

CRC/GC/2005/6 (Sep. 1, 2005).

²⁶⁴ 6 U.S.C. § 279(g)(2) (2021).

²⁶⁵ For example: higher “credible fear” standards in asylum interviews, case quotas for immigration court judges, restrictions on asylum for domestic violence survivors and migrants who cross between points of entry, and “safe third country” agreements that restrict the flow of asylum-seekers from Central America. *E.g.*, *A Timeline of the Trump Administration’s Efforts to End Asylum* [hereinafter *Asylum Timeline*], NATIONAL IMMIGRANT JUSTICE CENTER (last updated Jan. 11, 2021), <https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2021-01/01-11-2021-asylumtimeline.pdf> [<https://perma.cc/DE45-WW7R>].

²⁶⁶ *Id.*; see Memorandum from Jeff Sessions, Att’y Gen., for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018).

²⁶⁷ *Asylum Timeline*, *supra* note 265 at 23.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

affiliation, or even medical issues such as HIV status.”²⁷¹ This problem was compounded by subsequent decisions by the administration like banning asylum eligibility for any migrant who crosses between ports.²⁷² The 2019 Migrant Persecution Protocols (“MPP”), also known as the “Remain in Mexico” policy, required asylum seekers who were inspected at the port of entry return to Mexico to await the proceedings.²⁷³

In May 2019, a memo from USCIS undermined protections provided to unaccompanied children during the asylum process.²⁷⁴ This memo, which contained new procedures that would impact how children would access their rights to asylum, failed to recognize the protections that were designed for these children. For example, the memo failed to take into consideration the susceptibility of a child who arrives at the border alone.²⁷⁵ The memo also undermined the non-adversarial asylum interview procedures and exemption from the one-year filing deadline, the former of which was normally provided to unaccompanied children in their asylum proceedings.²⁷⁶ Thankfully, these procedures were short lived. In August of that year, a temporary restraining order was issued by a federal district court.²⁷⁷ Following a regulatory change executed as an Interim Final Rule (“IFR”), the administration banned persons who travel through a third country to the United

²⁷¹ *Id.*

²⁷² *Id.* at 19 (“In response to groups of asylum seekers from Central America arriving in the fall of 2018 (known colloquially as caravans), the administration, via proclamation, banned individuals who do not present themselves at a point of entry from applying for asylum.”).

²⁷³ Asylum Timeline, *supra* note 265 at 23. This policy tends to undermine the domestic and international law principle of non-refoulement. *See supra* text accompanying notes 150–54; *see also* Oona Hathaway, Mark Stevens & Preston Lim, *COVID 19 and International Law: Refugee Law - The Principle of Non-Refoulement*, Just Security (Nov. 30, 2020), <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement> [<https://perma.cc/BU4H-73Z7>] (“It appears likely that many States have violated the international law prohibition on refoulement during the course of the COVID-19 pandemic. COVID-19 does not grant States carte blanche to trample on well-established principles of international refugee law. States that are party to the 1967 Protocol have an obligation to process asylum claims, even if they are simultaneously allowed to impose COVID-responsive health protocols on entering asylum-seekers.”).

²⁷⁴ Asylum Timeline, *supra* note 265, at 19.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 19–20.

States from applying for asylum. This ban included children.²⁷⁸ Subsequently, the United States signed a bilateral agreement with El Salvador to control migration flow from Central America.²⁷⁹ Another such agreement with the same purpose and intent was reached with Honduras, blocking asylum seekers from getting to the United States.²⁸⁰ These agreements were buttressed by the IFR issued by the DHS and the DOJ, known as the asylum cooperative agreement (“CACA”), permitting the United States to enter into an unsafe third-country agreement with Honduras, El Salvador, and Guatemala.²⁸¹ The legality of this third-country agreement has been challenged in federal court.²⁸²

These agreements were challenged on the grounds that they violated the Refugee Act, the Immigration Act, and the Nationality Act.²⁸³ “The asylum-seekers were forcibly sent to some countries, such as Guatemala, that did not have the infrastructure to receive and house asylees.”²⁸⁴ Ironically, these asylum seekers are haunted by thoughts that they would likely encounter the same persecutions from which they are running from in the first place.²⁸⁵

In March 2020, the U.S. border was closed pursuant to the CDC request due to the COVID-19 pandemic. However, Customs and Border Protection (“CBP”) still expelled about 200,000 migrants and asylum seekers.²⁸⁶ This number included over 13,000 children.²⁸⁷ In November 2020, this systematic expulsion of children at the border was stopped as a result of an indigenous

²⁷⁸ *Id.* at 17.

²⁷⁹ *Id.* at 23 (“[T]he United States has entered into an agreement with El Salvador to have the Central American country develop its asylum process so that migrants will first seek asylum there.”).

²⁸⁰ *Id.* at 16.

²⁸¹ *Id.* at 15 (“Under this new rule, asylum officers and CBP would have the discretion to conduct threshold screenings to determine which country will consider an asylum seeker’s claim.”).

²⁸² *Id.* at 15 (“The lawsuit, *U.T. v. Barr*, was filed in the U.S. District Court of Washington D.C. . . . Plaintiffs are asylum seekers who fled to the U.S. and were unlawfully removed to Guatemala.”).

²⁸³ *Id.*

²⁸⁴ *Id.* at 13.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 3.

²⁸⁷ *Id.*

child's class action suit seeking asylum.²⁸⁸

With the new administration taking over in January 2021, one of the early tests of the new administration is the border crisis, which is fast becoming a humanitarian crisis. Under the Biden administration, the unaccompanied minors at the southern border are increasing in rapid numbers.²⁸⁹ These numbers have certainly skyrocketed since he took office and President Biden announced that he will not follow the Trump administration policy to send unaccompanied minors and children back to their countries, adding that they will be treated humanely.²⁹⁰ In his first press conference after taking office, President Biden said “nothing has changed” when compared to previous influxes at the border.²⁹¹ As of April 2021, the administration is spending approximately 60 million dollars a week to care for 16,000 children in shelters run by the HHS.²⁹² The 7,700 beds in the permanent shelters filled up rapidly, costing about \$290 a day per unaccompanied minor.²⁹³ The administration has dealt with the influx by setting up emergency facilities in convention centers, military bases, and oil workers camps, with almost 8,500 children at these facilities and with 4,000 more yet to be moved from the crowded border facilities.²⁹⁴ Understandably, because of the emergency need to set up all these structures and hire a large staff in a short time frame, the ultimate

²⁸⁸ *Id.* An indigenous child leading a class action suit has been successful in having the court enjoin the action. See *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020).

²⁸⁹ See Nick Miroff, *Biden Administration Spending \$60 Million Per Week to Shelter Unaccompanied Minors*, WASH. POST (Apr. 8, 2021), https://www.washingtonpost.com/national/border-shelters-cost/2021/04/08/c54ecc3a-97bd-11eb-8e42-3906c09073f9_story.html [<https://perma.cc/CD7R-ELJP>].

²⁹⁰ *Id.*

²⁹¹ Franco Ordoñez, *Biden Says ‘Nothing Has Changed’ But Child Migrants Crossing Border At Higher Pace*, NPR (Mar. 27, 2021), <https://www.npr.org/2021/03/27/981730103/biden-says-nothing-has-changed-but-child-migrants-crossing-border-at-higher-pace> [<https://perma.cc/R8B4-G9YP>]; see also Ted Hesson et al., *Tensions rise within Biden administration as migrant kids crowd shelters*, REUTERS (Sep. 1, 2021), <https://www.reuters.com/world/us/tensions-rise-within-biden-administration-migrant-kids-crowd-shelters-2021-04-15/> [<https://perma.cc/VGT6-GVZ9>] (“Republicans blame [President Biden] for the rising numbers, saying he was too hasty in rolling back former President Donald Trump’s restrictive immigration policies.”).

²⁹² See Miroff, *supra* note 289 (stating that these temporary shelters, although not perfect, are still better than the cramped border tents where children are held upon crossing the border).

²⁹³ *Id.*

²⁹⁴ *Id.*

cost is two and a half times more than it would ordinarily cost to have a permanent shelter.²⁹⁵ The ultimate cost per day works out to around \$775.²⁹⁶ It is estimated that 22,000 to 26,000 unaccompanied minors will arrive at the United States border by September 2021.²⁹⁷ Having these migrant families at the border is not new, as it also occurred during the Bush and Obama administrations, albeit to a lesser extent. Like the previous presidents, the Biden administration was not prepared to shelter these numbers.²⁹⁸ The share and perhaps unanticipated growth in numbers from previous years may be the reason for the unpreparedness.

In 2008, President George W. Bush responded to the ongoing problem by calling for “unaccompanied minors” crossing the border to be released into the “least restrictive setting.”²⁹⁹ In 2014, President Barack Obama encountered a similar inflow of unaccompanied children and families fleeing from violence in Central America.³⁰⁰ Although President Obama tried resolving the issue by having these immigrants housed in a special detention camp, this was short lived.³⁰¹ A California federal judge determined that this means of accommodating these migrants was in violation of an agreement prohibiting kids from being held under such restrictive jail-like settings.³⁰² Consequently, the Obama administration went with the policy of releasing these migrants into the country while they wait for their court date notifications.³⁰³

As discussed above, the Trump administration ushered in the zero-tolerance policy for border crossing, as they showed their disdain for the Obama immigration policy they termed “catch and

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* Anne Flaherty, *Origins of family separation issue stretch back many years*, Associated Press News (Sep. 1, 2021), <https://apnews.com/article/immigration-north-america-laws-george-w-bush-politics-> [PERMALINK - cc]

²⁹⁹ Anne Flaherty, *Origins of family separation issue stretch back many years*, Associated Press News (Sep. 1, 2021), <https://apnews.com/article/immigration-north-america-laws-george-w-bush-politics-26b88518310f47018b724e200b28e88f> [https://perma.cc/8YNB-Y839].

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

release.” The Trump administration believed that these migrants took advantage of the immigration system, as they traveled with children to avoid being arrested, and then would disappear before their court date. Consequently, children were separated from their parents, resulting in parents not knowing where their children were.

Upon taking office, the Biden administration permitted families—in particular, those with minor children—to enter the United States.³⁰⁴ However, the Biden administration changed its mind, likely because the numbers seeking to enter the United States increased dramatically as discussed above. The administration expressed that the asylum seekers should simply wait where they were until the administration could ensure humanitarian processing facility at the border. The administration also insinuated that they needed to do that first, as the former administration had demolished the system that was in place.³⁰⁵ The Biden administration was also applauded for halting the Trump administration’s “Remain in Mexico” policy, although it was still criticized for blocking and expelling asylum seekers under the same policy.³⁰⁶ The Biden administration is therefore said to be propelling the same Trump administration policy at the Southern border and side-stepping refugee law by expelling asylum seekers to Mexico.³⁰⁷ The Biden administration claims a public health authority rationale, as permitted under 42 U.S.C. § 265, to prohibit individuals from seeking asylum at the border.³⁰⁸

Under 42 U.S.C. § 265, referred to as simply “Title 42,” the Surgeon General is authorized to suspend the introduction of individuals where “there is serious danger of the introduction of a communicable disease into the United States,” in the interest of public health.³⁰⁹ The Department of Homeland Security (“DHS”)

³⁰⁴ *A Guide to Title 42 Expulsions at the Border: Fact Sheet*, American Immigration Council, (Mar. 29, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [https://perma.cc/3LVL-3G7X].

³⁰⁵ *Id.*

³⁰⁶ *Human Rights Travesty*, *supra* note 153, at 2.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Lucas Guttentag, *Coronavirus Border Expulsions: CDC’S Assault on Asylum Seekers and Unaccompanied Minors*, Just Security (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/> [https://perma.cc/Y78W-DC4C]. Historically, Title 42 bestowed quarantine powers to handle the spread of cholera and

announced that it will use the August 2021 order issued by the Center for Disease Control (“CDC”) under Title 42 to handle persons seeking protection in the United States.³¹⁰ Using COVID-19 as the health issue, this Title 42 policy resulted in essentially sealing the borders to asylum seekers. Even though the use of the Public Health Service Act of 1944 was intended to apply to all persons, including U.S. citizens, arriving from a different country,³¹¹ those barred from entering the United States are those crossing the border from Mexico and Canada.³¹² Further, the border closure is not based on scientific public health indicators.³¹³ This process is like the policy undertaken by the Trump administration. Consequently, the Biden administration has been accused of following a “gentler” version of the Trump policy by professing it has stopped the Remain in Mexico policy.³¹⁴

When the Trump policy of “Remain in Mexico” was halted, Texas and Missouri sued the Biden administration, requesting the court oblige the administration to reinstate the “Remain in Mexico” policy.³¹⁵ A federal district judge in Texas ordered the reinstatement of the program, stating that the Biden administration violated the law when it put an end to the program.³¹⁶ The administration appealed the ruling to the Fifth Circuit Court of Appeals, which

yellow fever. References to immigration were removed from an early draft of the law to address concerns that all travelers, not just immigrants, could carry diseases. *Id.*; see also Anne Bloomberg, Explainer: *What are Title 42 Expulsions?*, Jurist, Legal News & Commentary, Univ. Pittsburg School of L. (May 14, 2021), <https://www.jurist.org/features/2021/05/14/explainer-what-are-title-42-expulsions/> [https://perma.cc/G2B3-8LVF].

³¹⁰ *Human Rights Travesty*, *supra* note 153.

³¹¹ *Q&A: US Title 42 Policy to Expel Migrants at the Border* [hereinafter *Q&A: US Title 42*], HUMAN RIGHTS WATCH (Apr. 8, 2021), <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border> [https://perma.cc/MPF4-29QB].

³¹² *Id.* The Irony of this policy is that the U.S. Department of State warns U.S. citizens in it travel advisory not to travel to some of the same towns in Mexico where these asylum seekers stay and wait for their immigration court hearings. See *Delivered to Danger*, *supra* note 152.

³¹³ *Human Rights Travesty*, *supra* note 153.

³¹⁴ *Id.*

³¹⁵ Uriel J. Garcia, *Revival of “remain in Mexico” policy could have deadly consequences for asylum-seekers, advocates warn*, Texas Tribune (Aug. 25, 2021), <https://www.texastribune.org/2021/08/25/remain-in-mexico-supreme-court-ruling/> [https://perma.cc/F6EL-55LU].

³¹⁶ *Id.*

ordered an expedited consideration of the appeal and found in favor of Texas and Missouri.³¹⁷ The administration appealed the case to the U.S. Supreme Court, which decided in August 2021 that the “memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious.”³¹⁸ The Biden administration argued in briefs that the president has “clear authority to determine immigration policy.”³¹⁹ The American Civil Liberties Union (“ACLU”) has asked the administration to demonstrate a “fuller rationale for ending “Remain in Mexico” that could withstand court scrutiny.”³²⁰ According to a human rights organization report, at least 1,544 migrants have been either raped, killed or kidnapped as a result of being sent to Mexico under the “Remain in Mexico” Policy.³²¹

The quintessential question is what lasting and enduring solutions should be carried out to end this cyclical pattern at the southern border?

A. Some Recommendations on How to Effectively Manage the Border Crisis

Some recommendations to resolve the border problems for families and unaccompanied minors, among other due process issues, include:

- Regularly train border agents on human rights issues and how to relate to vulnerable populations “in the conduct of human mobility.”³²² They should understand the risks that some unaccompanied children may be forced to endure such as pressed involvement in drug rings or human trafficking organized by crime rings.³²³

³¹⁷ *Id.* The States argued that their states are burdened by the release of these migrants because of the impact it has on its state’s resources like education and health care. *Id.*

³¹⁸ Mark Sherman, *Supreme Court orders “Remain in Mexico” policy reinstated*, Associated Press News (Aug. 24, 2021), <https://apnews.com/article/mexico-courts-immigration-us-supreme-court-a3fe33081fa2909c17e8c08a2c37f818> [<https://perma.cc/E5FD-E5VV>].

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ Garcia, *supra* note 315.

³²² IACHR Report, *supra* note 153, at 105.

³²³ *Id.* Such advocacy from border patrol agents would assist in transforming policies and services that affect refugees at regional and international levels. Their advocacy during times of numerous forced displacements could influence governments, NGOs and other

- Make child-sensitive immigration court proceedings that makes it conducive for children to participate effectively.³²⁴ The immigration judges and others involved should be trained in how to handle children who may have suffered trauma.³²⁵
- Increase federal assistance to States that have received unaccompanied children as well as families.³²⁶ Ancillary to this is the suggestion that legal assistance be given to unaccompanied minors, at no cost, for collecting documents and evidence to use in defense at a hearing with the immigration judge.³²⁷
- Where a family or unaccompanied child has filed a lawsuit against a U.S. immigration official for abuses, mistreatment, or other causes, a grant of automatic stay of removal proceedings should be granted to the claimant.³²⁸ The removal of such a plaintiff to a third country while non-immigration proceedings are in progress may greatly undermine the claimant's ability to participate (due process) or obtain a remedy through the courts.³²⁹
- Confront the actual cause of displacement in Honduras, Guatemala, and El Salvador by infusing great support for effective programs that would fight against violence, encourage economic prospects, bolster justice systems, and protect communities from climate change.³³⁰
- Build and support increased asylum and refugee-hosting

stakeholders to embrace procedures that would protect and enhance the needs of migrants and refugees.

³²⁴ *Id.*

³²⁵ *Id.* at 95, 107–08. The Inter American Commission on Human Rights in its 2015 report indicated on p. 95 that “unaccompanied are still subject to an inherently adversarial and intimidating environment in the courtroom, in which they may be examined and cross-examined and that overall, USCIS officers (as well as officers of other federal agencies involved) lack sufficient training on issues regarding child development and child-sensitive, age-appropriate questioning. *Id.* at 95.

³²⁶ *Id.* at 109.

³²⁷ *Id.* at 107.

³²⁸ *Id.* at 110.

³²⁹ *Id.* The Inter American Commission on Human Rights, its members noted in their 2015 report that in a complaint filed regarding the treatment of unaccompanied children in the custody of CBP officials, 116 of the children between the ages of 15 and 17 endured some form of abuse or mistreatment from the officers. *Id.* at 94.

³³⁰ *The Real Solution: Regional Response Rather than Border Closures, Mass Incarceration, and Refugee returns*, HUMAN RIGHTS FIRST, (Apr. 2019), <https://www.humanrightsfirst.org/resource/real-solution-regional-response-rather-border-closures-mass-incarceration-and-refugee> [https://perma.cc/ZRY3-4YYB].

capability in Mexico and the other Latin American countries.³³¹ This is critical, given that asylum filings in countries like Mexico have increased by over 700 percent since 2014.³³²

□ In the same vein, the United States should work with UNCHR to develop strong regional capabilities for asylum and refugee protections and systems.³³³

□ Protect access to asylum by fighting against smuggling and human trafficking forces that prevent fleeing from dangerous countries.³³⁴

□ “Manage U.S. asylum arrivals effectively through a genuine humanitarian response that upholds U.S. law and provides order including:”³³⁵ (1) Reestablish timely systematic asylum processing at ports of entry and make sure there are prevailing human conditions at all DHS facilities; (2) end the deleterious policy of the “Remain in Mexico” scheme and “metering” policies that put people in harm’s way as they seek to cross between ports of entry or put their lives in in danger as they wait in Mexico; (3) fund and support NGOs and shelters in the United States; and (4) usher in orderliness through effective procedures that provide expedient, fair, and effective U.S. adjudications.³³⁶

□ Increase, instead of eliminating, immigration judges and interpreters.³³⁷ It is quintessential that the judges understand and ensure due process in their courtrooms, and that this is backed by interpreters.³³⁸

□ To enable eligible refugees to receive protection early in the process, support a legal representation initiative that makes comprehensive legal orientation representation (LOPs) available to all, including those in custody of DHS and/or Customs and Border Protection.³³⁹

□ Hold federal agencies accountable by monitoring and evaluating local partners and agencies involved with the

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.*

336 HUMAN RIGHTS FIRST, *supra* note 330.

337 *Id.*

338 *Id.*

339 *Id.*

resettlement of refugees, thereby making sure they are abiding by their contractual obligations.³⁴⁰

□ Streamline the security check process to achieve effectiveness.³⁴¹ Because each new administration tends to add new layers of security screening for refugees, the process appears to be repetitive and cumbersome. This process should be reexamined and revised for efficiency and effectiveness without undermining its potency.³⁴²

□ Suggestions have been made about creating a worldwide resource pool for refugees.³⁴³ All States would share proportionately the burdens of refugees, but perhaps it would be best to create a global fund to which each State would contribute and from which they could withdraw costs incurred for the protection of those in need.³⁴⁴

B. Recommendations—The Strategic Role of Advocates

In this current atmosphere of jurisdictional regulation and deterrence policy towards asylum seekers, advocates must be aggressive in challenging both the law and practice that tends to limit access to asylum.³⁴⁵ Advocates should push the courts to recognize and embrace due process to asylum seekers, including “the right to seek asylum, a full and fair hearing, and access to counsel.”³⁴⁶ Without proper due process, the United States is unlikely to adequately meet its obligation under the law “to ensure it does not return people to persecution.”³⁴⁷

Appointing counsel to everyone in immigration proceedings would be ideal. Access to counsel is vital and critical to these asylum seekers, whose destiny most likely is determined by the kind of help and representation they are given.³⁴⁸ Fleeing from one’s own country is already tough, especially for children, individuals in detention, and other vulnerable populations. To add to that the

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² HUMAN RIGHTS FIRST, *supra* note 330.

³⁴³ Boed, *supra* note 202, at 32.

³⁴⁴ *Id.*

³⁴⁵ Drake & Gibson, *supra* note 58, at 113.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ See *Asylum Seekers & Refugees*, *supra* note 157.

challenge of navigating the complex immigration system that they usually know nothing about is unrealistic. Advocates should engage with policy makers about human rights protections while also holding the government accountable.

An advocate should frame the issues to address the concerns of decisionmakers and follow international norms in the process. These two objectives were accomplished in *Sale v. Haitian Center Council*.³⁴⁹ In *Sale*, Haitians were offshore in Guantanamo for two reasons: temporary protection was at least granted, even if only offshore, and secondly, that action dissuaded other Haitians from trying to reach the United States.³⁵⁰ This case established that the United States still chose to comply with refugee protection based on the principle of non-refoulement, although it did so with the refugees outside the United States, which in itself was commendable.³⁵¹ In so doing, the United States took off the concerns against promoting illegal immigration.³⁵²

VII. Conclusion

The current wave of refugees is a global phenomenon that is predicted to grow, given the prevailing factors that force people to migrate in the first place. These factors, including the increase in conflicts propelled by limited resources in developing countries, the impacts of climate change, domestic and international terrorism, and globalization, all forecast a bleak future for migrants and refugees.³⁵³ The previous openness with which States accepted refugees has waned and moved, in most cases, to following refugee deterrence policies.³⁵⁴

The Trump administration mishandled the refugee and humanitarian crisis, causing people to flee from political upheavals, human rights abuses, economic poverty, and climate change from countries like Honduras, El Salvador, and Guatemala.³⁵⁵ By implementing the border externalization policy, entering into safe third-party agreements, and contravening the principle of non-

³⁴⁹ *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

³⁵⁰ *Id.* at 160–62.

³⁵¹ *Id.* at 182–83.

³⁵² *Id.* at 201.

³⁵³ Ormsby, *supra* note 177, at 1215–16.

³⁵⁴ *Id.* at 1219–20.

³⁵⁵ The Real Solution, *supra* note 330.

refoulement, the administration made things worse. The United States turned a blind eye to the human rights abuses endured by these persons fleeing their countries and penalized them as they sought U.S. protections. In doing so, the federal government enabled family separations, detention, and ultimately, the traumatization of children and families.³⁵⁶

Under the principle of non-refoulement, the best interest of the child standard and immigration policies should be applied in accordance with human rights standards. This principle of non-refoulement is the heart of international refugee law. Non-refoulement and international law intentionally put in place a system whereby any migrant seeking protection is, at the very least, given provisional shelter while awaiting adjudication of that protection claim. Only after due process and fair consideration are given to the asylum claimant can a State be certain that its process does not contravene international legal obligations.³⁵⁷ Non-refoulement is better described as “a rare right that is not predicated on the arrival of a refugee at a State’s territory, nor on the formal adjudication of their status.”³⁵⁸ Indeed, the UNHCR was quick to state in March 2020 that “a ‘blanket measure’ barring asylum seekers at risk of refoulement—such as the U.S. government’s expulsion of asylum seekers—is discriminatory and does not meet international standards.”³⁵⁹

Asylum is founded on the United Nations Convention Relating to the Status of Refugees, the Refugee Convention, and the 1967 Protocol to the Convention. Congress enacted the Refugee Act of 1980 and sought to bring the domestic statute in conformity with international law.³⁶⁰ This is why some scholars promote the view that courts should interpret U.S. asylum laws in conformity with international law.³⁶¹ Both the 1951 Convention and the 1967 Protocol are informed by human rights principles, which then inform domestic laws.³⁶² Worldwide, the most applied body of international law in domestic venues is the international refugee

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 99.

³⁵⁸ *Id.*

³⁵⁹ *Q&A: US Title 42, supra* note 311.

³⁶⁰ *American Courts and the UNHCR, supra* note 87, at 1401–02.

³⁶¹ Bhargava Ray, *supra* note 95, at 140.

³⁶² *Id.* at 144.

regime.³⁶³ The UNHCR, with its developed expertise, plays an important role in the implementation of the refugee regime worldwide and is better placed in harmonizing the international regime.³⁶⁴ As discussed, the UNHCR has played a pivotal role in interpreting the text of the 1951 Convention and 1967 Protocol and providing its interpretations to courts. The U.S. Supreme Court seems to have a love-hate relationship in considering the views of the UNHCR, and therefore does not tend to “articulate a clear and consistently applied posture toward the UNHCR.”³⁶⁵

This article highlights that the refugee problem continues to be a challenge to the international community. As States continue to find ways to deter migration and refugees from their borders, they tend to run afoul of international and human rights laws. States must be intentional about upholding the tenets of the 1951 Convention and other related bodies of law that protect and honor refugees. Until the root humanitarian problems are effectively tackled, forced migration and asylum seekers will remain widespread and unavoidable. According to the UNHCR, of the current 79.5 million people who have been forced to escape from their homes globally, more than 26 million are identified as refugees; of those, around 80 percent are accommodated in developing countries.³⁶⁶ These developing countries, as would be imagined, already have significant problems of their own.³⁶⁷

For the United States, such an imbalance of global responsibility-sharing to protect the most vulnerable population of the world may have unintended consequences on regional security and stability, and thus should influence the foreign policy of the United States.³⁶⁸ The United States, as the most powerful nation in the world, should take its leadership position and model for the rest of the world to follow.

³⁶³ See James Hathaway et.al, *Supervising the Refugee Convention: Introduction*, 26 J. REFUGEE STUD. 323, 323 (2013).

³⁶⁴ *American Courts and the UNHCR*, *supra* note 87, at 1411-13.

³⁶⁵ *Id.* at 1410.

³⁶⁶ Mathema & Carratala, *supra* note 109, at 1.

³⁶⁷ See *id.* See also *Resettlement in the United States*, U.N. High Commissioner For Refugees (March 2020), <https://www.unhcr.org/en-us/resettlement-in-the-united-states.html> [<https://perma.cc/7BHM-KEPP>] (providing global refugee resettlement statistics).

³⁶⁸ Mathema & Carratala, *supra* note 109, at 1.