

INTERNATIONAL HUMAN RIGHTS VIOLATIONS WITH CONCERN TO THE
REGULATION OF MIGRATION

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Introduction

Immigrants, regardless of their reasons for migrating, will face significant stress before and after their arrival into a new country, where the immigration experience itself has been shown to threaten individual and family well-being due to family separation, discrimination, and loss of social status.¹ The path of an asylee or refugee can be especially trying, considering the experiences that lead up to migration by force, and not necessarily by choice.

Upon arrival to the United States, an asylee's fate rests with the U.S. government.² In a nation which had previously prided itself as a melting pot of immigrants and diverse cultures, the United States has contributed to human rights violations of immigrants by wrongfully denying the entry of asylum seekers against international law, detaining immigrants, and continuing to deport those currently in the country. With concern to the rights of immigrants, the United States has violated its own due process laws, as well as the principle of non-refoulement.

Immigrants currently present in the country have increasingly faced the possibility of removal. There are approximately 11 to 16 million immigrants living in the United States without a permanent or fixed status,³ whom many refer to as "undocumented" or "illegal." This rhetoric only confuses the general population, and reinforces a false idea that refugees are illegitimate, rather than human beings deserving of basic human rights under customary international law. The United States' current immigration policies push towards deterring asylum applications in violation of international law, and the removal of immigrants in violation of the principle of non-refoulement. "Although deportation is traditionally considered as an attribute of

the state inherent to its territorial sovereignty, this prerogative may degenerate into an international crime.”⁴ The United States has been increasingly responsible for violations of basic human rights through the forced removal and deportation of immigrants. Those who are undocumented often face constant fear of deportation and authority, struggle emotionally and economically, often subject to the lowest paying jobs and sometimes lacking basic needs.⁵ This causes human beings to suffer as individuals where, as a collective country, the United States has created a precedent of violating international human rights.

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

- I. The United States’ Violations of Customary International Law with Concern to Migrations, Compared with Other Nations

- A. Greece

Greece has recently experienced an influx of migrants, primarily refugees, escaping turmoil in their home country, which has led to a situation dubbed by the United Nations High Commissioner for Refugees as a “humanitarian crisis.”⁶ The Grecian Government, like the United States, has struggled with a broken asylum system, inhumane detention conditions, and other human rights abuses with concern to migrants. Of the 106,200 migrants that entered the

European Union in 2009, Greece became the entry point for approximately three quarters of those migrants.⁷ These numbers have caused Greece to become overwhelmed in its refugee processing. To combat this crisis, the government began offering temporary housing in empty apartments and limited cash assistance. These resources for migrants were limited, and soon resulted in a lack of resources and makeshift refugee camps well below humanitarian standards.

Greece and the United States share an unfortunate policy of substandard conditions in detention facilities housing migrants, as well as no government-sponsored legal assistance for unaccompanied minor migrant children. Asylees arriving in the United States are often dependent on family members, friends, or organizations for housing and basic necessities, where government “housing” involves forced detention in prison-like camps where liberties are limited, or actual prisons themselves. Similarly, they are not eligible for most public benefits nor work authorization for extended periods while their applications are pending.

B. Germany

In 2013, Europe received approximately 400,000 requests for asylum, where Germany alone received approximately 100,000 refugees.⁸ Many refugees fleeing Syria have often traveled through Greece and have ended their present search for safety in Germany. Among the nations of the European Union, Germany has been one of the most accepting countries of refugees. With concern to violations of non-refoulement in the European Union, “Schengen visas, carrier sanctions, and maritime patrols pay, however, insufficient attention to the specific situation of the forcibly displaced.”⁹ The right to asylum in Germany consists of a prohibition against forcible return of a noncitizen to a country of persecution.¹⁰ Not only can a noncitizen not be returned, but the Aliens Act has been further defined to prohibit such a removal even if the

immigrant is in the country unlawfully.¹¹ Moreover, they may not be removed until there is a final, negative decision on their asylum request and the removal is used as an *ultima ratio* measure.¹²

C. Other Nations

The United States is not alone with concern to violating the provisions of non-refoulement as many European nations have been taking tough lines with concern to refugee migration. The European Union has attempted to limit the influx of refugees through difficult provisions, where “[t]he notion of the safe third country, the extended visa obligations, and the reinforced carrier sanctions all aim at denying access to the territory or the procedure.”¹³ Quite recently, the United States also attempted to make bids to categorize Mexico as a safe third country, thus giving the United States the ability to deny entry of refugees at the U.S.-Mexico border without violating the principle of non-refoulement. As we have seen through the Migrant Protection Protocols, this act had horrendous effects on refugees, given that Mexico is unable to meet the protection needs of asylees.

Canada’s procedures to allow refugees could be used as an example of adaptations to be made by the United States. Canada utilizes a two-person panel to conduct interviews for the asylum process, where one interviewer is an immigration inspector and the other is a member of the Convention Refugee Determination Division, who has received training to ensure the refugee’s rights and customary international law are respected.¹⁴ Presently in the United States it is possible that only one border patrol officer, not trained in asylum law, may be the decider in an asylee may present their claim for protection.

II. Violations of Due Process in U.S. Immigration Laws and Policies

A. Criminalization of Reentry

Under U.S. Federal Code, immigrants who have been previously removed from the United States may face federal criminal charges upon an unlawful reentry. The United States has stated that the rationale behind these criminal prosecutions was to help deter illegal immigration. The limited deterrent effect and high financial costs of this practice is outweighed by the cost of humanitarian rights and customary international law.

The criminalization of immigration laws thus results in consequences under both immigration law and federal criminal law for the attempted reentry. The UN special rapporteur on the human rights of migrants has specifically called out the United States, stating that “irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property, or national security.”¹⁵ United Nations human rights experts have advised against the use of criminal procedures against migrants, where “[t]he breadth and scope of criminal prosecutions for illegal entry and reentry... have led to procedural shortcuts ... that imperil the due process rights of immigrant defendants.”¹⁶

Many who reenter the United States illegally do so to reunite with family members who are often U.S. citizens and lawful permanent residents. The U.S. federal code has tried to adapt to this reality, by amending the sentencing guidelines to recognize cultural assimilation as a valid reason for granting a lower sentence.¹⁷ Although the guidelines should take into consideration the humanitarian concerns of returning migrants, they do not address the inherent violations of human rights with concern to family reunification. Migrants can be returned to a country they may not even know, and if they return to the United States, can be subjected to lengthy federal prison sentences simply for their reentry. Defense attorneys have even noted that although the

sentencing guidelines are meant to mitigate the time to be served, judges sometimes see these familial ties as evidence that the migrant is likely to return and should have a stronger deterrent in the form of a harsher sentence.¹⁸

The criminalization of illegal entry can also result in prosecution of migrants fleeing violence and persecution. Protections under international law must include those that are seeking protections, but have not yet had their asylum request adjudicated; without such a concept, genuine refugees could be denied under Article 31(1) of the 1951 Refugee Convention.¹⁹ A federal criminal proceeding “can delay asylum applications, exacerbate trauma or psychological problems, and potentially discourage people from pressing their asylum claims at all.”²⁰ Such prosecutions are entirely contradictory to the fundamental principle of international refugee law: that asylum seekers should not be punished for using improper means to enter a country seeking asylum.²¹

B. Rapid Processing Without Due Process

Before asylees can present their claim for protections, their claims may be blocked entirely or processed quickly without a complete consideration of their merits. Migration policies do not distinguish between the “mixed flows” of people crossing the borders, treating individuals as immigration offenders rather than vulnerable populations seeking protections.²²

The previous U.S. Attorney General Sessions conducted a review and re-determination of immigration case law precedent. Sessions attempted to reshape who qualifies for asylum, vacating a four-year precedent of the BIA, which held that immigrants applying for asylum or withholding of removal are entitled to a full hearing on their application.²³ By calling into question this BIA precedent, the U.S. opened itself to violations of customary international law.

Under this proposal by Sessions, asylum officers, who may not even be attorneys, could make a determination of law as to whether an asylee meets the burden of asylum, and this determination would not be subject to appeal or review.

C. Deportation as a Violation of International Law

Nations must screen migrants to ensure that they do not meet the definition of refugee before attempting to deport them to their country of origin. The United States, however, “tends to make narrow interpretations of the concept of refugee, limiting in that way the right of asylum, and consequently, the right to not be subject to Refoulement.”²⁴ An individual with a well-founded fear of persecution “may be subject to refoulement if he or she is not able to show that the (i) central reason the persecutor had for threaten[ing] the applicant’s life or integrity was one of the statutory grounds, (ii) his or her testimony is *credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee*, (iii) evidence, in case the adjudicator consider[s] his or her testimony is not enough.”²⁵ These are difficult burdens to prove, especially for those who have fled their home country, often with nothing – including no identification, let alone physical proof of their persecution.

In 2020, approximately 185,000 immigrants were deported from the United States.²⁶ Some of these immigrants were placed into removal proceedings or detained through ICE raids, including at workplaces. These systematic, military-style raids are generally vastly disproportionate to the threat that immigrants pose. Those residing undocumented in the United States are also largely working class, having resided in the United States for a decade or more, often with U.S. citizen children and other lawfully residing family members.²⁷ Removing such

immigrants calls into question the values and priorities of the United States, and whether they are ultimately in line with customary international and humanitarian laws.

D. Migrant Protection Protocols

The Migrant Protection Protocols (“MPP”) claimed legality from the Immigration and Nationality Act, which allowed the Department of Homeland Security to return certain noncitizens seeking admission into the United States back to the country from which they arrived.²⁸ MPP expanded this statutory authority to noncitizens who arrived *through* Mexico to the Southwestern border, regardless of whether the noncitizen was a Mexican national.²⁹

The structure of MPP raised a myriad of constitutional concerns in the eyes of practicing immigration attorneys. The first of these were due process concerns. Thousands of people in the program were unable to return to the border for their hearings and were ordered deported because they had missed their court date.³⁰ Hearings were missed for multiple reasons, such as danger at the border which forced them to abandon their search for asylum and return home.³¹ Others still were victims of kidnappings or did not know when or where to report because their paperwork from the courts was stolen.³² Another issue was access to counsel. All those subjected to MPP were forced to remain in Mexico while the immigration attorneys were in the United States. The few who were lucky enough to secure counsel met their attorneys the day of their case and were only given a short amount of time before the trial to confer with their lawyer.³³ As a result of these constitutional issues, approximately forty-four percent of the cases closed under MPP were done so with the entry of *in absentia* removal orders.³⁴

E. Title 42

The process for determining who is subjected to the Title 42 order has been vague from its implementation. The original CDC order bans the “introduction” of immigrants into the country if they have been in highly populated areas, namely immigrants in ports of entry with no documentation to enter the country, such as a visa.³⁵ The order reasoned that all migrants should be turned away because of an inability to properly test each individual for COVID-19.³⁶ Ironically, the Trump Administration did eventually begin testing migrants for COVID-19, specifically unaccompanied minors, as proof to their native countries that ICE was not responsible for spreading the pandemic through Latin America.³⁷ Those who tested negative were sent back with proof of a negative test, and those who tested positive were isolated in hotels at the Southern border of the United States until they received a negative test.³⁸

On May 19, 2020, the order was extended indefinitely and required the CDC to review the latest data regarding the pandemic every 30 days.³⁹ The order has been largely the same since its implementation in March of 2020. Since October 2020, Title 42 has been used to justify the expulsion of 983,045 noncitizens.⁴⁰ With the implementation of MPP and Title 42, the Trump Administration took drastic action to close off the southern border of the United States from thousands of migrants, even those attempting to seek refuge from persecution.⁴¹

III. Asylum and Refugee Seekers

A. U.S. Violations of International Law with Concern to Asylees

1. Refusal of Entry of Asylees

The State has the power to grant asylum.⁴² An asylee does not necessarily have the right to be granted asylum, however this does not give the State the permission to violate international human rights in the asylum-seeking process. Customary international law has come to agree that

Article 33 of the 1951 Convention “must be considered to include non-rejection at the frontier.”⁴³ The procedures in place at the U.S.-Mexico border, however, are inadequate to properly identify refugees in need of protection.

With concern to asylees, many who arrive at the U.S. border and request asylum are detained by CBP. Countries are “not allowed to ‘catch individuals who are trying to enter their borders, and return them to their countries where there exists the possibility they will face persecution.’”⁴⁴ However, this is exactly how the U.S. system has been set up. CBP often refuses entry of asylum seekers, preventing them from legally requesting asylum under customary international law; thus, refusing their entry, “without an analysis of whether...their life or personal integrity will face any danger.”⁴⁵ Asylum seekers can also not “be prevented from being able to request protection, even if they enter unlawfully, or if they are on the border.”⁴⁶ CBP officers may briefly ask asylees if they have a fear of return. Many of these interviews are conducted within earshot of other migrants, not allowing the asylee to feel safe to disclose their fears for return, or the facts necessary to determine if they are a genuine refugee. The current process of questioning may not be sufficient to elicit the details necessary for a CBP officer to make a proper determination as to refugee status.

Upon an expression of a fear of return to a migrant’s native country, the CBP officer should refer the migrant to an asylum officer for a credible fear interview; if the migrant has been previously removed from the United States, they may only be eligible for withholding of removal, with the more difficult burden of a reasonable fear interview. Both asylum and withholding of removal require that the applicant show a history of past persecution, or possible future persecution. Withholding of removal requires the additional higher standard that this

persecution be *more likely than not*. Asylum, on the other hand, requires the lower burden of a well-founded fear of persecution.

Asylees with a positive credible fear finding are unlikely to abscond, given that an asylum officer has already determined there is a possible claim for asylum. However, asylees are considered arriving aliens, and are presently detained, and frequently not given a bond, or are given an unreasonably high bond. The asylee, even having passed the first burden in the long process, may be detained for months or years in the United States as they seek relief entitled to them under customary international law. Under current U.S. practices, those who are only eligible for withholding of removal due to a previous deportation or removal order have not been given a bond whatsoever, and are mandatorily detained until their proceedings are adjudicated.

2. Expedited Removal at Ports of Entry

The concept of expedited removal was codified in IIRIRA in 1996. This process can easily violate the 1951 Refugee Convention with concern to refoulement for genuine asylum seekers, as this administrative decision is made hastily and with little review. Expedited Removal was meant as a way for CBP to quickly expel immigrants who entered the United States by fraudulent means, misrepresentation, or without proper travel documents. The current process in the United States allowing for an expedited removal is reminiscent of the Haitian Refugee influx into the United States by sea in the late 1970s. Further litigation proved that the program caused “inadequate legal representation, incomplete asylum applications, insufficient consideration of claims, poor translation – all this culminated in a program, which ‘in its planning and executing [was an] offense to every notion of constitutional due process and equal protection.’”⁴⁷

Allowing for an expedited removal can mean that an asylum seeker, who sought entry into the United States in accordance with customary international law, could be forcibly removed from the United States simply for not having a valid visa to enter the country, and even then, by a refusal of entry by a border officer. When an asylee approaches the border, the officer he encounters *must* determine whether there is a credible fear of persecution.⁴⁸

The United States violates international customary law, as this practice allows an asylee who is requesting asylum to be removed without further review if the officer determines that he does not have a credible fear of persecution. This determination is made only with the statements made by the noncitizen and the facts that are known to the officer.⁴⁹ It should be noted that rarely is a border officer an attorney, yet they are single-handedly entrusted with applying the law with possible life-threatening consequences for bona-fide refugees. This decision is subject to review if the noncitizen requests so. The process is often done with such haste that asylees may be unaware of their right to seek a review by a judge, or are fearful given their reasons for fleeing their home country.

3. Subsequent Bars to Asylum

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

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

Migrants with a previous deportation order have also been referred for criminal prosecution for criminal reentry instead of being considered for a reasonable fear interview and a possible claim for withholding of removal or protections under CAT.⁵⁰ "In addition to the trauma criminal prosecution and incarceration may impose on asylum seekers, an asylum seeker who is not given a credible fear interview before being prosecuted and deported faces significant challenges to seeking refugee protection, including longer waits in detention and a higher standard of proof" for withholding of removal instead of asylum.⁵¹

Withholding of removal does not allow for a permanent residence in the United States, although it may be continued indefinitely. However, unlike those granted asylum status, withholding of removal does not allow for the petitioning of any qualifying members. Thus, a migrant loses many benefits by not being able to qualify for asylum status. Withholding is also more difficult to win over asylum, as the applicant must prove that the persecution is more probable than not, in comparison to asylum's burden of a "well-founded fear" of persecution.⁵²

B. Denial of Asylum Applications

The denial of a legitimate claim to asylum can have severe consequences if one is a bona-fide refugee.⁵³ Article 33 of the 1951 Convention does not require that the State grant asylum, but if the migrant is a bona-fide refugee, they cannot be sent back to the country of persecution.⁵⁴

Either the State can find a third country to accept the refugee, or the refugee must remain in the arriving State. Under IIRIRA, the United States imposes a one-year deadline for filing a formal written request for asylum; those immigrants who have legitimate claims for asylum, if not requested within a year, may be denied and exposed to refoulement.

An applicant for asylum in the United States may file an affirmative application within one year of arrival to the country, or within a reasonable period of changed and/or “extraordinary” circumstances.⁵⁵ Applications passed the one-year deadline may be rejected if they do not fit the limited criteria for an exception and are then only considered for withholding of removal and CAT in the alternative. This deadline can cause violations of the protections against non-refoulement, as bona-fide claims to asylum can be rejected simply based on a procedural bar set by Congress, with no consideration for the legitimacy of the claim. This can lead “to arbitrary and disparate outcomes” and can deter bona fide claims.⁵⁶

When an immigration judge hears an initial defensive application for asylum, the noncitizen’s assessment made by the CBP officer becomes part of that noncitizen’s record and is considered in the removal proceedings. These comments and writings by an officer who is not necessarily trained in asylum can greatly influence the immigration judge’s decision.

“Immigration judges responsible for assessing credibility...must contend with an administrative record that is deeply flawed when purporting to convey the alien’s prior ‘statements.’ The forms filled out by inspectors and asylum officers for screening purposes are often regarded as though they contain comprehensive if not verbatim transcripts of the alien’s asylum claim. The alien’s own complete and considered testimony is then all too often seen as self-serving embellishment, lacking in credibility. The result is that aliens seeking asylum in Expedited Removal face serious obstacles to establishing their credibility that other asylum seekers do not, obstacles put in their path by the Expedited Removal process itself.”⁵⁷

Another concerning aspect of this process is that there is no right to representation. While a noncitizen may consult with an attorney or representative at their own expense, given their lack of knowledge of the complex asylum process, and detention in facilities with scant access to counsel, it is extremely difficult for a refugee to benefit from often much needed legal advice.

“While an alien/asylum seeker will not have access to counsel at the primary or secondary inspection process, or likely not even at the credible fear determination, the alien is asked to sign legal documents which will have a bearing on a subsequent claim for asylum.”⁵⁸

Moreover, the same application for asylum may have different findings in different immigration courts. Although the federal law is universal across the country, its application and interpretation can vary greatly, especially with concern to definitions of particular social groups. Membership in a particular social group can be a reason for granting of asylum status, however the definition of what consists of a group is inconsistent across the country. What may be an acceptable social group in one Circuit may not be in another. This variation by Circuit can then become the difference between asylum or removal.

IV. Proposed Migration Reform in Accordance with International Laws

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

“No contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion.”⁵⁹

The idea of non-refoulement was created to be so compelling that no reservations were allowed by signatory states;⁶⁰ this shall include the United States, regardless of the Refugee Convention of 1980. “Even if Article 33 of the Protocol is not self-executive and therefore not the ‘law of the

land,' the principle of non-refoulement is a preemptory norm of customary international law, and as such, is part of U.S. law."⁶¹

Several international treaties clearly establish the Principle of Non-Refoulement, including the U.N. Convention Relating to the Status of Refugees, CAT, and the International Covenant on Civil and Political Rights (ICCPR). The United States is a party to these treaties, and to the U.N. Convention Relating to the Status of Refugees, but only with concern to the 1967 Protocol. In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees. The United States has codified the Protocol through its domestic passing of the Refugee Act of 1980.⁶²

The United States often relies on national court decisions and statutory interpretations to define immigration laws, instead of also looking to international human rights treaties for guidance.⁶³ The United States should recommend clear language in the Convention and protocol against prolonged detention of asylum seekers under Article 31(2). The United States could modify its 1980 Refugee Convention to prohibit arbitrary and prolonged detention.

The 1951 Convention Relating to the Status of Refugees arose heavily in part due to the large number of people facing persecution and displacement following World War II. At the core of the 1951 Convention and the 1967 Protocol is the establishment of Article 33, the Principle of Non-Refoulement. This principle has since become one of customary international law.⁶⁴ This principle is obligatory for all nations, where the Convention does not permit reservations, and has evolved into a norm of *jus cogens*, as it is not subject to derogation.⁶⁵ The 1951 Convention on Article 33(2) allows two exceptions to the Principle of Non-Refoulement: (1) in the case of threat to national security of the host country; and (2) in the case their proven criminal nature and

record constitute a danger to the community.⁶⁶ However, crimes in and of themselves, when not a specific threat to national security, cannot be used as a basis of denial of asylum; thus, they should only be very serious and specific crimes to fall into this category allowing refoulement.

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

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees' restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.⁶⁷

The aforementioned U.S. asylum policies clearly violate the principle of non-refoulement established in Article 33 of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. Article 38 of the Convention states that disputes arising from the application of the Convention, (for example, as to whether a state party is violating the Principle of Non-Refoulement), which cannot be settled by other means can be solved by the International Court of Justice ("ICJ"). Thus, any state party could take the United States to the ICJ to address its violations. Due to perhaps many political reasons and concerns of international relations, no country has done so.

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

The current definition of refugee is ambiguous and could be expanded to include broader categories of migrants, to allow for them to also seek protections under certain international conventions. Refugee at this time omits “those who have not yet crossed an international border, but are internally displaced,” where this definition thus, “denies protection to an equally vulnerable group.”⁶⁸ Migrants who fall outside the present definition of refugee lose out on international protections. This would include internally displaced people, and those extraterritorially displaced due to other forces, such as armed conflict, civil warfare, and other internal country issues. Because they are not displaced because of an individualized prosecution, they are not considered refugees under current law.⁶⁹

The Report of the UN Office of the High Commissioner for Refugees of 1986 also finds that individuals, “may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence,” and should not be separated or deported when in the interests of family unity. Any State Party to the Refugee Convention may cause the application of Article 33(1) CSR51, such as “denying visas, rejecting boarding, or interdicting a migrant boat at sea,” thus triggering a violation of “the principle of non-refoulement contained in the Convention and constitute a violation thereof, if it causes refugees to return to persecution.”⁷⁰

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

Article 3 of CAT is interpreted to include the widest range of migrants against the principle of non-refoulement, where CAT views this as an absolute principle. This Article protects terrorist suspects, as well as criminal suspects, from being returned to torture, regardless of the gravity of

their crimes. Thus, there is no balance of the risk of torture to that of the harm the migrant would cause to nation state, as non-refoulement under CAT has no exceptions.⁷¹

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

The United States signed the ICCPR in 1977, but it was not ratified until 1992, and is not yet incorporated into domestic law. Article 9(1) of the ICCPR states that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁷²

Article 9(1) of the ICCPR states that detention shall not be arbitrary, such as it has been in the United States with concern to women and children seeking asylum. This article would in fact appear to limit the detention of an asylum seeker only until a legitimate claim for asylum can be established. In the case of the United States, the credible/reasonable fear interview is the migrant’s first hurdle, where a ‘positive’ credible fear is determined by a trained U.S. asylum officer following interviewing and analysis of the asylee’s claim.

Article 12(1) limits the “liberty of movement and freedom to choose [one’s] residence” to individuals “lawfully within the territory of a State.”⁷³ Asylees should be considered lawfully within the territory, and thus under the purview of this protection.

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

The ECHR was adopted by the Council of Europe in 1950. Article 3 of the ECHR does not expressly state the principle of non-refoulement; however, it has arisen through further caselaw. Although not a signatory to the ECHR, nor the possibility of such designation, the

United States can compare its treatment of refugees to those in Europe. Article 5 of the ECHR protects the rights to liberty of the person, going into more detail regarding the withholding of liberty, than does ICCPR's Article 9.

Conclusion

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

It is imperative for human rights to preserve and facilitate a refugee's right to flee their home state and seek protection abroad. The right to seek and enjoy asylum is recognized as a basic human right.⁷⁴ States should not just disregard these rights with an excuse that migrants are arriving *en masse*, thus disregarding that individuals can be refugees in any number. In the same light, not naming refugees for what they are will remove the obligations of states to protect these migrants who have been displaced. The principle of non-refoulement is one of customary international law, and cannot be derogated from by any state, regardless of whether that state is party to any convention. The root of the word asylum refers to something or someone that 'cannot be seized.' In assessing what can and should be done to prevent these human rights violations by the United States and our treatment of other human beings, one must be reminded

of the reasons why migrants would be driven to leave their home, and how they can be made as whole again as possible through welcoming protections by their receiving country.

¹ Rachel Siemons, et. al, (2017). Coming of Age on the Margins: Mental Health and Wellbeing Among Latino Immigrant Young Adults Eligible for Deferred Action for Childhood Arrivals (DACA). 19 J. OF IMMIGRANT AND MINORITY HEALTH, 543 (2017).

² Damir Utržan & Andrea Northwood, Broken Promises and Lost Dreams: Navigating Asylum in the United States, 43 J. OF MARITAL AND FAMILY THERAPY, 3, 11 (2017).

³ M. Brinton Lykes, et. al, Continuities and Discontinuities in Human Rights Violations: Historically Situating the Psychosocial Effects of Migration, 71 J. OF SOC. ISSUES 244, 245 (2015).

⁴ Vincent Chetail, (2016). Is There any Blood on my Hands? Deportation as a Crime of International Law. 28 J. OF INT'L L.,917 (2016).

⁵ Siemons, *supra* note 1 at 543.

⁶ Nisha Varia, *Rights on the Line: Human Rights Watch work on abuses against migrants in 2010*, HUMAN RIGHTS WATCH (Dec. 11, 2010), <https://www.hrw.org/report/2010/12/11/rights-line/human-rights-watch-work-abuses-against-migrants-2010>.

⁷ *Id.*

⁸ Eman Hamdan, The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 115 INT'L STUD. IN HUM. RTS. 1 (2016).

⁹ Violeta Moreno-Lax, (2017). Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law, 247 (1st ed. 2017) (referring to the Schengen Borders Code, Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016 OJ L 77/1 ('SBC'))).

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²¹ *Id.*

²² Varia, *supra* note 6.

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²⁵ *Id.* at 303. (emphasis added).

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⁴¹ *See id.*; Mayorkas, *supra* note 39; *see also A Guide to Title 42 Expulsions at the Border*, AMERICAN IMMIGRATION COUNCIL (Oct. 2021) https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border.pdf (“Title 42 has led to the mass expulsion of thousands of asylum seekers... Many individuals have been sent back to persecution in their home countries or forced to wait in Mexico for a time when the border will reopen to those seeking asylum”).

⁴² Stenberg, *supra* note 10 at 16.

⁴³ *Id.*

⁴⁴ Arenilla, *supra* note 24 at 286.

⁴⁵ *Id.*

⁴⁶ *Id.* at 288.

⁴⁷ Fontus, *supra* note 14 at 51 (quoting *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 532 (S.D. Fla. 1980)).

⁴⁸ INA Section 235(b)(1)(B)(iii)(I).

⁴⁹ *Id.*

⁵⁰ Meng, *supra* note 17.

⁵¹ *Id.*

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⁵³ *Id.* at 49.

⁵⁴ Stenberg, *supra* note 10 at 178.

⁵⁵ Schrag, *supra* note 52 at 45.

⁵⁶ *Id.*

⁵⁷ *Id.* at 88.

⁵⁸ *Id.* at 238.

⁵⁹ Protocol, Art. VII; Cnvention, Art. 42.

⁶⁰ Fontus, *supra* note 14 at 56.

⁶¹ *Id.* at 57. *See also Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396, 1406 (D.D.C. 1985).

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⁶⁵ Meili, *supra* note 63 at 288.

⁶⁶ *Id.* at 294.

⁶⁷ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

⁶⁸ Bayefsky, *supra* note 13 at 7.

⁶⁹ *Id.*

⁷⁰ Moreno-Lax, *supra* note 9 at 265.

⁷¹ Hamdan, *supra* note 8 at 24.

⁷² International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁷³ *Id.*

⁷⁴ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 st 71 (1948), art. 14.