Enter at Your Own Risk: Criminalizing Asylum-Seekers
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INTRODUCTION

Led by authoritarian Prime Minister Viktor Orban, Hungary has virtually closed its border to asylum-seekers from Syria, Sudan, and other countries. The few who are admitted to Hungarian “transit zones” generally are denied asylum and are given only three days to appeal, which they must do themselves in written Hungarian without a lawyer.\(^1\) In June 2018, the Hungarian Parliament enacted a statute making it a criminal offense punishable by up to one year in prison for any person to “‘enable illegal immigration,’ defined [as] . . . helping asylum-seekers who are ‘not eligible for protection’ including [prohibiting any person from] ‘border monitoring,’ producing and disseminating information about the asylum process or ‘network building.’”\(^2\)

In November 2018, UN inspectors went to Hungary to ensure that its immigration centers met international standards. The Hungarian government refused them access. Mr. Orban also refused to comply with the European Union’s order to admit 2,000 refugees as part of Hungary’s obligation as an EU member.\(^3\) An imposing Hungarian-built barbed wire fence, reinforced with drones and heat sensors, traverses the entire border between Hungary and Serbia. The state-controlled Hungarian media call immigrants, including asylum-seekers, “undesirables” and

“criminals.” The Parliament, dominated by Orban’s Fidesz party, enacted a statute to detain asylum-seekers, including children, during the entire course of the asylum procedure.  

Aside from its anti-immigration policies, Fidesz pushed through a new constitution, gerrymandered election districts to ensure the party’s future success, virtually eliminated the independent judiciary, and not only took over the state media, but also enabled large portions of the private media to be “bought up by pro-Orban oligarchs.” These disturbing policies have made Hungary in essence a one-party state and an example of new authoritarianism in Europe.  

Hungary is not the only government to use criminal law and prolonged detention against the foreign-born. United States President Donald J. Trump has likewise demonized immigrants.  

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5 See Human Rights Watch, supra note 2.  


8 See full text of the European Parliament’s Resolution and Annex condemning the Hungarian government for violating fundamental principles of the European Union, Texts Adopted (Sept. 12, 2018), http://tiny.cc/hji85yNotably, Orban was the first world leader to publicly support Mr. Trump’s 2016 Presidential campaign See Kingsley, supra note 2.  

Although all reliable studies demonstrate that immigrants commit fewer crimes per capita than native-born American citizens and many studies indicate that immigrants significantly help the economy, the Trump Campaign portrayed immigrants as criminals, labelling Mexican

A necessarily incomplete list of this Administration’s attacks on immigrants, compiled by co-author Vanessa Merton, is appended as “Trump Administration Actions That Have Required Response from the Immigration Bar.” It is difficult to keep it up-to-date, because almost every week new policies are promulgated (often in violation of Administrative Procedure Act requirements) that are designed to make it more difficult and expensive to apply for any type of lawful entry or status; to get accurate and timely decisions on those applications; and to appeal or challenge incorrect decisions. See *infra passim*. However, co-author Merton will maintain and update this list on a separate website available to readers of this article at [URL]. The American Immigration Lawyers Association (AILA), a membership organization joined by most expert immigration lawyers who represent immigrants, has found an artful metaphor for the massive policy changes under this Administration: the “Invisible Wall.” See AILA, *Deconstructing the Invisible Wall: How Policy Changes by the Trump Administration Are Slowing and Restricting Legal Administration*, AILA Doc. No. 18031933 (posted March 19, 2018) (“Invisible Wall”), http://tiny.cc/evj85y. See also Featured Issue: Changes in USCIS Policy Under the Trump Administration, AILA Doc. No. 19022633 (posted May 1, 2019) http://tiny.cc/kuj85y.

10 See the recent review of decades of academic expert studies by the highly conservative, pro-law-enforcement Cato Institute, which found as follows: “All immigrants have a lower criminal incarceration rate and there are lower crime rates in the neighborhoods where they live, according to the near-unanimous findings of the peer-reviewed evidence. . . . Illegal immigrant incarceration rates are about half those of native-born Americans in 2017. In the same year, legal immigrant incarceration rates are then again half those of illegal immigrants. . . . crime along the Mexican border is much lower than in the rest of the country, homicide rates in Mexican states bordering the United States are not correlated with homicide rates here, El Paso’s border fence did not lower crime, Texas criminal conviction rates remain low (but not as low) when recidivism is factored in, and that police clearance rates are not lower in states with many illegal immigrants – which means that they don’t escape conviction by leaving the country after committing crimes. . . . Higher illegal immigrant populations [are correlated with] large and significantly associated reductions in drug arrests, drug overdose deaths, and DUI arrests with no significant relationship between increased illegal immigration and DUI deaths. Alex Nowrasteh, *Illegal Immigrants and Crime – Assessing the Evidence*, CATO INSTITUTE (Mar. 4, 2019), https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence; University of Pennsylvania Wharton School, The Effects of Immigration on the United States Economy (June 27, 2016), https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy; 4 Myths About How Immigrants Affect the Economy, THE NEWS HOUR (Nov. 2, 2018), http://tiny.cc/9wj85y; Ryan Nunn, Jimmy O’Donnell & Jay Shambaugh, *Economic Facts: A Dozen Facts About Immigration*, THE HAMILTON PROJECT (Oct. 9, 2018) (output in USA economy higher and grows faster with more immigrants; small impact of immigration on low-skilled native-born wages; immigration to the United States does not increase crime rate), https://www.hamiltonproject.org/papers/a_dozen_facts_about_immigration; Alexia Fernández Campbell, These Immigrants Contribute $4.6 Billion in Taxes. Trump’s Trying To Strip Their Legal Status, VOX (Apr. 17, 2019)(President Trump trying to terminate status of thousands of TPS immigrants who pay taxes, mortgages, rents, etc. and contribute to economy), https://www.vox.com/policy-and-politics/2019/4/17/18411975/tps-immigrants-pay-billions-in-taxes; Nina Roberts, Undocumented Immigrants Quietly Pay Billions Into Social Security and Receive No Benefits, NPR MARKETPLACE (Jan. 28, 2019) (in one year, undocumented immigrants contributed $13 billion into Social Security and $3 billion to Medicare), https://www.marketplace.org/2019/01/28/undocumented-immigrants-quietly-pay-billions-social-security-and-receive-no/.

8.19.19 Draft—Please do not cite.
immigrants as “rapists.” As President, Mr. Trump has continued to highlight immigrant crime all out of proportion to reality.

Mr. Trump appointed as his first Attorney General, the most conservative and anti-immigrant sitting Senator, Jefferson Sessions, general anti-immigrant Secretaries of State and


Homeland Security, pressured the Departments of State, Justice, Homeland Security, and their subsidiary agencies, including Customs and Border Protection (“CBP”), Immigration and Customs Enforcement (“ICE”), and the Executive Office of Immigration Review, including the Board of Immigration Appeals (“BIA”) and Immigration Court Judges (“IJJs”), to harshly enforce immigration laws. At times these laws are used to retaliate against activists, journalists, and even IJs who express the slightest resistance to, or merely report on, his policies.14 This type of wholesale abuse and hijacking of a legal system to crush and marginalize opposition was not seen in the United States even during the Holocaust era of abandonment of refugees.15

The Trump Administration’s harsh immigration policies and practices violate international law generally, international human rights and refugee law more specifically, and basic norms of morality and humanity.16 This Article analyzes only one aspect of the Trump


15 Holocaust Memorial Museum, Voyage of the St. Louis, HOLOCAUST ENCYCLOPEDIA, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267 (describing the voyage of the St. Louis, a ship that in 1938 travelled from Hamburg, Germany, with over 900 Jewish refugees, almost all of whom were denied entry in Havana, Cuba; the St. Louis was not allowed to dock in Miami, and was compelled to return to Europe. Over 250 of the Jewish passengers were killed in the Holocaust.).

humanitarian law is developing, populations “remain under the protection . . . of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”).
Administration’s breaches of international law: namely, its policies and practices that penalize asylum-seekers17 in contravention of the 1951 Refugee Convention and the 1967 Refugee Protocol.18

17 The Trump Administration has just issued perhaps its most obviously lawless order against asylum-seekers yet, precluding them from even applying for asylum if they have travelled through another country before reaching the southern land border with the United States – i.e., if they are not able to arrive by boat or airplane – and did not apply for asylum in the countries of transit. See Michael D. Shear and Zolan Kanno-Youngs, Most Migrants at Border with Mexico Would Be Denied Asylum Protections Under New Trump Rule, N.Y. TIMES (July 15, 2019)(Administration announces restrictive rule automatically denying asylum without a hearing to all migrants who had not applied for asylum in countries transited through); James McHenry, USCIS Director, Guidelines Regarding New Regulations Governing Asylum and Protection Claims (July 15, 2019)(joint Interim Final Rule (“IFR”) of Department of Justice and Department of Homeland Security, effective immediately, establishes EOIR policy and procedures to refuse to accept asylum claims of aliens who enter or attempt to enter the United States across the southern land border after “failing to apply for protection from persecution or torture while in a third country through which they transited”), https://www.justice.gov/eoir/file/1183026/download.

This purported rule directly contradicts not only the international law incorporated into domestic law, but a Congressional statute: Immigration and Nationality Act (INA) § 208(a)(1)(emphasis added) “Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section” as well as the Congressionally crafted scheme defining “firm resettlement” as a bar to asylum claims, see 8 U.S.C. §§ 1158(a)(2)(A) and 1158(b)(2)(A)(vi)(noncitizen ineligible for asylum in the United States only if “firmly resettled in another country prior to arriving in the United States.”). Related provisions of the INA were at issue in another Interim Final Rule issued in November 2018, which sought to prevent asylum-seekers who enter the United States other than through a Port of Entry from qualifying for asylum. See infra n.61 and accompanying text. The U.S. Circuit Court of Appeals for the Ninth Circuit in December 2018 issued a preliminary injunction against that regulation, see East Bay Covenant Sanctuary, et. al. v. Trump, 3:18-cv-6810-JST (N.D Cal. November 19, 2018) (Motion for Temporary Restraining Order), application for stay pending appeal denied sur nom. Trump v. East Bay Sanctuary Covenant (U.S. Sup. Ct. Dec. 21, 2018), https://www.scotusblog.com/case-files/cases/trump-v-east-bay-sanctuary-covenant/.

Part I of this article extensively details the Trump Administration’s policies toward immigrants and asylum-seekers and briefly contrast those policies and practices with those of his predecessors. Part II will analyze the relevant articles of the 1951 Refugee Convention and the 1967 Refugee Protocol, including their historical context and various interpretations. This Part will also analyze analogous customary international law governing refugees and discuss the practice of states. Part III will argue that Article 31(1) and 33(1) of the 1951 Refugee Convention are self-executing, and consequently should be the rule of decision when processing asylum-seekers. Since Article 31(1) expressly forbids imposing “penalties” on refugees for their unlawful presence, the United States Justice Department may not criminally prosecute individuals with a *prima facie* case for asylum until the asylum case is concluded.19 The article will conclude with the argument that Article 31(1) and customary international human rights law permit at most brief detention of *bona fide* asylum seekers and unquestionably prohibit the seizure of infants and children from their parents or lawful guardians.

I. THE TRUMP ADMINISTRATION’S POLICIES AND PRACTICES TOWARD ASYLUM-SEEKERS

According to the UN High Commissioner of Refugees (“UNHCR”), there are over 67 million refugees, stateless persons, returnees, and internally displaced persons around the world.20 Over 70.8 million people have been forced from their homes—the highest number of displaced people ever recorded.21 The most obvious causes of this huge number include war and

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20 CITATION NEEDED

internal conflict; climate change; gross human rights violations; organized crime proto- and quasi-states; and severe economic exploitation—principally in the Global South. This unprecedented wave of refugees has coincided with the tectonic political and economic shifts following the 9/11 attacks; the United States involvement in wars in Iraq, Afghanistan, Libya, Syria, Yemen, and other Islamic countries; the 2008 worldwide economic crisis; increasing globalization; and the digitizing and growing automation of the economies of developed countries. Prompting steep increases in perceived economic and military insecurity, these events, together with the increasing realization by White Americans that they will be in the minority in next decade or so, seem to have contributed to the ever more vehement opposition by many Americans to immigration and immigrants from certain countries.22

Elected in part by promoting and riding this burgeoning anti-immigrant and white nationalist sentiment,23 President Trump promptly adopted harsh policies and practices against

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23 It is indisputable that President Trump has singled out immigrants from Latino and Muslim countries, e.g., Clyde Haberman, Trump’s Argument Against Immigrants: We’ve Heard it Before; Retro Report, THE N.Y. TIMES (Oct. 9, 2017), (comparing post-World War II xenophobia to current treatment of Latinos and Muslims), https://www.nytimes.com/2017/10/09/us/retro-anti-immigration.html, as has been acknowledged by the several federal judges who have enjoined various aspects of his policies in part because of the demonstrable racial agenda
both unauthorized and legal immigration. Starting with his chaotically put-in-place first
Executive Order, the Trump Administration has imposed quotas on immigration law judges;\textsuperscript{24} cut the number of refugees admitted by more than half;\textsuperscript{25} cancelled DACA (Deferred Action for Childhood Arrivals);\textsuperscript{26} the program enabling qualified children involuntarily brought to the USA to apply for temporary deferral of deportation as a matter of prosecutorial discretion, which eliminated legal protection for about 700,000 children and youth;\textsuperscript{27} stationed Immigration Customs and Enforcement Agents outside state courtrooms to arrest immigrants who are using


\textsuperscript{24} The quotas are constantly updated in red yellow green “dashboards” that automatically appear on judges’ computer screens, resembling how pieceworkers are tracked. Laura Meckler, \textit{New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations}, THE WALL ST. J. (Apr. 2, 2018), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158 (under new quotas imposed by the Trump Administration, judges are required to complete 700 cases a year and to ensure that fewer than 15% of their decisions are remanded on appeal.). For a comprehensive (for the moment) description of the impact of this elimination of the remnants of genuine judicial independence from the Immigration Courts, perhaps the best source is the continuing blog of former Immigration Court Judge and BIA Senior Staff Advisor Jeffrey S. Chase, “Opinions/Analysis on Immigration Law,” in particular the transcript of his March 28, 2019 lecture at Cornell Law School, \textit{The Immigration Court: Issues and Solutions}, available at https://www.jeffreyschase.com/blog/2019/3/28/6e11d65f4431nk8vwr28dv9qi.

\textsuperscript{25} Joel Rose, \textit{Trump Administration to Drop Refugee Cap to 45,000, Lowest in Years}, NATIONAL PUBLIC RADIO, INC. (Sept. 27, 2017), https://www.npr.org/2017/09/27/554046980/trump-administration-to-drop-refugee-cap-to-45-000-lowest-in-years (as compared to the Obama Administration’s cap in the 2016 fiscal year of 110,000 refugees).

\textsuperscript{26} DACA was instituted by the Obama Administration in 2012 to enable qualified children involuntarily brought to the USA to apply for temporary deferral of deportation as a matter of prosecutorial discretion, which eliminated legal protection for about 700,000 children and youth. See MIGRATION POLICY INSTITUTE, Deferred Action for Childhood Arrivals (DACA) Data Tools (August 2018), https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles; Adam Edelman, \textit{Trump Ends DACA Program, No New Applications Accepted}, NBC NEWS (Sept. 5, 2017), https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686.
the court system affirmatively or defensively;28 militarized the southern—and only the southern—border with thousands of deployed troops and combat equipment, in keeping with his troubling metaphor referring to immigrants as an invasion;29 ended deferred action for thousands of immigrants and in some cases summarily deported them;30 and cancelled Temporary Protected


In June 2019, in a case brought by state prosecutors alleging that ICE activity was causing major disruption of the state criminal justice system, a federal judge enjoined ICE from making arrests for civil immigration violations in Massachusetts courts, on courthouse steps, and in courthouse parking lots. The state prosecutors, who filed this lawsuit days after federal prosecutors (no doubt spurred by their boss, U.S. Attorney General William Barr) charged a Massachusetts state court judge with helping a man who was living in the U.S. without status to leave by the back door of the courthouse, have been viciously attacked, by name, by President Trump, who called them “people that [sic] probably don’t mind crime.” Alanna Durkin Richer, “Judge Halts Immigration Arrests at Massachusetts Courts,” WASH. POST (June 20, 2019), https://www.washingtonpost.com/national/judge-halts-immigration-arrests-at-massachusetts-courts/2019/06/20/5060510e-938f-11e9-956a-88c291ab5c38_story.html?noredirect=on&utm_term=.a5ef8d28f95s. See also Akliah Johnson, ICE Arrests at Courthouses Disrupt Justice, Lawsuit Claims, THE BOSTON GLOBE (Mar. 16, 2018), https://www.bostonglobe.com/metro/2018/03/15/ice-arrests-courthouses-are-disrupting-justice-two-lawsuits-claim/N7lBxHlEw3Qd21XDlt4I/story.html. (“According to the suit, ICE has been arresting immigrants—both those in the country legally and illegally—at state courthouses in Massachusetts with increasing frequency since President Trump took office.”) See also, Jeff Gammage, ICE to Cease Arrests In Philly Courthouses, Agree to New Rules of Conduct, Says Sheriff’s Department, THE PHILADELPHIA INQUIRER (Apr. 5, 2019), https://www.inquirer.com/news/ice-immigration-immigrants-courts-arrests-sheriffs-department-20190405.html?__vfz=medium%3Dsharebar.

The right of concerned citizens to document the behavior of ICE officers engaging in this abusive practice has also been sharply challenged. See Media Lab, “Eyes on Courts,” https://lab.witness.org/eyes-on-courts-documenting-ice-arrests.


30 Jennifer Lee Koh & Shoba Sivaprasad Wadhia, Deport, Not Court? The U.S. Is Already Doing That, L.A. TIMES (June 30, 2018), http://www.latimes.com/opinion/op-ed/la-oe-koh-wadhia-deportations-20180630-story.html (writing that through administrative removals, DHS officials can summarily deport noncitizens who are not lawful permanent residents—including valid visa holders, those with Temporary Protected Status and those enrolled in DACA—if the official believes the immigrant has previously been convicted of an aggravated felony); see also...
Status for residents of six countries. Although the Trump Administration initially said that only unauthorized immigrants convicted of serious crimes would be prioritized for deportation, it has implicitly given ICE officers carte blanche to arrest unauthorized immigrants anytime.

Daniella Silva, *Trump Calls for Deporting Migrants ‘Immediately’ Without a Trial*, NBC NEWS (June 24, 2018), https://www.nbcnews.com/politics/immigration/trump-calls-deporting-migrants-immediately-without-trial-n886141. Mr. Trump tweeted, “when somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.” Id.  


32 In 1996, Congress enacted a statute changing the word for deportation to “removal.” See https://www.uscis.gov/tools/glossary/deportation. In this article, however, we use the word “deportation” instead of “removal” because the former term is more readily and easily understood.
anywhere, creating a climate of fear in immigrant communities, and, somewhat ironically, substantially reducing the deportation of people actually convicted of significant crimes.33

A. Treating All Irregular Immigrants as Criminals

33 Alan Gomez, ICE Arresting More Non-Criminal Undocumented Immigrants, USA TODAY (May 17, 2018), https://www.usatoday.com/story/news/nation/2018/05/17/ice-arresting-more-non-criminal-undocumented-immigrants/620361002/ (during the Trump Administration, ICE agents have arrested on average 4,143 undocumented immigrants without a criminal record each month whereas in the last two years of the Obama Administration, agents averaged 1,703 a month); American Immigration Council, The End of Immigration Enforcement Priorities Under the Trump Administration (Mar. 7, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf (the Trump Administration has broadened enforcement priorities to afford ICE officers greater power to remove unauthorized immigrants than exercised in other Administrations); See also recent reports from TRAC, the highly respected nonpartisan, nonprofit data research center affiliated with the Newhouse School of Public Communications and the Whitman School of Management, both at Syracuse University: TRAC, ICE Focus Shifts Away from Detaining Serious Criminals (June 25, 2019), https://trac.syr.edu/immigration/reports/530/ (number of ICE detainees up 22 percent from September 2016; most striking change over 27-month period a dramatic drop in the number of detainees who had committed serious crimes); TRAC, Profiling Who ICE Detains - Few Committed Any Crime, (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530/ (58% of individuals in ICE custody had no criminal record; four out of five either have no record or only minor offense such as traffic violation).

Attorney General Sessions initiated the policy of criminally prosecuting all immigrants, including first-time entrants, who entered the United States without inspection. On April 6, 2017, Mr. Sessions formally declared his “zero tolerance” policy—every person who crossed the “Southwest” border (but, not the Canadian border) without inspection would be “criminally prosecuted for illegal entry or illegal reentry.” Sessions directed all U.S. Attorneys to prioritize prosecuting noncitizens for smuggling (broadly defined) and illegal entry. His policy included


35 On February 20, 2017, the Trump Administration released a memorandum directing DHS to take action against parents, family members, and any other individual who ‘directly or indirectly . . . facilitates the illegal smuggling or trafficking of an alien child into the United States.’ Sec. John Kelly, Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), Sec. M; see also Donald J. Trump, Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements (Jan. 25, 2017). This provision is so broad that it could include persons who help to arrange a child’s travel to the United States, help pay for a guide for the child’s journey to the United States, or otherwise encourage the child to enter the United States. The memorandum directs that enforcement against parents, family members, or other individuals involved in the child’s unlawful entry into the United States could include (but is not limited to) placing such person in removal proceedings if they are removable, or referring them for criminal prosecution. CITATION NEEDED As of June 29, 2017, ICE confirmed that it has begun targeting individuals in the United States who may have paid a guide to smuggle children into the United States. Although ICE has failed to disclose details regarding the scope or length of this enforcement action, its apparent focus is on “sponsors” (individuals, often parents or other close family members, who agree to provide a safe appropriate home for children awaiting immigration processing). This means that individuals who sponsor a child to facilitate the child’s release from immigration detention are likely themselves at increased risk. Alison Kamhi & Rachel Prandini, Alien Smuggling: What It Is and How It Can Affect Immigrants, IMMIGRATION LEGAL RESOURCE CENTER PRACTICE ADVISORY (July 18, 2017), https://www.ilrc.org/sites/default/files/resources/alien_smuggling_practice_advisory-20170728.pdf.

The 1996 immigration act had expanded the definition of smuggling to remove the requirement of financial gain, and technically include helping one’s own accompanying minor child or relative enter the country without inspection. INA § 212(a)(6)(E)(i); INA § 237(a)(1)(E)(i); 104th Congress, 2d Session, House of Representatives Conference Report 104–828 to accompany HR 2202 (Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (Sept. 24, 1996), https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf. See (1)(A) Any person who— (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien; . . . shall be punished as provided in subparagraph (B) [imposing fines and imprisonment of from up to 5 years, up to 10 years, and up to 20 years, depending on certain requirements] (emphasis added). However, this interpretation had rarely been utilized in previous Administrations. See Catholic Legal Immigration Network, Inc. & Public Counsel, Practice Advisory: Working with Child Clients and Their Family Members in Light of the Trump Administration’s Focus on “Smugglers” (July 2017), https://cliniclegal.org/resources/working-child-clients-and-thir-family-members-light-trump-admnistrations-focus-smugglers.

asylum-seekers and families with children—he made no exceptions. A month later, he explained what “zero tolerance” meant:

I have put in place a “zero tolerance” policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. If you make false statements to an immigration officer or file a fraudulent asylum claim, that’s a felony. If you help others to do so, that’s a felony, too. You’re going to jail. So if you are going to come to this country, come here legally. Don’t come here illegally.37

B. Employing the Pretext of Criminality to Take Children from Their Parents

The Trump Administration seized on the so-called nuclear option of “zero tolerance”38 deliberately to separate noncitizens from their children on the theory that such violent disruption of people’s lives would deter other would-be immigrants from coming to the United States.39

Former DHS Secretary and then-the President’s Chief of Staff John Kelly said, “But a big name of the game is deterrence . . . . [F]amily separation would be a tough deterrent.”40

administrations, first-time entrants were usually placed in administrative (civil immigration) detention.\footnote{Linda Qiu, Fact-Checking Trump’s Family Separation Claim about Obama’s Policy, N.Y. TIMES (Apr. 9, 2019), http://tiny.cc/dbk85y. “Last year, as the Trump administration faced backlash over its policy, top officials countered that Mr. Trump’s predecessors had also separated families at the border. That was misleading. While previous administrations did break up families, it was rare — for example, in cases where there was doubt about the familial relationship between a child and an accompanying adult, according to former officials and immigration experts. Neither former Presidents George W. Bush nor Barack Obama had a policy that had the effect of widespread family separation. Sarah Pierce of the Migration Policy Institute told The Times last June. “[N]othing like what the Trump administration is doing has occurred before,” she said. Linda Qiu, Fact Checking Trump’s Family Separation Claim About Obama’s Policy, N.Y. TIMES (Apr. 9, 2019).} In civil detention, unlike federal penal custody, children can stay with their parents.\footnote{Seung Min Kim, 7 Questions About the Family-Separation Policy, Answered, WASH. POST (June 19, 2018), http://tiny.cc/dek85y; see also Salvador Rizzo, The Facts About Trump’s Policy of Separating Families at the Border, WASH. POST (June 19, 2018), http://tiny.cc/dek85y.} After nation-wide outcry, President Trump stated that he halted this program, but, as of June 2019, thousands of children are still separated from their parents or close relatives, whose whereabouts are essentially unknown.\footnote{In January 2019, the Inspector General of the Department of Health and Human Services identified 2,737 immigrant children whom the government had separated from their parents, but noted that there may have been “thousands” more. Department of Health and Human Services, Issue Brief on Separated Children Placed in Office of Refugee Resettlement Care (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf.} According to the Administration, it may take at least two years before these children can be reunited with their families because the government made no effort to keep track of information about either the children or their relatives.\footnote{Julia Jacobs, U.S. Says It Could Take Two Years to Identify Up to Thousands of Separated Immigrant Families, N.Y. TIMES (Apr. 6, 2019), https://www.nytimes.com/2019/04/06/us/family-separation-trump-Administration.html?module=inline} Advocates were reduced to recommending that the names, birthdates, and, when known, Alien Numbers of parents or siblings be written in indelible ink on the backs of children, with the thought that children would be less likely to wash ink off their backs.\footnote{Presentation of Lorelei Williams, Esq., Chair, New York City AILA Chapter, April 9, 2019 (describing her multiple trips to asylum-seeker border camps and caravans and working with NGOs trying to provide food, water, clothing, and minimal shelter and protection to the refugees).} Before Mr. Trump ostensibly stopped the policy, hundreds of immigrant parents had been deported to their countries of origin without

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\footnote{Linda Qiu, Fact-Checking Trump’s Family Separation Claim about Obama’s Policy, N.Y. TIMES (Apr. 9, 2019), http://tiny.cc/dbk85y. “Last year, as the Trump administration faced backlash over its policy, top officials countered that Mr. Trump’s predecessors had also separated families at the border. That was misleading. While previous administrations did break up families, it was rare — for example, in cases where there was doubt about the familial relationship between a child and an accompanying adult, according to former officials and immigration experts. Neither former Presidents George W. Bush nor Barack Obama had a policy that had the effect of widespread family separation. Sarah Pierce of the Migration Policy Institute told The Times last June. “[N]othing like what the Trump administration is doing has occurred before,” she said. Linda Qiu, Fact Checking Trump’s Family Separation Claim About Obama’s Policy, N.Y. TIMES (Apr. 9, 2019).}

\footnote{Seung Min Kim, 7 Questions About the Family-Separation Policy, Answered, WASH. POST (June 19, 2018), http://tiny.cc/dek85y; see also Salvador Rizzo, The Facts About Trump’s Policy of Separating Families at the Border, WASH. POST (June 19, 2018), http://tiny.cc/dek85y.}

\footnote{In January 2019, the Inspector General of the Department of Health and Human Services identified 2,737 immigrant children whom the government had separated from their parents, but noted that there may have been “thousands” more. Department of Health and Human Services, Issue Brief on Separated Children Placed in Office of Refugee Resettlement Care (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf.}


\footnote{Presentation of Lorelei Williams, Esq., Chair, New York City AILA Chapter, April 9, 2019 (describing her multiple trips to asylum-seeker border camps and caravans and working with NGOs trying to provide food, water, clothing, and minimal shelter and protection to the refugees).}
their children.46 The young sons and daughters of these immigrants were left in locked residential facilities47 or foster care to fend for themselves. No proceeding determined that their parents were unfit or were otherwise abusive or neglectful parents. Even at the time that the


47 The more than 100 federally contracted “shelters” – children are not free to leave and the large, understaffed facilities have been denounced as hotbeds of illness and danger, not to mention profound mental harm and emotional suffering, by Congressional leaders and criticized even by the Inspector General of the Department of Health and Human Services (“HHS”) – are now almost at capacity, with about 15,000 children detained, although sponsors (usually family members residing in the United States) have applied for the release of thousands of the children. HHS is taking far longer to conduct background checks on these sponsors than in prior Administrations, which has slowed the release of the children to a trickle – even though staffers in these facilities do not have to undergo the same thorough background checks, and a horrifyingly high incidence of sexual assault on children, not only by other child inmates but by staff, has been documented by HHS and reported to Congressional oversight. See NPR National, Almost 15,000 Migrant Children Now Held at Nearly Full Shelters (Dec. 13, 2018), https://www.npr.org/2018/12/13/676300525/almost-15-000-migrant-children-now-held-at-nearly-full-shelters; Victoria López, ACLU National Prison Project & Sandra Park, ACLU National Women’s Rights Project, ICE Detention Center Says It’s Not Responsible for Staff's Sexual Abuse of Detainees, https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-detention-center-says-its-not-responsible; Michael Grabell, Tophier Sanders & Silvina Sterin Pensel, In Immigrant Children’s Shelters, Sexual Assault Cases Are Open and Shut, ProPublica (Dec. 21, 2018), https://www.propublica.org/article/boystown-immigrant-children-shelter-sexual-assault; Kristen Martinez-Gugerli, Reported Sex Abuse of Migrant Children in U.S. Custody Highlights Inadequacies in Immigration System, University of Pittsburgh Panoramas (March 18, 2019) https://www.panoramas.pitt.edu/news-and-politics/reported-sex-abuse-migrant-children-us-custody-highlights-inadequacies-immigration; Miriam Jordan, Thousands of Migrant Children Could Be Released After Sponsor Policy Change, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/migrant-children-release-policy.html. HHS has also deliberately discouraged eligible sponsors from coming forward to claim children by reporting the background information they provide to ICE; at least 170 potential sponsors who appeared to be undocumented have been targeted and arrested by ICE. See Brian Tashman, ACLU Report: Kirstjen Nielsen Continues to Insist That There is No Family Separation Policy, https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/kirstjen-nielsen-continues-insist-there-no.

Finally, apparently in an attempt to hide the truth, ICE has sought permission from the National Archives and Records Administration to destroy the records of physical and sexual abuse of immigrants in its custody, which have been widely reported and the subject of federal court civil rights action. 82 FR 32585 (July 14, 2017); see Victoria López, Senior Staff Attorney, ACLU National Prison Project, ACLU Report: ICE Plans to Start Destroying Records of Immigrant Abuse, Including Sexual Assault and Deaths in Custody (May 29, 2018), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-plans-start-destroying-records-immigrant; see also CIVIC, Sexual Assault in Immigration Detention: Watchdog Organization Files Civil Rights Complaint Alleging Rising Sexual Abuse, Assault, and Harassment in U.S. Immigration Detention Facilities (April 11, 2017),
program was formally and grudgingly disbanded—although it is now clear that it has continued, despite the DHS Secretary’s strident denials to Congressional oversight committees—ICE and CPB had little information on where some 2,000 of the separated children were located or how to reunite them with their parents.49

C. Radical Attempts to Sharply Reduce Asylum-Seekers’ Rights to Assert Their Claims

1. Denying Bond (Bail) and Making “Detention” Intolerable

Almost as disquieting as the Trump Administration’s child separation policy is its actions targeting asylum-seekers and refugees.50 President Trump’s first executive order called on the Justice Department to make prosecutions of illegal entrants a “high priority” even though such cases already had accounted for more than half of federal prosecutions.51 Besides

48 Lomi Kriel and Dug Begley, Trump Administration Still Separating Hundreds of Migrant Children at the Border Through Often Questionable Claims Of Danger, HOUSTON CHRONICLE (June 24, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php (although a federal judge had ostensibly ended a year ago the controversial policy of separating immigrant families at the southern border and ordered the government to reunify more than 2,800 children with their parents, the judge allowed DHS to continue separating families if a parent posed a danger to the child or had a serious criminal record or gang affiliation, but with no guidelines hundreds of children continue to be taken from parents — often, advocates say, for unclear or no justification; more than 700 children taken from parents or other relatives between June 2018 and May 2019, according to most recent government court filing), https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-administration-still-separating-hundreds-of-14029494.php.

49 Catherine Schoichet, Why it’s Taking so Long for the Government to Reunite the Families it Separated, CNN (July 10, 2018), https://www.cnn.com/2018/07/09/politics/family-separation-reunion-hurdles/index.html (reporting that the delay in reuniting separated families is due to government failure to create a plan for reunification when the practice began, to the fact that some parents have already been released from ICE custody and others deported, and to the lengthy process associated with releasing children from custody, including DNA testing); see also Michael D. Shear, Maggie Haberman & Zolan Kanno-Youngs, Trump Is Pushing to Restart Family Separations at Border, N.Y. TIMES (Apr. 8, 2019), https://www.nytimes.com/2019/04/08/us/politics/trump-nielsen-family-separation.html.

50 Under the binding Flores settlement, the DHS “shall release a minor from its custody without unnecessary delay.” The Administration defied the Flores settlement and is seeking to keep children in jail with their parents for over 20 days. Rather than challenging the settlement, DHS has attempted to bypass federal courts by issuing an interim regulation permitting the indefinite detention of immigrant children with their parents. See Proposed Rule Would Allow DHS to Detain Parents and Children Longer, CONGRESSIONAL QUARTERLY (Sept. 6, 2018), 2018 WL 4233055. The UN High Commissioner for Refugees Office noted, “Children should never be detained for reasons related to their own or their UN High Commissioner parents’ migration status. Detention is never in the best interests of the child and always constitutes a child rights violation.” for Human Rights, Press Briefing Note on Egypt, United States and Ethiopia (June 5, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E.

prosecuting first-time border entrants, including asylum-seekers, for illegal entry, the Trump Administration had denied virtually all asylum-seekers, parole or reasonable bond (bail, and thus release) in their noncriminal immigration cases, regardless of the strength of their claims. Further, the Trump Administration kept asylum-seekers locked up in immigration detention until the ACLU obtained a district court order in July 2018 to stop the blanket denial of parole. Despite the court order, ICE has reportedly rejected 75 percent of requests for parole made by asylum-seekers deemed to have a credible fear of persecution. In comparison, the Obama Administration granted over 90 percent of such requests.


53 The practice of denying parole for asylum-seekers who passed their credible fear interviews became most salient in 2017 when the Administration departed from the 2009 directive requiring ICE officials to make individualized determinations for parole. Damus v. Nielsen, No. 18-578, 2018 U.S. Dist. LEXIS 109843 at *47-48 (D. D.C. 2018) (finding that from February to September of 2017 three field offices declined 100% of parole applications and two other field offices denied 92-98% of parole applications, as compared to previous years where ICE granted more than 90% of parole applications (emphasis added)); see also . For particularly vivid and egregious examples of the detention of more than 100 Cuban asylum-seekers – who used to be welcomed to the United States with open arms – languishing for years in detention despite having passed credible fear interviews, see Southern Poverty Law Center, Cuban Men Thrown into Louisiana Prisons Despite Legal Asylum Requests (Apr. 10, 2019), https://www.splcenter.org/news/2019/04/10/cuban-men-thrown-louisiana-prisons-despite-legal-asylum-requests.


55 Todd Wiseman, ACLU Claims ICE Is Still Detaining Some Asylum-Seekers For No Reason Despite Court Order, TEXAS TRIBUNE (Aug. 28, 2018), 2018 WLNR 26483342 (noting that after a July 2018 federal court order, ICE began granting parole to about 25 percent of those asylum-seekers demonstrating credible fear compared to the 90 percent under the Obama Administration); see also Will Weissert and Emily Schmall, ‘Credible fear’ for U.S. Asylum Harder to Prove Under Trump, CHICAGO TRIBUNE (July 16, 2018), http://www.chicagotribune.com/news/nationworld/ct-credible-fear-asylum-20180716-story.html# (Obama Administration allowed a noncitizen who, during a preliminary interview with an asylum officer, established “a significant possibility” that the noncitizen is eligible for asylum, withholding of removal or protection under the Convention Against Torture, 8 C.F.R. § 208.30, § 1208.30, i.e., “passed a credible fear interview”) to be paroled rather than detained).

56 Weissert & Schmall, supra note 55.
A recent decision of Attorney General William Barr will presumably enable ICE to return to denying bond to nearly 100 percent of asylum-seekers. On April 16, 2019, Mr. Barr overruled a George W. Bush-era Board of Immigration Appeals decision and codified ICE’s bond denial practice with a directive to Immigration Judges that will further reduce meaningful access to asylum. The Attorney General, again exercising his unique power of unilateral reversal and revision of selected prior “judicial” decisions by the Board of Immigration Appeals, with no hint of deference to the concept of stare decisis found that, except in extraordinarily limited cases, asylum-seekers who demonstrate a credible fear of persecution are no longer eligible for parole or reasonable bond. By requiring asylum-seekers to remain in ICE detention pending adjudication of their asylum claim, a process that could take well over a year, if not years, the Trump Administration has forced many bona fide asylum-seekers to give up their asylum claims. In effect, the Administration compels them to make the Hobson’s choice between lengthy immigration detention in the United States or “voluntary” deportation with the risk of

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57 Matter of M-S-, 27 I & N Dec. 509 (A.G. Apr. 16, 2019) (holding that noncitizens initially placed in expedited removal proceedings are statutorily subject to mandatory detention during proceedings, even when found to have a credible fear of persecution (see supra note 52); see Michael D. Shear & Katie Benner, In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers, N.Y. TIMES (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/us/politics/barr-asylum-bail.htm. In July 2019, a federal district court judge issued a decision in a class action reversing the Attorney General, ruling that the government must provide reasonably prompt bond hearings to asylum-seekers in Immigration Court and requiring Immigration Judges to grant bond unless the Department of Homeland Security can demonstrate good cause to keep the asylum-seeker in detention. Noah Lanard, Judge Blocks Trump Administration’s Attempt to Subject Thousands of Asylum Seekers to Indefinite Detention, MOTHER JONES (July 2, 2019), https://www.motherjones.com/politics/2019/07/judge-blocks-trump-administrations-attempt-to-subject-thousands-of-asylum-seekers-to-indefinite-detention/; see Padilla v. U.S. Immigration & Customs Enforcement, No. 2:18-cv-00928-MJP (W.D. Wash.), http://americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_credible_fear_interview_and_bond_hearing_delays_order_granting_plaintiffs_motion_for_preliminary_injunction.pdf. 58 Throughout the Trump Administration, Immigration Courts have experienced a 32% increase in backlog, causing waiting times before an Individual Merits Hearing (fact-finding and decision proceeding) to vary enormously, depending on location. Immigration Court Backlog Jumps While Case Processing Slows, TRAC (June 8, 2018), http://trac.syr.edu/immigration/reports/516/. Overall, the Immigration Court backlog has ballooned by a stunning 49 percent during the first two years of the Trump Administration, surpassing one million pending cases for the first time. See Immigration Court Backlog Surpasses One Million Cases, TRAC (November 6, 2018), https://trac.syr.edu/immigration/reports/536/; Immigration Court Workload in the Aftermath of the Shutdown, TRAC (Feb. 19, 2019), https://trac.syr.edu/immigration/reports/546/.
persecution and death in their countries of origin.\textsuperscript{59} Despite continuing publicity and protest about the conditions in which asylum-seekers are held, the Administration has descended to new lows in its lawless treatment of detained children, at a cost to the US taxpayer of about $775 per child, per day.\textsuperscript{60} Terrified toddlers, who were promptly separated from their parents or guardians

\textsuperscript{59} In a classic example of this phenomenon, one co-author consulted with a detained asylum seeker who had a textbook religious persecution claim who had been detained for seven months in an isolated facility in Georgia awaiting his individual hearing although he had never even been accused of any crime and there was no reason to suspect, with such a strong claim, that he would not appear for his hearing, which he was very eager to participate in. He was forced to appear pro se before one of the notorious Atlanta Immigration Judges who virtually never grant asylum to anyone, see GAO-17-72, Asylum Variation Exists in Outcomes of Applications Across Immigration Courts and Judges (Nov. 2016) (grant rate of 52 percent (defensive) - 66 percent (affirmative) in New York Immigration Court and less than 5 percent (affirmative and defensive) in Atlanta Immigration Court, \url{https://www.gao.gov/assets/690/680976.pdf}, a judge who also refused to allow him representation by someone of his own choosing, even though the representative was clearly qualified by statute and regulation See 8 C.F.R. § 1292.1(a)(3) (2011). After a cursory hearing and the inevitable denial, this IJ deliberately misinformed the respondent about the length of time an appeal to the Board of Immigration Appeals would likely take. In despair at the thought of years more in detention, he was persuaded to give up, irrevocably waive his right to appeal, and accept immediate removal to the country where he had been repeatedly physically harmed and threatened with death for carrying out his evangelical duties to resist the actions of local maras.

The UN Committee Against Torture has specifically concluded that this practice violates the Convention: “States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers, which would compel persons in need of protection under article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment there.” UNCAT Comm. General comment No. 4 (2017) on the implementation of article 3 of the Convention, CAT/C/GC/4 (Sept. 4, 2018) emphasis added), \url{https://www.ohchr.org/Documents/HRCouncils/CAT/CAT-C-GC-4_EN.pdf}.

upon entering the United States, are confined with no concept of why or for how long they will be detained without their parents, with no supervision but that of other children.61 Most recently, the Trump Administration announced that it would no longer provide any opportunity for sports, English classes, or the general know-your-rights legal orientation programs that have long been offered to detained unaccompanied children.62

2. Prohibiting Asylum-Seekers Who Entered Without Inspection from Applying for Asylum

The day after the 2018 midterm elections, the Secretary of Homeland Security and the Acting Attorney General jointly issued an interim rule purporting to prohibit immigrants who entered without inspection from applying for asylum.63 Such a regulation is without precedent and

underscores not only the Administration’s disregard of American law and traditions, but, as this article shows, our international obligations and the rights of refugees. The stated purpose of the proposed rule is to funnel asylum-seekers to the U.S. ports of entry. Yet reliable reports have indicated that under this Administration many CBP officers first began telling asylum-seekers at the border ports of entry that they no longer have a right to asylum, dissuading them from filing asylum claims.64 Later, the CPB, claiming a lack of capacity, appears to have changed its policy to interview only a miniscule number of applicants at the ports of entry.65 Meanwhile, the remaining applicants must remain in Mexico, trapped in an extralegal process called “metering,” that is often controlled by corrupt Mexican law enforcement or criminal “coyotes” who make the destitute migrants bid with whatever they have for higher “numbers” on an unofficial list that is, nonetheless, enforced by the CBP. Given the resources of CBP and ICE, one has to wonder whether this is a deliberate policy to discourage asylum applicants from claiming asylum at the ports of entry.66

64 Facing Walls: USA and Mexico’s Violations of the Rights of Asylum-Seekers, AMNESTY INTERNATIONAL 1, 19-20 (June 2017), https://www.amnestyusa.org/wp-content/uploads/2017/06/USA-Mexico-Facing-Walls-REPORT-ENg.pdf (reporting that between December 2015 and April 2017, 71 asylum-seekers at the San Diego-Tijuana border crossing were told by CBP officers that they could not seek asylum or were given incorrect instructions on where to go to seek asylum); see video of Rep. Nanette Barragan confronting CBP and recording their rebuffing asylum-seekers at a port of entry; Zachary Mueller, Members of Congress Waited With Migrants Seeking Asylum. It took Them 20 Hours and a Cold Wait Overnight, AMERICA’S VOICE EDUCATION FUND (Dec. 18, 2018), https://americasvoice.org/blog/reps-barragan-and-gomez-asylum/; see also Rebekah Entralgo, Nielsen Claims Asylum Seekers Are Not Being Turned Away at Ports Of Entry, THINKPROGRESS (Mar. 6, 2019) https://thinkprogress.org/nielsen-asylum-seekers-turned-away-ports-of-entry-be806e02f80/.


66 An NGO has sued DHS Secretary Nielsen, alleging that this “lack of capacity” is a deliberate governmental policy. Beginning around 2016, high-level CBP officials, under the direction or with the knowledge or authorization of the named Defendants (the “Defendants”), adopted a formal policy to restrict access to the asylum process at POEs [“Ports of Entry”] by mandating that lower level officials directly or constructively turn back asylum-seekers at the border (the “Turnback Policy”) contrary to U.S. law. In accordance with the Turnback Policy, CBP officials have used and are continuing to use various methods to unlawfully deny asylum-seekers access to the asylum process based on purported but ultimately untrue assertions that there is a lack of “capacity” to process them. These methods include coordinating with Mexican immigration authorities and other third parties to implement a “metering,” or waitlist, system that creates unreasonable and life-threatening delays in processing asylum-seekers; instructing asylum-seekers to wait on the bridge, in the preinspection area, or at a shelter until there is adequate
3. **Requiring Asylum-Seekers to “Remain in Mexico”**

Another Trump Administration attack on asylum-seekers, the euphemistically named the Migration Protection Protocols (“MPP”), forces asylum-seekers to remain in Mexico while their asylum claims are pending in the United States. This policy geometrically magnifies the long-term practice of placing immigration detention centers in isolated areas of the United States, far from the media and, more importantly, far from attorneys who could represent those seeking refuge from systematic violence in their countries of origin. Rather than protecting asylum-seekers, this radical policy makes it all but impossible for asylum-seekers to obtain counsel while they wait for months, if not years, in the impoverished, cartel-ruled Mexican border cities. Not only does this policy deprive asylum-seekers of their right to obtain effective assistance of counsel, but the DHS memorandum establishing the “Remain in Mexico” policy also impermissibly imposed a much higher bar for asylum.

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After being returned to Mexican border cities, which are completely unequipped to provide refugees any services or support, and among the most criminally violent and dangerous places on the globe, thousands of asylum-seekers have found it virtually impossible to participate in developing the necessary evidence for their asylum claims. They are mostly homeless and unemployed, and the Mexican government does not issue them work permits. They have no addresses or ways to communicate with the Immigration Court or with lawyers. The CBP or ICE often keeps their precious identification documents—birth, marriage and death certificates—and other necessary original documents making it difficult for them to navigate any Mexican governmental systems.

Observers of the massive “MPP dockets” describe the San Diego Immigration Court as a chaotic epicenter of “aimless docket reshuffling.” Just a few examples from a collection of near-transcripts by attorneys and advocates at the Court, seem to strongly corroborate that image, as well as the horrors endured by victims of what they call the Migrant Persecution Protocols:


(Baby crying during Immigration Court hearing for a mother and child forced to "Remain in Mexico")

**Immigration Judge**: Ma'am, didn't I tell you that you didn't need to bring your child to Court for this hearing

**Mother with nursing baby**: It's just that... I don't have any family. I don't know anyone in Mexico.

**Immigration Judge**: Okay, but you are going to need to be able to concentrate at your hearings so that you can provide the best testimony in your case.

**Mother with nursing baby**: But if I have to stay in Mexico and come the United States for court... where am I supposed to leave my baby?

**Immigration Judge**: Ok. I just don't want your baby to distract you.

**Immigration Judge to ICE Trial Attorney**: Since you didn't provide me with the brief I requested at the last hearing, what would you like me to do?

**ICE Trial Attorney**: I'm sorry your honor. I'm having trouble thinking over the crying baby.

**Immigration Judge**: Well what exactly would you like me to do about it?

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74 The so-called Mexico Protection Protocols have caused cases like the following:

June 18  A Honduran woman sent back to Mexico under Migrant Protection Protocol was kidnapped and raped in Juarez. The #MigrantPersecutionProtocols are directly at fault for this woman’s kidnapping & rape by men wearing Mexican Federal Police Uniforms. She had been returned to Mexico after having court in El Paso on May 15, 2019. 15, 2019 (link: https://www.eldiariodechihuahua.mx/estado/secuestraron-federales-a-migrante-hondurena-20190618-1528964.html)

May 3  Today in #MigrantPersecutionProtocols court; a crying, shaking mom showed off her 7yr-old daughter’s bloody scab from where she bumped her head while escaping armed attackers who broke into their migrant shelter in the middle of the night. even the judge looked shook.

Rene, a man from El Salvador, said on March 29 he was robbed and stabbed in Ciudad Juarez. He went to the police but was told they couldn't help him because he wasn't Mexican.

Esdras, a man from Guatemala, was robbed twice at a church shelter. He went to police with suspicions he was being victimized by a neighbor of the church and police recovered his stolen cell phone. He was then threatened by the neighbor's family.

Juana, a woman from Guatemala, said people in a car came to her shelter saying they wanted to recruit “workers.” She and others agreed but said they needed approval of the pastor's wife. The car, which had no plates, took off.

Fvia, also from Guatemala, said she was robbed at a church shelter. Altogether, 9 of the 20 people in court told the judge they had a fear of returning to Mexico.

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Bill Newman @bill2earth at https://twitter.com/bill2earth/status/1138282824199540737; see also Innovation Law Lab.
Can one truthfully declare that this practice comports with human rights and our international obligations towards refugees and asylum seekers or that it does not amount to a “penalty” within the meaning of article 31 of the 1951 Refugee Convention?75

4. Charging Desperate Asylum-Seekers Filing Fees While Denying Work Authorization

Moreover, the Trump Administration has imposed filing fees sufficient to cover the administrative costs of processing asylum applications. At the same time, the Administration has revoked the eligibility for work permits from asylum-seekers who either entered, or tried to enter, in the United States in a way other than through a port of entry, even as CBP continues to block attempts to enter at those ports.76

5. Politically Interfering in the State Department’s Human Rights Reports

The Trump Administration has deliberately falsified through omission of what had been the gold standard for factual claims about persecution in other countries: the Department of State’s annual Country Reports on Human Rights Practices. These Reports are the bedrock documentation that asylum-seekers must both rely on and counter during the adjudication of their claims. They are utilized by USCIS asylum officers, ICE and CBP officers at the border, by Immigration Court Judges, the BIA, and by State Department officers in embassies and consulates abroad to test and evaluate the credibility, persuasiveness, and reliability of asylum-

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seeker accounts of persecution, as well as to establish, or controvert, whether individual reports of abuse are isolated criminal acts or governmental policies—a crucial distinction that makes or breaks almost every asylum claim.77

For the vast majority of asylum-seekers who are unrepresented (and who often lack English proficiency and literacy, access to computerized resources or even books and newspapers, and increasingly are detained in remote facilities or now, cabined in Mexico), these official publications, routinely entered into evidence at asylum hearings, may be their sole means to corroborate the torture and persecution they fear or have suffered from. In a campaign worthy of the Orwellian term “memory hole,”78 State Department compilers have apparently been ordered to eliminate information specifically about the oppression of female and LGBTQ residents,79 including governmental policies that deprive women of reproductive rights

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77 Dree K. Collopy, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE (8th ed 2019) (Chapter 4: Proving the Case); Deborah E. Anker, THE LAW OF ASYLUM IN THE UNITED STATES (2018) (Chapter 3: Evidence: Country Conditions and Human Rights Documentation) (“country conditions” are perhaps the single most important factor in determining asylum applications; essential to explaining why asylum-seekers cannot safely relocate within country of origin and escape persecution that way; essential to establish validity, social visibility, social distinction, and particularity of “particular social groups,” a necessary element for all asylum claims that are not based on racial, religious, ethnic and nationality discrimination or political opinion).

79 Attorney General Sessions unilaterally overruled a BIA decision and decreed that women fleeing intimate partner violence would no longer be recognized as a “Particular Social Group” and therefore a protected category. See Matter of A-B-, 27 I. & N. Dec. 316 (A.G. June 11, 2018), but see Grace v. Whitaker, 344 F.Supp. 3d 96 (D. D.C. 2018) (permanently enjoining Attorney General from effectuating his decision, albeit with respect solely to Credible Fear and Reasonable Fear Interviews); see also Theresa A. Vogel, Critiquing Matter of A-B-: An Uncertain Future In Asylum Proceedings For Women Fleeing Intimate Partner Violence, 52 U. MICH. J. L. REFORM 343 (2019); Testimony of Prof. Karen Musalo, Director, Center for Gender and Refugee Studies, before Canadian Parliament Standing Committee on Citizenship and Immigration (May 8, 2019) (contrasting President Trump’s attempted elimination of protection for survivors of gender-based violence with Canadian recognition of gender-based persecution as basis for asylum). For the most compelling account to date of the nearly inconceivable level of violence against women in Honduras, clearly tantamount to torture, let alone persecution see J. Filipovic, I Can No Longer Continue to Live Here, POLITICO (June 7, 2019) at https://www.politico.com/magazine/story/2019/06/07/domestic-violence-immigration-asylum-caravan-honduras-central-america-227086?fbclid=IwAR35SHt_qm6sPdlaOM7t1QjZRu93mafe20yGtEhptg6iqlLmTn5CuaGiQ. As the epigraph puts it, “What’s driving so many Honduran women to the U.S. border? The reality is worse than you’ve heard.” For an equally graphic, comparable article about El Salvador, see Tristan Clavel, Extortion and Sexual Violence: Women’s Unspoken Suffering, INSIGHT (Apr. 26, 2019), https://www.insightcrime.org/investigations/extortion-sexual-violence-womens-unspoken-suffering/?fbclid=IwAR3UE_yROpX-4eQc90Yf0o4NMNLdDmAdlSzm802xUqvJo0PtxR-LoMssY.
(not only of the right to abortion, but also to contraception, to freedom from domestic violence, and access to health care). In 2019, as observed by many advocates and NGOs:

"[T]he Trump Administration released its annual Country Reports on Human Rights Practices without information on the full range of abuses and violations of reproductive rights experienced by women, girls and others around the world. The reports focus solely on coerced abortion or involuntary sterilization. These violations represent only a narrow slice of the coercive and harmful policies and other systemic challenges that women and girls face when trying to exercise their reproductive rights, including a lack of access to contraceptives and other sexual and reproductive health services."

In response, the “Reproductive Rights are Human Rights Act,” bicameral legislation that would require the U.S. to report on the full range of reproductive rights in the annual Country Reports on Human Rights Practices, has been introduced and is cosponsored by 126 members of the House of Representatives and thirty Senators.

6. Drastically Reducing the Number of Refugees and Their Capacity to Present and Prove Their Claims

President Trump’s original January 2017 executive order suspended the worldwide refugee program for 120 days and indefinitely halted the admission of Syrian refugees. The

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81 Id.


83. The federal fiscal year begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends; for example, fiscal year 2013 began on October 1, 2012 and ended on September 30, 2013. U.S. Senate: Glossary Term, “Fiscal Year,” https://www.senate.gov/reference/glossary_term/fiscal_year.htm. From February 2017 to September 2017, the Trump Administration admitted 21,268 refugees in total, including 1,673 from Syria. In the 2018 fiscal year, 18,214 refugees in total were admitted, but only 56 from Syria. REFUGEE
United States is now admitting refugees again but at numbers among the lowest in decades. President Trump early on cut the refugee allocation from 110,000 in Fiscal Year (“FY”) 2016 to 50,000 in FY 2017. The number was further reduced to 45,000 in FY 2018.\textsuperscript{84} Given all the additional restrictions imposed on migrants, the number of refugees actually admitted in 2018 was 22,491—less than half those allocated.\textsuperscript{85} Secretary of State Michael Pompeo announced that the allocation will now be further reduced to 30,000, for FY 2019, the lowest allocation on record.\textsuperscript{86}

In suspending the refugee program, President Trump principally argued that terrorists posing as refugees would come into the country. This was essentially the same argument that the United States raised against Jewish refugees in World War II.\textsuperscript{87} This fear during World War II proved unfounded\textsuperscript{88} just as the President’s argument is now. As many have noted, none of the immigrants and visitors coming from the Muslim countries designated in the Executive Orders\textsuperscript{89} has been found to have committed any terrorist offenses in the United States.\textsuperscript{90}
The Trump Administration has also attempted to reduce the number of refugees who reach the United States to claim asylum by deterring and preventing U.S. citizens from assisting them, whether by intimidation, surveillance, and harassment or by criminal prosecution.

Attacks have stepped up against all kinds of efforts to aid migrants, primarily asylum-seekers, in the United States and in Mexico. Many appear to involve collusion between corrupt Mexican officials and Border Patrol officers, a constant problem since the CBP’s creation in 2003. For example, Scott Warren, a volunteer for the humanitarian organization No More Deaths, was prosecuted (but not convicted by the jury) for “harboring” in violation of 8 USC § 1324. CBP agents set up surveillance at a humanitarian station and arrested Mr. Warren, a 36-year-old geography teacher, on three felony charges because he helped a pair of migrants from Central America who were hungry, dehydrated and struggling to walk on blistered feet. At the same time, other murders were recorded after the Refugee Act of 1980 implemented rigorous screening measures; see also Uri Friedman, Where America’s Terrorists Actually Come From, THE ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361/ (“Nationals of the seven countries singled out by President Trump have killed zero people in terrorist attacks on U.S. soil between 1975 and 2015.”); Intel brief, supra note 12.


93 The United States is still largely a Christian country, but such practices fly in the face of the Last Judgment, From the Gospel According to St. Matthew, Matthew 25:31-46:

‘Come, you that are blessed by my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me.’
time, vigilante groups such as the United Constitutional Patriots, with no legal basis whatsoever, roam the border in full combat gear, intimidating, threatening, and even detaining large numbers of people whom they believe to be immigrants.

Perhaps the most dangerous Trump proposal is the plan to substitute ICE and CBP officers for trained, experienced Asylum Officers to conduct reasonable and credible fear interviews. These interviews determine the crucial question of whether an asylum-seeker is

Then the righteous will answer him, 'Lord, when was it that we saw you hungry and gave you food, or thirsty and gave you something to drink? And when was it that we saw you a stranger and welcomed you, or naked and gave you clothing? And when was it that we saw you sick or in prison and visited you?' And the king will answer them, 'Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me.'

Then he will say to those at his left hand, 'You that are accursed, depart from me into the eternal fire prepared for the devil and his angels; for I was hungry and you gave me no food, I was thirsty and you gave me nothing to drink, I was a stranger and you did not welcome me, naked and you did not give me clothing, sick and in prison and you did not visit me.' Then they also will answer, 'Lord, when was it that we saw you hungry or thirsty or a stranger or naked or sick in prison, and did not take care of you?' Then he will answer them, 'Truly I tell you, just as you did not do it to one of the least of these, you did not do it to me.' And these will go away into eternal punishment, but the righteous into eternal life.'

Id. (emphasis added).


See supra note 53; infra note 156; Victoria Neilson & Anna Gallagher, Trump Administration Makes a Mockery of Asylum System, THE HILL (May 11, 2019), https://thehill.com/opinion/immigration/443200-trump-administration-makes-a-mockery-of-asylum-system?bclid=IwAR2S8Ryvc2xJrCVYpuk5Q-IwahIavT2I9g5XdatTeobcnJXjFWhYyHyHa-Y (Administration is now seeking to remove asylum officers from their core duties because they have been correctly applying the law: allowing those who have a credible fear of persecution to pursue protection in the United States, in accord with our international treaty obligations).

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eligible for bond, and if so, whether she will have to await a full Immigration Court hearing in Mexico. From our own experience as volunteer lawyers at the detention facilities in Dilley, Texas, and Folkston, Georgia, the authors are painfully aware of how difficult and delicate a challenge it is to build a modicum of trust that will enable these highly traumatized women, children, and men to reveal their most painful, frightening – and sometimes shameful – secrets, often in a coercive prison cell, surrounded by hysterically weeping and demanding children, about the events and people who made them give up everything at home to make the long dangerous trek north. Asylum-seekers cannot be expected to achieve even that inadequate level of rapport and communication (setting aside language and cultural barriers for the moment) with uniformed officers under no obligation of confidentiality, and who have only a cursory knowledge of the multilayered, nuanced, immensely complex body of relevant asylum, immigration, and international human rights law.\textsuperscript{96} As one commentator has noted, assigning

\textsuperscript{96} We do not mean to suggest that every CBP official including Border Patrol agents attempts to limit or to deny immigrants and asylum-seekers their rights or treats them inhumanely, but the revelation that at least 9500 – a very significant percentage – current and former CBP officers subscribe to and post revolting misogynistic, racist and callous comments, expressing their indiscriminate contempt and hatred for immigrants, on a secret, exclusive “Dark Web” page does nothing to enhance confidence in their ability to conduct effective threshold interviews of asylum-seekers. See Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes, PRO PUBLICA (July 1, 2019), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes. What is worse, CBP leadership knew of the site, which included graphic images of agents simulating sexual acts with a training mannequin, defecating, and smiling at a human skull, for at least three years, but did nothing. Ted Hesson and Cristiano Lima, Border Agency Knew About Secret Facebook Group For Years, POLITICO (July 3, 2019). Surely it is reasonable for migrants – themselves often evangelicals well-versed in the Christian Bible – to distrust and be unable to confide in officials under the leadership of former Attorney General Sessions, who used the Bible to justify his zero tolerance policy, of imprisoning parents and separating and detaining children and subjecting them to the physical deprivation and permanent psychological damage. The contradiction is both demonstrated and discussed in these articles, including most saliently perhaps the essay by former Border Patrol Agent Montoya: Julie Zauzmer and Keith McMillan, Sessions Cites Bible Passage Used to Defend Slavery in Defense of Separating Immigrant Families, WASH. POST (June 15, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/06/14/jeff-sessions-points-to-the-bible-in-defense-of-separating-immigrant-families/?noredirect=on&utm_term=.2989f158093; Ulrike Elisabeth Stockhausen, Evangelicals and Immigration: A Conflicted History, PROCESS: AMERICAN HISTORY (Mar. 18, 2019), http://www.processhistory.org/stockhausen-immigration; Christopher Montoya [retired Border Patrol Agent], Between the Sacred and the Profane: The Border as a Contested Space, HARVARD DIVINITY SCHOOL BULLETIN (Spring/Summer 2018 - Vol. 46, Nos. 1 & 2), https://bulletin.hds.harvard.edu/articles/springsummer2018/between-sacred-and-profane; Kristin Kobes Du Mez, Understanding White Evangelical Views on Immigration: For This Cultural Group, Militant Masculinity Trumps the Bible, HARVARD DIVINITY SCHOOL BULLETIN (Spring/Summer 2018 - Vol. 46, Nos. 1 & 2), https://bulletin.hds.harvard.edu/articles/springsummer2018/between-sacred-and-profane; Kristin Kobes Du Mez, Understanding White Evangelical Views on Immigration: For This Cultural Group, Militant Masculinity Trumps the Bible, HARVARD DIVINITY SCHOOL BULLETIN (Spring/Summer 2018 - Vol. 46, Nos. 1 & 2), https://bulletin.hds.harvard.edu/articles/springsummer2018/between-sacred-and-profane.
Border Patrol agents to this duty is like asking the security guard in a hospital to triage incoming patients in an emergency ward.\(^97\) It is, in fact, worse because these “security guards” largely see their jobs as arresting undocumented immigrants, including those with valid asylum claims, who have crossed without inspection.\(^98\) As Julie Veroff of the American Civil Liberties Union’s Immigrant Rights Project stated, “Credible fear interviews involve the discussion of sensitive, difficult issues. . . . Federal law thus requires that credible fear interviews be conducted in a ‘nonadversarial manner’. . . . Credible fear interviews have always been conducted by professionals who specialize in asylum adjudication, not immigration enforcement.”\(^99\) The Administration’s radical proposal is antithetical to principles of elemental fairness and due process and violates our obligations under international human rights and refugee law.\(^100\) To evaluate the extent to which the U.S. asylum process complies with the commitment not to “penalize” asylum-seekers, it is important to look to its overall functionality, reliability, and insulation from political pressure. The U.S. Immigration Courts and Board of Immigration Appeals have failed to fulfill the constitutional and statutory promise of fair and impartial case-

\(^97\) Neilson & Gallagher, supra note 95.

\(^98\) . For another example of the type of behavior that suggests it is very unlikely that an asylum-seeker could ever communicate openly with these officers, see, e.g., the conduct alleged in the civil legal action Mejia Rios v. GEO Group, 5:19-cv-00553 (W.D. Texas May 24, 2019), https://www.raicestexas.org/2019/05/28/raices-aren-t-fox-llp-and-aldea-pjc-sue-the-geo-group-for-forcefully-re-separating-immigrant-families/.

\(^99\) Nick Miroff, U.S. Asylum Screeners to Take More Confrontational Approach as Trump Aims to Turn More Migrants Away at the Border, WASH. POST (May 7, 2019) (emphasis added), https://www.washingtonpost.com/immigration/us-asylum-screeners-to-take-more-confrontational-approach-as-trump-aims-to-turn-more-migrants-away-at-the-border/2019/05/07/3b15e076-70de-11e9-9eb4-08285389013_story.html?utm_term=90b02573dceff (in response to pressure and comments from President Trump such as “the asylum program is a scam,” John Lafferty, director of the USCIS asylum division, sent all asylum officers a memorandum requiring them to adopt a much more challenging and adversarial approach to asylum-seekers; memo is “among the most significant steps the administration has taken to limit access to the country for foreigners seeking asylum”), https://www.washingtonpost.com/immigration/us-asylum-screeners-to-take-more-confrontational-approach-as-trump-aims-to-turn-more-migrants-away-at-the-border/2019/05/07/3b15e076-70de-11e9-9eb4-08285389013_story.html?utm_term=90b02573dceff. For more on the plan to have Border Patrol agents conduct asylum interviews, see text accompanying notes 95-Error! Bookmark not defined.

\(^100\) GET A CITATION.
by-case review, according to a report by the Innovation Law Lab, the largest network of pro
bono-based immigrant defenders,101 and the Southeast Immigrant Freedom Initiative of the
Southern Poverty Law Center,102 which is only the most recent and comprehensive of several
fierce critiques, especially of its politicization 103 Entitled The Attorney General's Judges: How
the U.S. Immigration Courts Became a Deportation Tool, the Report begins:

The nation’s immigration courts have been dysfunctional since their inception. Today, the system has effectively collapsed. The attorneys general appointed by President Trump have used their authority over the immigration courts to weaponize them against asylum seekers and immigrants of color in support of

101  https://innovationlawlab.org/.
102  https://www.splcenter.org/our-issues/immigrant-justice/southeast-immigrant-freedom-initiative-en (only one in six immigrants detained in the Southeast has access to an attorney in removal proceedings; for an immigrant in detention, legal representation means the difference between staying safe with his/her family and being forced to return to a place that is no longer home).
103 Retired Immigration Judges and other authoritative bodies and commentators have also criticized the Trump administration for politicizing Immigration Courts and Js. See, for only one example, Aaron Reichlin-Melnick, Immigration Judges and Advocates Criticize Immigration Court System for ‘Propaganda’, American Immigration Council (May 16, 2019) (politicization of court system demonstrated by the Executive Office of Immigration Review’s sending to all Immigration Court Judges a fallacious, distorted document entitled “Myths vs. Facts About Immigration Proceedings,” plainly “aimed directly at opponents of the Trump administration’s crackdowns on asylum seekers”), http://immigrationimpact.com/2019/05/16/judges-criticize-immigration-court-system-propaganda/#.XTD2cPJKjw.
The “Myths vs. Facts” pastiche was denounced as raw propaganda by a group of 27 former Immigration Court Judges/BIA members known as the Round Table, which has taken issue with several of the changes in Immigration Court structure and practice instituted by the Trump Administration, but never before this strongly. Round Table Letter to James McHenry, Director of Executive Office of Immigration Review, dated May 19, 2019 (“issuance of such a document can only be viewed as political pandering, at the expense of public faith in the immigration courts” “nothing short of judicial independence, neutrality, and fairness is acceptable for courts that make life and death determinations”), https://drive.google.com/file/d/0B_6gbFPjVDoxSmZaaWw0ODctMkRZaTiyZWrpm5URDJrZD4/view. See also AMERICAN BAR ASSOCIATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (March 2019) (major systemic issues facing the immigration courts are political interference, lack of judicial independence, a chronic lack of resources, and “policies and practices that threaten due process,” as well as disparities in how and when Immigration Court judges grant asylum; lack of independence and politicized hiring practices in the immigration court so problematic that the ABA calls for suspension of hiring of new immigration judges until the immigration courts become more independent, even in light of historic backlogs; best solution is to make immigration courts an “Article I” court, similar to federal tax or bankruptcy courts, which would insulate the judges from the Attorney General’s current authority to directly overrule them, to create new precedent, and to discipline judges for failing to meet case completion quotas), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.
Trump’s anti-immigrant policies. This report examines the system’s collapse and explains why it cannot be salvaged in its current form.104

In another troubling example of political interference with the adjudication of asylum claims, in June 2019 the newly appointed Acting USCIS Director, Kenneth Cuccinelli105 (widely touted as likely to become Trump’s “immigration czar” and an official with extreme anti-immigrant views)106 emailed asylum officers, telling them to do a better job of rejecting asylum-seekers during their initial screenings at the border and noting that USCIS needs “to do its part to help stem the crisis and better secure the homeland.”107

Mr. Cuccinelli cited grossly false statistics about the percentage of asylum-seekers who do not appear in Immigration Court108 and admonished asylum officers that the gap between the


106 Eli Stokols, Trump Expected to Pick Hard-Liner Ken Cuccinelli for New Post of ‘Immigration Czar,’ THE SAN DIEGO UNION-TRIBUNE (May 22, 2019), https://www.sandiegouniontribune.com/news/us-politics/la-na-pol-trump-cuccinelli-immigration-czar-20190522-story.html?fbclid=IwAR200HIx5e9G4E9K91MwwABXvQ5WqSur3s0EkxQxmgVUmLgLkwv. Mr. Cuccinelli rewrote Emma Lazarus’s famous poem (on the Statue of Liberty), which states, “Give me your tired, your poor, your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!” Cuccinelli changed the poem to say, “Give me your tired and your poor who can stand on their own two feet and who will not become a public charge.”


108 President Trump and his surrogates have been trumpeting (no other word will do, alas) the false statistic, with no source cited, that 90% of asylum-seekers don’t show up for Immigration Court. See, e.g., Jack Crowe, DHS Secretary: 90 Percent of Recent Asylum-Seekers Skipped Their Hearings, THE NATIONAL REV. (June 11, 2019), https://www.nationalreview.com/news/dhs-secretary-90-percent-of-recent-asylum-seekers-skipped-their-hearings/ (90% of recent asylum-seekers failed to appear in court). The converse reality was investigated and is reported by TRAC. See, e.g., Immigration Reports, https://trac.syr.edu/pftools/reports/reports.php?layer=immigration&report_type=report, Most Released Families Attend Immigration Court Hearings, https://trac.syr.edu/immigration/reports/562/?fbclid=IwAR3fD-50wrpaVo20qYVVp_eZcLijT-ro_Z6qD0ntrGn8kACcTG48Zwmx9TE (from September 2018 to May 2019, based on over 47,000
number who pass a Credible Fear Interview and the number who eventually denied asylum in Immigration Court was wider than the “two legal standards would suggest.” Acting Director Cuccinelli’s email then stated:

“Therefore, USCIS must, in full compliance with the law, make sure we are properly screening individuals who claim fear . . . .” He added that officers have tools to combat “frivolous claims” and to “ensure that [they] are upholding our nation’s laws by only making positive credible fear determinations in cases that have a significant possibility of success.”

Despite the facially innocuous sounding of this language, former immigration officials said in the current political context the email was clearly a threat. “I read this only in one way — a threat. A threat that asylum officers will be blamed by their new boss for the repeated failures of the Trump administration,” Ur Jaddou, a former chief counsel at USCIS, told BuzzFeed News. “This is an unbelievable threat and not something a director would normally ever send.”

The severe policies of the new Administration are particularly troubling given the human rights catastrophe occurring not only in distant countries such as Syria and Myanmar, but also in Venezuela and the nearby countries in Central America. Extensively networked quasi-

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governmental entities (“the Maras”) have taken on quasi-state authority in Guatemala, Honduras, and El Salvador, often referred to collectively as ‘the Northern Triangle.’ Those countries have among the highest homicide rates in the world, and their governments are manifestly either unable or unwilling to protect a large proportion of their population from persecution.

112 United Nations, The Globalization of a Crime: A Transnational Organized Crime Threat Assessment 240 2010 (stating that gangs in the Northern Triangle have corrupted and outgunned civilian police forces). See also Nelson Rauda Zablah, Sala de lo Constitucional declara ilegal negociación con pandillas y las numero grupos terroristas, El Faro (Aug. 25, 2015) (reporting decision of Constitutional Chamber of Supreme Court of El Salvador to declare MS 13 and Barrio 18 are terrorist organizations wielding political power over people and territory) (decision available at La sentencia 22-20007/42-2007/89-2007/96-2007 de la Sala de lo Constitucional de la Corte Suprema de Justicia– San Salvador, 24 Aug. 2015). “Mara” is typically translated as “gang” in English, but that is overly simplistic. As the Globalization and Localization Association (GALA), a global, nonprofit trade association for the language industry, states, “Translation is the communication of meaning from one language (the source) to another language (the target). . . . The purpose of translation is to convey the original tone and intent of a message, taking into account cultural and regional differences between source and target languages.” What is Translation? https://www.gala-global.org/industry/intro-language-industry/what-translation (last accessed Oct. 28, 2018). Numerous experts at Immigration Court hearings and scholarly articles attest that “gang” is a complete misnomer for these entities. “Gang” in no way denotes or connotes these sophisticated, powerful organization that have seized political power and rule their fiefdoms as warlords, constituting de facto governments not only in their local strongholds, but throughout such extensive regions that no one can hope to escape them anywhere in these countries. Words associated with private crime do not accurately describe entities such as the maras. See, e.g., Max G. Manwaring, A Contemporary Challenge to State Sovereignty: Gangs and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and Brazil, Strategic Studies Institute, U.S. Army War College, Dec. 2007, p. 7 (available at https://www.jstor.org/stable/24388251?read-now=1&refreqid=excelsior%3A0aea348599427ee3bfa8e5a2d4f9b12&socuid=11e33c47-bc7c-4b67-a070-0402246811f8&socplat=email#page_scan_tab_contents ) (last accessed Oct. 30, 2018). Translating “maras” as gangs may serve the interest of threatened de jure governments that seek to mischaracterize, and thus minimize, the threat posed by these formidable opposing political forces.

113 For extensive documentation of the rampant unpolicied (or perpetrated by law enforcement) violence in the Triangle against distinctive target groups such as women, young men who reject forced induction into Mara service, etc. there are a multitude of sources: for basic data, see United Nations High Commissioner for Refugees, UNHCR Country Conditions Reports, https://www.unhcr.org/en-us/country-reports.html; Amnesty International Report 2017/18, pp. 156-58, 180-81, 185-87; https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF, and for some of the most current and compelling reports, see, e.g., InsightCrime, an organization of journalists and academic researchers seeking to document the phenomenon of political violence in Latin American and the Caribbean, https://www.insightcrime.org; Blog of Dr. Elizabeth Kennedy (renowned University of San Diego researcher currently living and working in Triangle countries, compiling a report on the number of U.S. deportees murdered by the Mara after their deportation) (“World Health Organization classifies a homicide rate higher than 10 per 100,000 as an epidemic, every bit as harmful to children, mothers, fathers and their communities as diseases like Ebola, swine flu, or Zika. El Salvador finished 2015 with a rate of 103, Honduras with a rate of 57, and Guatemala with a rate of 30. Parts of each country have double the national rate. These homicide rates are among the highest in the world—including war zones. El Salvador’s rate is second only to Syria’s. Honduras’ is in the top five, and Guatemala’s is in the top 20.”), https://elizabethkennedy.com/, See also, Cinthya Alberto and Mariana Chilton, Transnational Violence Against Asylum-Seeking Women and Children: Honduras and the United States-Mexico Border, Human Rights Review (June 2019), https://link.springer.com/article/10.1007/s12142-019-0547-5; Karen Musalo, El Salvador – A Peace Worse Than War: Violence, Gender and a Failed Legal Response, 30 Yale L.J. 4
NEEDS SOMETHING MORE FOR WHY YOU’RE DISCUSSING THIS EMAIL

NEED A SECTION TYING THESE POLICIES TO THE REFUGEE CONVENTION TO LEAD INTO PART II

II. THE OBLIGATIONS OF THE UNITED STATES TO ASYLUM-SEEKERS UNDER INTERNATIONAL LAW

From the rise of Nazi Germany in 1933 to nearly the end of World War II, most Western nations, including the United States, refused to admit Jewish refugees and others who were attempting to escape the fatal grasp of the Third Reich.\textsuperscript{114} The world’s failure to provide a safe haven for those facing the Holocaust led to the adoption of the Convention Relating to the Status of Refugees in 1951. The Convention prohibits returning refugees to a country where they might face persecution “on account of race, religion, nationality, membership in particular social group, or political opinion.”\textsuperscript{115} The Convention also prohibits receiving countries from discriminating among refugees on the basis of their religion.\textsuperscript{116} Most salient, the Convention generally prohibits penalizing a refugee for unlawful presence or illegal entry.\textsuperscript{117} The Convention recognizes the extraordinary circumstances refugees may encounter in fleeing a country where they run a high

\textsuperscript{114} See Laura Tavares, Text to Text: Comparing Jewish Refugees of the 1930s With Syrian Refugees Today, N.Y. Times (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/learning/lesson-plans/text-to-text-comparing-jewish-refugees-of-the-1930s-with-syrian-refugees-today.html (writing about the similarities between Syrian refugees and Jewish refugees and noting that the United States was unwilling to accept Jewish refugees because of the fear of Nazi spies, economic hardship, and the desire to maintain “American” ethnic identity).

\textsuperscript{115} The 1951 Refugee Convention, supra note 18, art. 1.

\textsuperscript{116} Id., art. 4.

\textsuperscript{117} Id., art. 31(1).
risk of persecution. The Convention plainly contemplates that refugees may have no realistic choice but to enter a country illegally without a visa or passport and requires, at least where certain conditions are met, that the countries that have joined the Convention ("States Parties") forego imposing penalties on such refugees.118

In 1967, the international community formed the Refugee Protocol, which expanded both the temporal and geographic scope of the 1951 Convention.119 In 1968, the United States Senate gave its advice and consent to the Protocol, which President Lyndon B. Johnson subsequently ratified.120 Although the United States did not originally join the 1951 Convention, the Protocol incorporates all the critical provisions of the Convention, namely, Articles 2 to 34.121

A. The Plain Meaning of the 1951 Refugee Convention’s Articles Prohibiting Non-Refoulement and Penalization of Asylum-Seekers

Two provisions of the 1951 Refugee Convention work in tandem with each other. First, the Convention prohibits refoulement—the receiving state’s returning the refugee to a country where he or she might be persecuted. Second, the States Parties to the Convention have an obligation generally not to penalize asylum-seekers for entering its country without authorization. The non-refoulement obligation is contained in Article 33(1):

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

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119 The 1951 Refugee Convention was limited to events occurring before January 1, 1951, essentially to refugees compelled to flee their countries because of World War II and its aftermath. See Refugee Protocol, supra note 18, art. 1. The Protocol eliminated that date restriction and clarified that the key provisions of the 1951 Refugee Convention applied world-wide. See Protocol, supra note 18, art. 1, and Ira Frank, Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States, 11 INT’L LAWYER (no. 2), 291, 294 (Spring 1977).

120 CITATION

121 CITATION
would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.122

The wording of Article 33 expresses an intent to protect refugees virtually absolutely from expulsion to a country where their “life or freedom” would be threatened for any of the five given grounds: race, religion, nationality, membership of a particular social group, or political opinion. The words, “No Contracting State shall expel or return (‘refouler’),” constitute mandatory language prohibiting the return of a refugee. The phrase “in any manner whatsoever” underlines the absolute nature of the prohibition. The only exception is found in subsection 2 of Article 33:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.123

Thus, refugees may be excluded only if they have been convicted of a “particularly serious crime”124 or if “there are reasonable grounds for regarding” the refugee “as a danger to the security of the country.” Note that the language requires a showing that the particular refugee is a danger to the national security or has been so convicted. A receiving state is prohibited from banning classes of refugees, whether on the basis of nationality or religion.125

An exception to Article 32 explains the “national security” rationale, emphasizing that the state may exclude a refugee only for “compelling reasons of national security.”126 Dr. Paul Weiss’s commentary on the drafting history notes that at the negotiation conference the official

122 1951 Refugee Convention, supra note 18, art. 33(1).
123 Id., art. 33(2) (emphasis added).

124 See Refugee Convention, supra note 18, art. 3 (“The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”) (Emphasis added).
125 1951 Refugee Convention, supra note 18, art. 42.
representatives wished to impose on receiving states a high bar for excluding refugees on grounds of national security: “[N]ot any grounds of national security or public order may be invoked but only compelling grounds.”  

To help effectuate this strict prohibition on returning refugees, the Convention imposes a corresponding obligation on receiving states to refrain from penalizing asylum-seekers. Penalizing asylum-seekers would deter them from seeking asylum in the first place, thereby undermining the non-refoulement obligation, one of the most fundamental obligations in international refugee and human rights law. Penalizing asylum-seekers by taking their children from them likewise runs afoul of United States human rights obligations under the Convention against Torture (“UNCAT”), the International Covenant on Civil and Political Rights (“ICCPR”), the Convention for the Elimination of Racial Discrimination (“CERD”), the Universal Declaration of Human Rights, the Declaration on the Rights of Man, and customary international law. The UN High Commissioner for Human Rights (“UNHCR”) noted, “

128 Cf. JAMES HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 26 (2d ed. 2014) (noting that refugee rights including the “right to non-penalization for illegal entry or presence” would be undermined if “a state could avoid its responsibility to protect by the simple expedient of refusing ever to assess a claim . . . .”).
129 The International Court of Justice has recently granted precautionary measures to Qatar and ordered United Arab Emirates “pending the final decision in the case and in accordance with its obligations under CERD [Convention for the Elimination of Racial Discrimination], [to] ensure that families that include a Qatari, separated by the [deportation] measures adopted by the UAE on 5 June 2017, are reunited . . . .” Application of CERD (Qatar v. UAE) Request for Provisional Measures, 23 July 2018 I.C.J., para. 75.
130 See also Vilma Aracely Lopez Juc de Coc and Others Regarding the United States of America, Precautionary Measure No. 505-18, Inter-American Commission of Human Rights. There, the Commission noted that “a rupture in the family unit can occur from the expulsion of one or both progenitors [parents] in such a way that separating families due to the violation of immigration laws results in a disproportionate restriction (on the right to family protection under Article 17 of the American Convention on Human Rights and under Article VI of the American Declaration on the Rights of Man.) Id., para. 27 (citing Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Committee on the Rights of the Child, Joint General Comment No 4 (2017) on State Obligations Regarding the Human Rights of Children in the Context of International Migration, para. 29 (Nov. 16, 2017), CMW/C/GC/4-CRC/C/GC/23).
131 See, e.g., Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Human Rights Council, A/HRC/37/50, 26 February–23 March 2018, para. 45: *For example, States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to “voluntarily” return*

8.19.19 Draft—Please do not cite.
practice of separating families amounts to arbitrary and unlawful interference in family life, and
is a serious violation of the rights of the child."\textsuperscript{132}

Article 31 of the 1951 Convention prohibits states' criminalizing refugees for illegal presence and prohibits unnecessary restrictions on refugees' free movement. The Refugee Convention of 1951 is official in both English and French. The English version of Article 31 provides:

\begin{quote}
The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly\textsuperscript{133} 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.\textsuperscript{134}
\end{quote}

to their country of origin, regardless of their need of non-refoulement protection. This may include measures such as the criminalisation, isolation and detention of irregular migrants, the deprivation of medical care . . . and adequate living conditions, the deliberate separation of family members, and . . . excessive prolongation of status determination . . . . [D]eliberate practices such as these amount to "refoulement in disguise" and are incompatible with the principle of good faith.

President Trump's policy of taking children from their parents also violates the Convention on the Rights of the Child ("CRC") and the American Convention on Human Rights ("ACHR"). Because the United States Senate attached an understanding to both the UNCAT and the ICCPR making most, if not all of their provisions, non-self-executing, because the United States is not a party to the CRC or the ACHR, and because the UDHR is a UN General Assembly resolution, not a treaty, federal courts cannot rely on these instruments as the rule of decision. All these instruments are, however, strong evidence of customary international law, and federal courts can invoke them as such or do so under the \textit{Charming Betsy} canon discussed infra at nn.229-240 and accompanying text. \textit{See} Paquete Habana, 175 U.S. 677 (1900); Sonja Starr & Lea Brilmayer, \textit{Family Separation as a Violation of International Law}, 21 \textit{BERKELEY J. INT’L L.} 213, 229-58 (2002). \textit{See also}, Nick Cumming-Bruce, \textit{Taking Migrant Children From Parents Is Illegal, U.N. Tells U.S.}, \textit{N.Y. TIMES} (June 5, 2018) (Ravina Shamdasani, spokeswoman for the Office of the United Nations High Commissioner for Human Rights: "The U.S. should immediately halt this practice of separating families and stop criminalizing what should at most be an administrative offense — that of irregular entry or stay in the U.S.").

\textsuperscript{132} \textit{UN High Commissioner for Human Rights, supra} note 131.

\textsuperscript{133} For the interpretation of the term "directly" as it may be applied in the case of refugees who traverse Mexico or other countries to reach the United States, \textit{see infra} text accompanying notes 169-170.

\textsuperscript{134} 1951 Refugee Convention, \textit{supra} note 18, art. 31. Subsection 2 of Article 31 of the 1951 Refugee Convention attempts to limit restrictions on the movement of refugees once they enter the receiving country:

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. 1951 Refugee Convention, \textit{supra}, art. 31(2) (emphasis added).
The French version adds the word “pénales” to modify “sanctions”—or “penalties” in English—in the first part of Article 31. Thus, in French, Article 31 reads, “Les Etats Contractants n’appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers aux réfugiés . . . .” The Council of Europe’s French-English Legal Dictionary defines “pénale” as “criminal, penal.” The dictionary defines “sanction” as relevant here as “penalty.” Google Translate gives the first line of Article 31 in French as meaning, “The Contracting States shall not apply penal sanctions . . . .” Others have argued that reading the English and the French versions of Article 31 together along with ICCPR’s ban on “arbitrary detention” requires a broader meaning, namely, to include not only criminal penalties but civil ones as well. Nevertheless, under either interpretation, criminal prosecution is definitely barred.

135 Convention relatif au Statut des Réfugiés, art. 31, http://www.unhcr.org/fr/4b14f4a62 (emphasis added). The French text of article 31 is as follows:

1. Les Etats Contractants n’appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l’article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu’ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irréguliers.

2. Les Etats Contractants n’appliqueront aux déplacements de ces réfugiés d’autres restrictions que celles qui sont nécessaires ; ces restrictions seront appliquées seulement en attendant que le statut de ces réfugiés dans le pays d’accueil ait été régularisé ou qu’ils aient réussi à se faire admettre dans un autre pays. En vue de cette dernière admission les Etats Contractants accorderont à ces réfugiés un délai raisonnable ainsi que toutes facilités nécessaires.

137 Id. at 280. See also CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/.
138 See GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 248 (2d ed. 1996). (“The first line of protection thus requires that all detention must be in accordance with and authorized by law; the second, that detention should be reviewed as to its legality and necessity, according to the standard of what is reasonable and necessary in a democratic society. Arbitrary embraces not only what is illegal, but also what is unjust.”) (emphasis added) (citing UN Commission on Human Rights on the right of everyone to be free from arbitrary arrest, detention, and exile, UN Doc. E/CN.4/826/Rev.1. (1964). See also UN International Covenant on Civil and Political Rights (“ICCPR”), open for signature Dec. 9, 1966, 999 U.N.T.S 171 (entered into force Mar. 23, 1976; adopted by the United States, Sept. 8, 1992 6 I.L.M. 368 (1967), art. 9.1 (“No one shall be subjected to arbitrary arrest or detention.”); see also Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. a/810, at 71 (1948), art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”)
139 Under the Vienna Convention on the Law of Treaties, the interpreter of co-official texts in two or more languages should do as follows when the meanings differ in the two (or more) texts: “[W]hen a comparison of the authentic texts discloses a difference in meanings which the application of Articles 31 and 32 [governing treaty interpretation generally] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” Vienna Convention on the Law of Treaties, art. 33(4), May 23, 1969, 1155 U.N.T.S. 331 (emphasis added). Subsection 4 of Article 33 notes an exception to the above rule, namely, where a treaty provides that in case of “divergence, a particular text shall prevail.” No such provision is present in
B. Drafting History (Travaux Préparatoires) of the Non-Refoulement and No Penalty Provisions of the 1951 Refugee Convention

In drafting Articles 31 and 33, the framers of the Refugee Convention intended to ensure that states parties would not return refugees to a country where they might be persecuted. The framers also intended that asylum-seekers would generally not be penalized for entering a country illegally. The first draft of what is now Refugee Convention Article 31 captures the latter theme:

The penalties enacted against foreigners entering the territory of the Contracting Party without prior permission shall not be applied to refugees seeking to escape from persecution, provided that such refugees present themselves without delay to the authorities of the reception country and show good cause for their entry.140

The official commentary on this draft explained its purpose:

A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a bona fide refugee.141

The original draft was modified only slightly. As noted above, the French representative proposed the term “sanctions pénales” for “penalties.” According to the French representative, the penalties in subsection 1 meant judicial, not administrative, penalties:

The French representative said that the penalties mentioned should be confined to judicial penalties only. But in so far as non-admission or expulsion had to be regarded as sanctions, they were in the vast majority of cases administrative measures, especially where they were applied at very short notice.142

the 1951 Convention on Refugees. In addition, Article 33(2) provides that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.”

140 Weiss, supra note 127 at 278 (emphasis added). The first draft was proposed by the UN Secretariat. Id. See also GOODWIN-GILL, supra note 138 at 305 (“Such refugees are not to be subjected to ‘penalties’, which appear to comprehend prosecution, fine, and imprisonment, but not administrative detention.”) (citing travaux préparatoires).

141 GOODWIN-GILL, supra note 138 at 279 (emphasis added).

142 Id. at 294 (emphasis added). At the negotiation conference, the Belgian representative and the French representative engaged in a colloquy on this issue. The Belgian representative stated, “With regard to the presence of a refugee in a given territory, a case might arise of a refugee who had been on foreign soil for a certain length of time being discovered by the authorities. The moment he was discovered he could present himself to the local
There can be no doubt that the states parties at the conference did intend to impose a legal obligation on states to refrain from penalizing asylum applicants. Taking the opposite position, Pakistan proposed that states should have the right to determine whether to impose penalties:

The Contracting States may at their discretion exempt from penalties on account of his illegal entry or presence a refugee who enters or who is present in their territory without authorization, and who presents himself without delay to the authorities and shows good cause for his illegal entry or presence.143

In the first line of its proposal, Pakistan attempted to give states parties the unfettered discretion whether to penalize asylum-seekers. Pakistan’s proposed language, however, was rejected. Article 31 (and Article 33 and the Convention as a whole) was enacted to protect asylum-seekers from being returned to the country of persecution and from being mistreated by the receiving state.144

As noted above, many scholars have argued that Article 31(1) should be interpreted to bar extended incarceration of asylum-seekers in administrative detention.145 The French representative, whose language was adopted in the co-official French version of the Convention,

143 Id.

144 In this regard, note that Article 33(2) attempts to prevent receiving states from overly restricting the movement of refugees. As observed above, the Convention expressly prohibits discrimination in the asylum procedural and substantive processes on the basis of race, religion or country of origin. See 1951 Refugee Convention, supra note 18, art. 3.

145 See Goodwin-Gill, supra note 138 at 248; see also Expert Roundtable, Summary Conclusions: Article 31 of the 1951 Convention, Global Consultations on International Protection 253, 256 (November 8-9, 2001), http://www.unhcr.org/419c783f4.pdf (finding that Article 31(2) intended that detention should not be extended for the purpose of punishment or deterrence).
asserted that the Convention only bars criminal penalties imposed by a court, not administrative ones imposed by immigration control bodies.

The English version of Article 31, however, makes no mention that only “penal” or “criminal” penalties are prohibited. While a reasonably brief period of administrative detention may be required to determine whether the asylum seeker can make out a *prima facie* case of asylum, lengthy or indefinite detention of asylum-seekers certainly constitutes a penalty.146 Not only does lengthy incarceration effectively punish the asylum-seeker, such detention or the threat of such lengthy detention may coerce a great many asylum-seekers to relinquish their asylum claims and “accept” deportation.147 Such coercion undermines the receiving state’s obligation of non-refoulement and the general obligation of receiving states to protect refugees—the central purposes of the 1951 Refugee Convention and 1967 Protocol.

In case of conflict between two or more official languages (versions of a treaty), the Vienna Convention on the Law of Treaties instructs that “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”148 In addition, Article 31 of the Vienna Convention on the Law of Treaties states that the interpreter should consider “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”149

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146 Of course, the authorities can continue to detain individuals with serious criminal records or those who pose a definite national security risk. Even such individuals, however, should have a bond hearing at which the immigrant may contest the government’s arguments for keeping the individual detained. Sajous v. Decker, No. 18-cv-2447, 2018 U.S. Dist. LEXIS 86921, at *1-47, *25-26 (holding that prolonged detention without a bond hearing would violate due process protections); *but see infra* note 161 on Jennings v. Rodriguez, 138 S.Ct. 830 (2018) et seq.

147 *See supra* note 59 (relating co-author’s experience with this phenomenon).


149 *Id.*, art. 31(1).
The ordinary meaning of “penalties” contemplates both civil and criminal ones.\textsuperscript{150} The UN agency responsible for monitoring compliance with the Convention and the Protocol, the UNHCR, has reached the same conclusion.\textsuperscript{151} The Trump Administration definitely intended to deter and possibly to punish asylum-seekers by keeping them in prolonged immigration (administrative) detention (as well as by criminal prosecution and punishment). While the Administration may continue trying to deny its intentions, it cannot credibly deny that its interwoven criminal prosecution/prolonged detention imperative and concomitant family separation policy have the effect of coercing asylum-seekers to give up their asylum claims, however strong.\textsuperscript{152} The Administration’s “Remain in Mexico” policy, distortion of Human Rights Reports, and political interference with and retaliation against advocates and adjudicators render it nearly impossible for any asylum-seeker to meet the high burden of proof required by the Real ID Act of 2005.\textsuperscript{153}

The purpose of the Refugee Convention is to protect refugees from persecution and “to assure refugees the widest possible exercise of [their] fundamental rights and freedoms.”\textsuperscript{154} Since the plain meaning of “penalties” in English includes both criminal and civil sanctions, and because the central purpose of the 1951 Refugee Convention and the 1967 Protocol is to protect

\textsuperscript{150} See \textit{MERRIAM-WEBSTER’S LAW DICTIONARY}, \url{https://www.merriam-webster.com/dictionary/penalty} (defining penalty as including “[T]he suffering or the sum to be forfeited to which a person agrees to be subjected in case of nonfulfillment of stipulations. [“]A penalty was imposed on the contractor for breach of contract. [“]). Anglo-Saxon Law is replete with statutes and regulations that impose civil penalties. See, e.g., \textit{Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.} 528 U.S. 167, 208 (2000) (Scalia, J., dissenting)”The Court[ . . . has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests”); \textit{U.S. Dep’t of Energy v. Ohio, 503 U.S. 607, 633} (1992)”Certainly this special definition [of the citizen suit provision] applies to the civil penalty enforcement provisions it incorporates.”).

\textsuperscript{151} See also \textit{UNHCR, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (“UNHCR Detention Guidelines”)} ¶ 21 (2012) “[d]etention as a penalty for illegal entry and/or as a deterrent to seeking asylum” is arbitrary and thus unlawful, \url{https://www.unhcr.org/publications/legal/5005b10ec9/unhcr-detention-guidelines.html}.

\textsuperscript{152} See supra note 56 (discussing co-author’s observation of this type of coercion).


\textsuperscript{154} 1951 Refugee Convention, supra note 18, second preambular paragraph.
refugees, the two official versions are best reconciled by reading “penalties” not only to include criminal prosecution and punishment, but also lengthy civil incarceration. ¹⁵⁵

Weighing against that interpretation, the *travaux préparatoires* shows that “sanctions pénales” in the French version referred only to criminal penalties and none of the representatives at the conference argued against that view. If, however, the parties at the conference intended to endorse the French version, they could have simply inserted “criminal” before “penalties.” The proponents of the French interpretation do have a second argument: the parties must have considered temporary administrative detention necessary so that authorities could have a reasonable opportunity to determine whether a given immigrant is a *bona fide* or a *prima facie* *bona fide* refugee. ¹⁵⁶ Both of these arguments are valid. Nevertheless, looking at the purpose of the Convention, its constant theme of protecting refugees from discrimination, expulsion, and other violations of international human rights law,¹⁵⁷ one has to conclude that administrative

¹⁵⁵ The UNHCR has noted, “The national laws in Argentina, Bolivia, Brazil, Chile, Costa Rica, and Nicaragua [among others] specify that protections against penalization applies as regards both ‘criminal and administrative sanctions.’ UN High Commissioner for Refugees, Article 31 of the 1951 Convention Relating to the Status of Refugees, July 2017, PPLA/2017/01, at 33, https://www.refworld.org/docid/59ad55c24.html (citing Argentina, Ley General de Reconocimiento y Protección al Refugiado (2006), art 40; Bolivia, Ley de Protección a Personas Refugiadas (2012), art 7; Brazil, Ley No 9.474 (22 July 1997), art 10; Chile, Ley No 20.430 (2010), art 8; Costa Rica, Reglamento de Personas Refugiados (2011), art 137; Nicaragua, Ley No 655 de la Protección a Refugiados (2008), art 10; Uruguay, Ley del Refugiado, art 15). But see GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 305 (2d. 1996) (“Such refugees are not to be subjected to ‘penalties’, which appear to comprehend prosecution, fine, and imprisonment, but not administrative detention.”) (citing travaux préparatoires).

¹⁵⁶ See UNHCR Detention Guidelines, supra note 155 ¶ 24 (“Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks.”). In the United States, a *prima facie* showing of asylum status is made through the “credible fear” interviewing process. Jason Boyd, The President’s Proposal to Eliminate Due Process at the Border, THINK IMMIGRATION (July 16, 2018), http://thinkimmigration.org/blog/2018/07/16/the-presidents-proposal-to-eliminate-due-process-at-the-border/ (writing Congress created the credible fear interviewing process in 1996 as a low-threshold, preliminary screening process to ensure *bona fide* claims to asylum); see 8 C.F.R. § 208.30; see also Alvaro Peralta, Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal, 64 AM. U. L. REV. 1303 (2015); Dree K. Collopy, Crisis at the Border, Part II: Demonstrating a Credible Fear of Persecution or Torture, 16–04 IMMIGR. BRIEFINGS 1 (2016); Denise Gilman, Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States, 36 FORDHAM INT’L L.J. 243 (2013).

¹⁵⁷ See, e.g., ICCPR, supra note 138, art. 9 (requiring habeas corpus); UN Human Rights Committee General Comment No. 35, ¶ 18 (noting that article 9 applies to asylum-seekers); Rights and Guarantees of Children in the
detention at some point undermines the fundamental purpose of the Convention and crosses the line into a “penalty” within the meaning of Article 31(1). When one adds substandard conditions in the immigrant detention facilities, including inadequate food, housing, medical care, and the failure of ICE to stop private detention personnel from subjecting immigrants to the risk of sexual assault, the inescapable conclusion is that immigration detention beyond a short period does indeed constitute a penalty within the meaning of Article 31.

Although brief detention of asylum-seekers is permissible, it should be avoided except in the case of a threat to “public order, public health or national security.” Even in one of those cases, detention should be relatively short and should only occur to ensure the asylum-seeker is not a threat. Generally, twenty days should be more than enough to conduct credible fear interviews or their equivalent. Six months unquestionably constitutes “prolonged” immigration detention. Six months is more than adequate for a government to provide an


159 UNHCR Detention Guidelines, supra note Error! Bookmark not defined., ¶ 21.
160 CITATION

161 See reasoning discussed in Abdi v. Duke, 2017 WL 5599521 (W.D.N.Y. Nov. 17, 2018) (ordering ICE to provide members of putative class of immigrant detainees who had been detained for six months or more with individualized bond hearings); see also analysis in Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015) (holding that immigrant detained pursuant to INA § 236(c) [8 USCA § 1226(c)], which requires mandatory detention of certain aliens awaiting removal proceedings, must be afforded a bail hearing before an immigration judge within six months of his or her detention); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016) (statute requiring mandatory detention of certain criminally convicted aliens in removal proceedings is subject to an implicit reasonableness limitation imposed by the Due Process Clause).

But see rejection of general concept of mandatory bond hearings and specific six-month limit on detention in Jennings v. Rodriguez, 138 S.Ct. 830 (2018) (INA provisions applicable primarily to detention of aliens seeking entry to United States, and defining narrow conditions under which Attorney General may release on bond aliens in removal proceedings based on criminal offenses or terrorist activities, could not be plausibly interpreted as implicitly placing six-month limit on detention or requiring periodic bond hearings); contra Jennings. 138 S. Ct. at —(Breyer, J., dissenting) (criticizing the majority for upholding denial of bond hearings for noncitizens held beyond six months and finding such denial unconstitutional for treating them worse than individuals charged with major crimes); see also Shanahan v. Lora, 138 S.Ct. 1260 (2018) (reversing Lora v. Shanahan); Reid v. Donelan, 2018 WL 4000993 (1st Cir. May 11, 2018) (opinion below withdrawn on reconsideration); Matter of M-S-, 27 I &
appropriate credible fear interview and to allow an appeal to an immigration court. Immigrants have the right to make an asylum claim. Lengthy incarceration of such individuals undermines that right. Even under United States law, a first-time illegal entrant is at most criminally responsible for committing a misdemeanor, a minor offense. Incarcerating such an individual for a lengthy period (albeit in immigration detention) violates the principle of proportionality.\textsuperscript{162}

Similarly, can one imagine anything more inherently punitive than forcible removal of children from their families, concealing it until it seemed useful to reveal as an explicit deterrent to asylum-seekers, compounded by the Administration’s abject failure even to keep track of the whereabouts and condition of the children, so that reunification is not readily possible? Any parent who has lost her child for five minutes in a relatively benign and secure department store or mall has experienced a depth of terror and wretched, self-blaming panic, an absolute inability to concentrate on or attend at all to anything else but the missing child that is hard to match.\textsuperscript{163}

How then, should we characterize that agony when it is coupled with the knowledge that -- while the parents are helplessly incarcerated – their children are suffering extreme distress, fear, loneliness, depression, not to mention the possibility of physical and sexual abuse being inflicted on the children themselves, who may be kept in isolation or thrown together with

\textsuperscript{162}  Alice Ristroph, \textit{Proportionality as a Principle of Limited Government}, 55 DUKE L.J. 263 (2005) (“In doctrinal contexts other than criminal sentencing, proportionality is frequently used as a mechanism of judicial review to prevent legislative encroachments on individual rights and other exercises of excessive power.”).

\textsuperscript{163}  For a stunning illustration of how forcible separation and the inability to determine the whereabouts of a five-year-old put one young immigrant mother in the hospital, and led to the child’s uncounseled “waiver” of her right to a bond hearing, see Sarah Stillman, \textit{The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights}, THE NEW YORKER (Oct. 11, 2018), https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights.
strangers of all ages, but almost always are deprived of communication and contact with counsel and family, in substandard and unacceptable detention facilities?

Then there is the refusal to release the detained children to potential sponsors, usually other relatives – how excruciating must it be for the children to know that even if their beloved parents or grandparents are still jailed (or perhaps worse, have disappeared in the desert or been deported to a quite possible death), other loving family members would gladly provide them with a home while they seek asylum – but are prevented, or subjected to the deliberate threat that these potential sponsors will themselves be deported, to discourage their coming forward?

Finally, add to this the wholesale cover-up/denial/attempt to ascribe blame for this shameful policy to the prior President by the highest Trump officials responsible, albeit paradoxically they still defend it or at the very least ignore or countenance with willful blindness this barbarity. Is it even possible to straight-facedly claim such treatment does not constitute a “penalty”?¹⁶⁴

¹⁶⁴ The UNHCR notes, “The term ‘penalties’ includes, but is not limited to, prosecution, fine, and imprisonment.” UNHCR, Advisory Opinion on Criminal Prosecution of Asylum-Seekers for Illegal Entry, March 2, 2006 (emphasis added), https://www.refworld.org/docid/4721ccd02.html. Article 1 of the Convention against Torture prohibits meting out not only severe physical pain, but also “severe . . . mental pain or suffering . . . intentionally inflicted . . . for any reason based on discrimination of any kind.” The United Nations Convention Against Torture, 1984, art. 1. 23 I.L.M. 1027 (1984); 1465 U.N.T.S. 85 (Dec. 10, 1984) (emphasis added). ICE and CBP took children from their parents because of the parents’ immigration status or nationality, fitting within “discrimination of any kind.” The severe mental pain or suffering must be committed by a “public official or at the instigation of or with the consent or acquiescence of a public official,” unquestionably satisfied here. Trump Administration officials deliberately took children from their parents to deter them and others, anticipating or callously indifferent to the mental pain and suffering their premeditated policy would cause both the children and their parents. Inflicting pain was the goal, to deter these immigrants and other potential immigrants from coming to the United States, satisfying both the “intentionally” element of the UNCAT and also the “specific intent” element of the restrictive U.S. Understanding that the U.S. Senate attached to the UNCAT. See supra nn.32-46 and accompanying text. Amnesty International, whose major mission is to prevent torture in all parts of the world, stated, “This is a spectacularly cruel policy, where frightened children are being ripped from their parent’s arms . . . . This is nothing short of torture. The severe mental suffering that officials have intentionally inflicted on these families for coercive purposes means that these acts meet the definitions of torture under both US and international law.” Nick Cumming-Bruce, U.N. Rights Chief Tells U.S. to Stop Taking Migrant Children from Parents, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/world/europe/trump-migrant-children-un.html.

On June 18, 2018, the UN High Commissioner for Human Rights, speaking before the Human Rights Council, noted that the family separation policy violated international law and cited the American Association of Pediatrics president, noting “that locking the children up separately from their parents constituted ‘government-sanctioned child abuse.’” Id. On the following day, President Trump withdrew the United States from the UN Human Rights Council. See United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism of its Border Policy, 112 AM. J. INT’L L. 745 (2018).
C. Presenting Oneself to Authorities Without Delay and Showing Good Cause for Entering Without Inspection

Article 31(1) prohibits imposing penalties on refugees, but only “provided that such refugees present themselves without delay to the authorities of the reception country and show good cause for their entry.” National courts have interpreted this language to mean **FINISH THIS SENTENCE.** For example, Canadian courts have stressed the concern about protecting refugees and have refused to penalize immigrants in such situations:

It does not stand to the applicant’s credit that, after entering Canada as visitors, they illegally obtained Canadian social security cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claims should be determined on the basis of these extraneous considerations.166

Likewise, a British court stated that it has long been settled that “those fleeing from persecution or threatened persecution . . . may have to resort to deceptions of various kinds (possession and use of false papers, forgery, misrepresentation, etc.) in order to make good their escape.”167 The obligation not to impose penalties on refugees who present themselves without delay and show good cause “is perhaps the most contentious element of Article 31” as the grant of protection is contingent on qualifying conditions: directness, promptness, and good cause.168 As to

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165 1951 Refugee Convention, supra note 18, art. 31(1); Weiss, supra note 127, at 278 (emphasis added). The first draft of the Convention was proposed by the UN Secretariat. Id.

166 HATHAWAY & FORSTER, supra note 128, at 29 n.77 (quoting Surupal v. Canada (Minister of Employment and Immigration), (1985) 60 NR 73 (Can. FCA, Apr. 25, 1985) at 73-74, per MacGuigan J. (in obiter)). Weiss, supra note 127, at 278 (emphasis added); see also GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 305 (2d. 1996) (“Such refugees are not to be subjected to ‘penalties’, which appear to comprehend prosecution, fine, and imprisonment, but not administrative detention.”) (citing travaux préparatoires).


168 UNHCR, supra note 155, at 17.

169 See SXH v Crown Prosecution Service, [2014] EWCA Civ 90, para. 26, United Kingdom: Court of Appeal (England and Wales), 6 February 2014, https://www.refworld.org/cases,GBR_CA_CIV,53020b204.html. (finding statute Applying article 31 of the Refugee Convention as not “limited to offences attributable to a refugee’s entry into or presence in this country, but should provide immunity, if the other conditions are fulfilled, from the imposition of criminal penalties [for] offences attributable to the attempt of a refugee to leave the country in the continuing course of a flight from persecution even after a short stopover in transit.”).
“directness,” refugees are afforded asylum protection after “coming directly from a territory where their life or freedom was threatened.” But, as Britain’s High Court of Justice concluded, a “short term stopover en route to such intended sanctuary cannot forfeit the protection of the article.”

With respect to “promptness,” the 2001 Expert Round Table, organized by the UNHCR and the Migration Institute, and composed of governmental officials, scholars, and NGO representatives, explained that it is “a matter of fact and degree” that “depends on the circumstances of the case.” Moreover, the UNHCR has stressed that “no strict time limit” should be applied to the “without delay” language. Noting that an asylum seeker may have many reasons for not immediately going to the receiving state’s authorities, the UNHCR stated:

[Asylum-seekers] may fear authority figures because of the persecution they have suffered or because of a language barrier. They may have been advised not to come forward immediately or fear immediate removal to the country of feared persecution. They may wish to first consult with an attorney or organization familiar with the country’s asylum laws. Trauma victims may be particularly fearful of revealing themselves immediately. Some asylum-seekers may wish to reunite with family members in the country of asylum before approaching the authorities.

To the extent a refugee must show “good cause,” the 2001 Expert Round Table concluded that having a well-founded fear establishes this requirement:

Having a well-founded fear of persecution is recognized in itself as ‘good cause’ for illegal entry. To ‘come directly’ from such a country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as ‘good cause’ for illegal entry. There may, in addition, be other factual circumstances which constitute ‘good cause.’

170 Admin at 678B-679A; see also R v. Uxbridge Magistrates.
173 Id. See also R v. Zanzoul, https://www.refugee.org.nz/Casesearch/CourtofAppeal/rvz.html holding that applicant “was not in the situation of many refugee claimants who were obligated to travel on false documentation because their country of origin would not issue passports. On the facts, his possession in New Zealand of a false Australian passport was completely irrelevant to any genuine belief he may have had a claim of refugee status.”
The United States has adopted a catch-22 immigration policy: a refugee is faced with the choice either to cross the border without inspection and be subject to an inevitable criminal prosecution, or, attempt admission “the right way” through a port of entry and be faced with CBP officers who “don’t tell the [refugee] they can’t apply for asylum, just that they cannot apply right now because the port of entry is at capacity.”\footnote{Robert Moore, \textit{At the U.S. Border, Asylum-seekers Fleeing Violence are Told to Come Back Later}, WASH. POST (June 13, 2018), http://tiny.cc/xsm85y.} Eleanor Acer, Senior Director of Refugee Protection for Human Rights First, cautions that the U.S. “has increasingly illegally turned away refugees at official border points, driving them to make the dangerous crossing between points.”\footnote{Eleanor Acer, Statement, Human Rights First (Nov. 1, 2018), http://tiny.cc/ovm85y.} The Trump Administration’s policies of largely rejecting presumptive asylum-seekers at its ports of entry, separating families, and indefinitely detaining refugees, raise the question: might refugees have \textit{good cause} for not presenting themselves \textit{without delay} to obviously adverse authorities eager to impose harsh punishments?

III. THE SELF-EXECUTING NATURE OF KEY ARTICLES OF THE 1951 REFUGEE CONVENTION AND 1967 PROTOCOL

The Framers of the United States Constitution intended treaties to be the supreme law of the land, to supersede inconsistent state statutes and state court rulings, and, when applicable, to be a state or federal court’s rule of decision.\footnote{CITATION} The Framers were particularly concerned that states would violate the rights of British nationals and other foreigners, and specifically would refuse to ensure that British nationals would be paid in pound sterling for debts that American nationals owed them. Article IV of the 1783 Treaty of Peace with Britain required such payment:
“It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”177

During the Revolutionary War, several of the newly declared independent states printed their own currency and permitted Americans to use such currency (generally with little actual value) to pay off their mortgages and other debts owed to British nationals. For example, the Virginia Legislature during the War of Independence passed a statute “contemplating to prevent the enemy [the British and British creditors] from deriving strength by the receipt of [payments of debts].”178 The statute provided that if any debtor “pa[id] his debt into the [Virginia] Loan Office, obtain a certificate and receipt as directed, he shall be discharged from so much of the debt.”179 After the war ended in 1781 and the Treaty of Peace was signed in 1783, the State of Virginia did nothing to ensure that the British creditors’ debts were paid in pound sterling as the Treaty of Peace required. Virginia’s and other states’ failure to abide by the Treaty threatened to unravel the hard-won victory by the fledgling United States over the then-superpower British.180

To address these and related issues, the Constitutional Convention convened in Philadelphia in 1787, and ultimately crafted Article 6, section 2 of the Constitution—the Supremacy Clause:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.181

178 Ware v. Hylton, 3 U.S. 199, 281 (3 Dall. 199) (1796) (Cushing, J.).
179 Id.
180 The Framers were also concerned with foreign powers playing one American state off another leading to a resultant weak, balkanized foreign policy. CITATION (MAYBE TO FED PAPERS)
181 U.S. CONST., art. VI, § 2.
Correspondingly, the Constitutional Convention expressly granted federal courts jurisdiction over treaty claims. “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .”182

In 1796, the Supreme Court had its first opportunity to interpret a treaty of the United States, namely, the Treaty of Peace with Britain. In Ware v. Hylton, the Court held that Article IV of the Treaty provided a remedy to the British creditor for money owed but denied by the Virginia sequestration statute discussed above.183 Supreme Court Justice Cushing noted that Article IV was definite and mandatory. “The provision, that ‘Creditors shall meet with no lawful impediment,’ etc (sic) is as absolute, unconditional, and peremptory, as words can well express, and made not to depend on the will and pleasure, or the optional conduct of any body of men whatever.”184

Justice Cushing, however, went on to imply that Article V of the treaty might not have established a legally enforceable obligation. That article states in relevant part, “It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective state, to provide for the restitution of all [confiscated] estates, rights and properties . . . .”185 The words “shall earnestly recommend” are plainly hortatory and strikingly contrast with “[c]reditors shall meet with no lawful impediment.” A party receiving a recommendation implicitly has the right to

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182 U.S. CONST. art. III, § 1 (emphasis added).
183 3 U.S. 199 (1796). Justice Cushing pointed out that the new nation in exchange for its promises to pay debts in pound sterling got much from the British with the 1783 Treaty of Peace. “Although our negotiators did not gain an exemption for individuals from bona fide debts contracted in time of peace, yet they gained much for this country—as rights of fishery, large boundaries, a settled peace, and absolute independence, with their concomitant and consequent advantages. All which it might not have been prudent for them to risk by obstinately insisting on such exemption, either in whole or in part, contrary to the humane and meliorated policy of the civilized world in this particular.” Id. at 284.
184 Ware v. Hylton, 3 U.S. at 284.
185 The Paris Peace Treaty, supra note 177.
reject it. Article IV, on the other hand is more than sufficiently definite to require the party or parties to whom it is directed comply.

The Court’s first treaty case thus clarifies perhaps the most important strand of what became known as the self-executing treaty doctrine. That strand presumes that treaty provisions are self-executing and may therefore serve as the rule of decision, but makes an exception for a treaty provision that is insufficiently definite.186 By framing Article V in the Treaty of Peace as a mere recommendation, the parties did not create nor intend to create a legally binding obligation. Consequently, the Court implied that Article V was not enforceable.

Like Article IV of the Treaty of Peace, the relevant treaty articles of the 1951 Convention impose definite legal obligations. Article 31(1), for instance, uses mandatory language and is stated in the negative. “The Contracting States shall not impose penalties, on account of their illegal entry or presence, . . . .” Negatively stated treaty provisions are more readily found to be self-executing, probably because “negatively drafted provisions are often more precise than are affirmative ones”187 and [because] the negative nature of such a treaty term implicitly eliminates the need for implementing legislation.”188

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186 CITATION
188 See McDonnell, supra note 187, at 1428 n.128, which noted that the Supreme Court considered Hawes, 76 Ky. (13 Bush) 697, a “very able” opinion, United States v. Rauscher, 119 U.S. 407, 427-28 (1886); Restatement (Third) of Foreign Relations § 111 reporter’s note 5. The court in Hawes explained that negative treaty provisions are self-executing. Hawes, 76 Ky. (13 Bush) at 702-03. [When a treaty provides] that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all sufficient reason, that to do so would be not only to violate the public faith, but to transgress the “supreme law of the land.”

8.19.19 Draft—Please do not cite.
Article 33 of the Refugee Convention likewise uses mandatory language, likewise imposes a negative obligation, and is similarly precise and definite:

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.

The highlighted language is specific and expressly prohibits the expulsion or return of refugees. The Supreme Court itself has contrasted this language with other articles in the Refugee Convention that do not create a legally binding obligation. “In contrast [to article 33], Article 34 provides that contracting states ‘shall as far as possible’ facilitate the assimilation and naturalization of refugees.”\(^{189}\) The Court characterized this provision of Article 34 as “precatory.”\(^{190}\) It bears an uncanny resemblance to Article V of the Treaty of Peace with Britain.

The language “shall as far as possible” suggests that if it is not possible, then it does not have to be done, just as Article V’s “shall earnestly recommend” language carries with it the right of states to reject the recommendation.

A. Clarifying the Roberts Courts’ Confusion about the Self-Executing Treaty Doctrine

The Framers intended that treaties, like federal statutes, be the law of the land. But courts have often ignored or misunderstood this command of the Supremacy Clause. Such courts have

\(^{189}\) McDonnell, supra note 187, at 1423.

\(^{190}\) I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987). The Court properly recognized this as creating something less than a legally binding obligation, a hortatory provision. The Court, however, went on to assert that Article 34 made granting asylum (rather than withholding deportation) a discretionary rather than a legally binding obligation—a characterization that does not fit with the plain meaning nor the purpose of Article 34. Article 34 calls for receiving states to “as far as possible facilitate the assimilation and naturalization of refugees.” It exhorts states to “make every effort to expedite naturalization proceedings,” but does not clearly require the states parties to do so. The article does not deal with asylum per se except to call upon states to provide for naturalization of refugees. So the Court’s conclusion regarding discretion in asylum adjudication is a little baffling.

8.19.19 Draft—Please do not cite.
typically relied on an 1829 case was overruled just four years later. In Foster & Elam v. Neilson, the Court interpreted the treaty between Spain and the United States regarding the U.S. purchase of Florida.\(^1\) The treaty stated that previous Spanish land grants “shall be ratified and confirmed.”\(^2\) Apparently, the Court took this language to mean that such grants will be ratified and confirmed in the future, and believed that the treaty provided only an executory right.\(^3\) The Court held this treaty provision unenforceable.\(^4\)

Four years later, however, the Court in United State v. Percheman overruled Foster. In Percheman, the Court again analyzed whether the same treaty language was sufficiently definite to state a legal obligation, but, apparently for the first time, examined the Spanish version of the treaty... The Spanish version used the phrase “quedaran (sic) ratificados,” which is translated “the grants shall remain ratified and confirmed . . . .”\(^5\) A treaty can include definite future obligations, so the futurity or lack thereof should not have made a difference. Apparently, the Foster Court saw the treaty language as referring to a future event without indicating who would “ratify and confirm” or when such ratification or confirmation would happen, thus rendering that

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\(^1\) 27 U.S. 253 (1829), overruled by United States v. Percheman, 32 U.S. 51 (1833).

\(^2\) The full text of the relevant article of the Treaty states as follows:

All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void.


\(^3\) Foster, 27 U.S. at 254.

\(^4\) Id.

\(^5\) Percheman, 33 U.S. 51, 52 (1833).
treaty term indefinite.196 Regardless, the Court relatively quickly overruled Foster, perhaps recognizing that besides the Spanish version of the relevant treaty term, the Court’s original decision contained strained analysis. After all, “shall” in this context generally denotes and connotes a present, mandatory norm, a legal obligation, not future tense.197

Unfortunately, some federal courts, instead of seeing the Foster case for what it was—an overruled opinion of little or no precedential value—relied on Foster as if it were controlling precedent. This practice reached its zenith in Medellín v. Texas. 198 In an admittedly hard case, the Medellín majority nevertheless distorted the doctrine of self-executing treaties, displaying an ignorance of both international and domestic law on the subject. In Avena and other Mexican Nationals (Mexico v. United States), the International Court of Justice (“ICJ”) ruled that United States violated the Vienna Convention on Consular Relations (“VCCR”), noting that Texas officials failed to timely inform capital defendants, all of whom were Mexican nationals, of their right to consult with the Mexican consul.199 The ICJ rejected the argument that such VCCR claims were procedurally defaulted.200 The ICJ reasoned that internal rules of a state may not be

196 See Foster, 27 U.S. at 254. (“By whom shall they [the land grants] be ratified and confirmed?”).
197 In this regard, the Percheman Court noted as follows:
Although the words ‘shall be ratified and confirmed,’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they ‘shall be ratified and confirmed, by force of the instrument itself. When we observe, that in the counterpart of the same treaty, executed at the same, time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable. In the case of Foster v. Neilson, 2 Pet. 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed, that there was no variance between them. We did not suppose, that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article.

United States v. Percheman, 32 U.S. 51, 89 (1829) (emphasis added). Black’s Law Dictionary underlines the view that “shall” means creating a legal duty: “shall vb. (bef. 12c) I. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold. BLACK’S LAW DICTIONARY (Bryan Garner, ed., 10th ed. 2014), Westlaw

200 Defendant Medellín had had failed to raise the VCCR claim at trial or on direct review. Medellín v. Texas, 552 U.S. at 501.
raised to defeat a treaty obligation.\textsuperscript{201} The ICJ ruled that the United States was obligated “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals.”\textsuperscript{202} Presumably, the ICJ expected that the United States Executive, or federal or Texas courts, would determine whether any of the defendants had been prejudiced by Texas’s failure to inform the defendants of their consular rights.

In rejecting the Mexican defendants’ arguments, the \textit{Medellín} majority misunderstood how international law works in tandem with domestic law in determining how a country carries out its treaty obligations. International law does not care \textit{how} a country carries out its treaty obligations as long as the country carries them out. Article 26 of the Vienna Convention on the Law of Treaties provides, “Every treaty in force is binding upon the parties to it and \textit{must be performed by them in good faith}.”\textsuperscript{203} Noticeably absent from this fundamental article in this foundational treaty is there any indication of how a state must “perform” its treaty obligations. A given country may use its courts to carry out its treaty obligations (via a self-executing treaty), or use its executive to do so (by issuing executive orders), or its legislative branch (by enacting implementing legislation).\textsuperscript{204} No matter the method used, the doctrine of self-execution rests on a state’s \textit{domestic law}.\textsuperscript{205} One can consider the mode of performance of a treaty (unless the states parties otherwise specifically agree) a matter solely within a state’s sovereignty.

Certain states, such as Britain, can never enter into a self-executing treaty. Under British law, treaties to be effective domestically must be expressly implemented by Parliament.\textsuperscript{206} The

\textsuperscript{201} Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J., para. 112.\textsuperscript{202} Id., para. 153(9).\textsuperscript{203} Vienna Convention on the Law of Treaties, \textit{supra} note 139, art. 26.\textsuperscript{204} See McDonnell, \textit{supra} note 187, at 1404-1406, illustrating how either the Executive or the Judiciary can carry out a treaty obligation. See also ANTHONY AUST, \textit{MODERN TREATY LAW AND PRACTICE} 159 et seq. (3d ed. 2013)\textsuperscript{205} Id.\textsuperscript{206} Carlos Manuel Vasquez, \textit{The “Self-Executing” Character of the Refugee Protocol’s Non-refoulement Obligation}, 7 \textit{GEO. IMMIGR. L.} J. 39, 45-46 (1993) (“For example, even if a treaty [entered into by Britain]...
Framers of the United States Constitution were well aware of British practice and adopted a different approach. The relevant domestic law of the United States is contained in Articles 3 and 6(2) of the Constitution. As previously noted, Article 6(2) makes treaties the supreme law of the land, invocable in state and federal courts as the rule of decision.

Perhaps the most grievous error of the *Medellín* majority is to quote with approval a statement from the First Circuit which claims that to be self-executing, treaties have to “convey[] an intent that it be ‘self-executing’ and is ratified on these terms.” As explained above, the question of “self-execution” is a matter of domestic law, not international law. Rarely, then, could one expect states parties with different domestic law traditions to negotiate on the precise manner in which a treaty will be enforced. Therefore, the question is not whether the negotiating parties to a treaty “convey[ed] an intent that it be ‘self-executing.’” The question is whether the parties intended to create a legally binding obligation. If so, it is up to the domestic law of the states parties to the treaty to determine how each party is to enforce the treaty. Sometimes the treaty will have a clause requiring states that do not recognize the doctrine on self-executing treaties to enact legislation to bring the treaty into effect by domestic statute.

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207 See *Medellin v. Texas*, 552 U.S. 492, 543 (2008) (Breyer, J., dissenting) (quoting Justice Iredell in *Ware v. Hylton*, 3 U.S. 199, 276-77 (1796) for the proposition that the Constitution rejected the British approach, noting that “further legislative action in respect to the treaty's debt-collection provision was no longer necessary in the United States.”) (emphasis, Justice Breyer’s).

208 *Medellín*, 552 U.S. at 505 (quoting *Igartua–De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C. J.)).

209 Justice Breyer was correct in observing, “How could those drafters achieve agreement when one signatory nation follows one tradition [for example, constitutionally permitting self-executing treaties] and a second follows another [rejecting, for example, under its custom, statute, or constitution, self-executing treaties]?” *Medellin*, 522 U.S. at 548 (Breyer, J., dissenting).

210 Because most countries lack constitutional provisions making treaties the Supreme law of the land, some multilateral treaties have a domestic implementation clause, requiring states to enact legislation to make the treaty enforceable domestically. Yet depending on the subject matter, countries like the United States that have taken the self-executing approach may not need to enact legislation. *See Iwasawa*, *supra* note 187, at 660; McDonnell, *supra* note 187, at 1428-31.

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Generally, however, the states parties leave it up to each individual state to enforce the treaty under the mode that the state itself has chosen to adopt.

The Medellín majority’s error is egregious. First, the Court looks to find something in the treaty that treaty drafters, for good reason, generally are unlikely to include. It’s like telling children to hunt for Easter eggs hidden in the back yard when in reality all the Easter eggs can be found only inside the house. Second, the Medellín majority’s misinterpretation ignores the plain meaning and the purpose of the Supremacy Clause and the Framers’ intent in drafting this critical constitutional provision.211 The Medellín Court never ruled on whether Article 36 of the VCCR is self-executing. The language of that article is as definite as Article IV from the Treaty of Peace. Article 36 requires states to inform foreign detainees of their right to consular assistance. “The [detaining] authorities shall inform the person [the foreign detainee] concerned without delay of his rights [to request the assistance of a consul from his or her country] and if the detainee “so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State” of its national’s detention.212 Sometimes called the international Miranda warning, the right to consular notification is stated in mandatory language, “shall inform . . . without delay.” The language is as specific as a Miranda warning, and is well within the competence of federal and state courts to apply.

Instead of focusing on the VCCR, the Court directed its attention to Article 94 of the UN Charter and held that Article 94(1) is non-self-executing. Article 94 provides in full as follows:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which

211 For a brief discussion of the framers’ intent in adopting the Supremacy Clause, see Vasquez, supra note 206, at 47-48. See also McDonnell, supra note 187, at 1406-1416.
may, if it deems necessary, make recommendations or decide upon measures to be taken
to give effect to the judgment.213

The Court reasoned that the words “undertake to comply” was not sufficiently definite to
constitute a self-executing treaty term. Granted, the language might have been stronger, for
example, “shall comply.” But “[i]n international usage, ‘undertaking’ is well recognized to be a
hard immediate obligation.”214 As Justice Breyer observed in dissent, “undertake” means to put
oneself under a legal obligation and is used with that meaning in numerous treaties.215 Justice
Breyer also examined “undertake” and the terms used in other co-official languages of the UN
Charter to conclude that they all mean “become liable.”216. But query whether the Court would
have reached the opposite result had Article 94 used the “shall comply” language.

A better argument for the Medellín majority’s position—one that the majority does
make—is reference to Article 94(2) of the UN Charter.217 That subsection concerns what
happens when a state party fails to comply with a decision of the International Court of Justice.

Article 94(2) states that “[i]f any party to a case fails to perform the obligations [under an ICJ

213 UN Charter, art. 94.
214 Carlos Manuel Vasquez, Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of
ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or
promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the
Contracting Parties. . . . It is not merely hortatory or purposive. The undertaking is unqualified . . . .”); Restatement
(4th) of Foreign Relations, §301 reporters' note 2 (citing as “[a]n example of a nonbinding agreement” an
instrument that “avoids words of legal undertaking”)).
215 Medellín, 552 U.S. at 553 (Breyer, J., dissenting).
216 Id.
217 The majority set forth this position as follows:

Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the
United Nations Security Council by an aggrieved state. . . . The U.N. Charter's provision of an express
diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be
enforceable in domestic courts. . . . And even this “quintessentially international remed[y]” . . . is not
absolute. First, the Security Council must “dee[m] necessary” the issuance of a recommendation or
measure to effectuate the judgment. Art. 94(2), 59 Stat. 1051. Second, as the President and Senate were
undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol, the United States retained the
unqualified right to exercise its veto of any Security Council resolution.

Medellín, 552 U.S. at 509-509 (emphasis in the original).
judgment], the other party may have recourse to the Security Council . . . .” One might argue that here the parties to the UN Charter specifically agreed that the only mode of enforcement of an ICJ decision is through the UN Security Council. Considering the high regard parties have had for state sovereignty and the placement of Article 94(2) in the same article dealing with legal obligation of states to comply with ICJ judgments, such an interpretation is plausible.218

Although the states parties usually leave the manner of enforcement to the individual states, the parties can agree to make a treaty provision non-self-executing. A clear example of this is the Mutual Legal Assistance Treaty (“MLAT”) between the United States and Switzerland. The MLAT expressly states that no defendant shall be able to invoke the treaty to exclude evidence in United States courts.219 This is a narrow exception to the general rule that treaties are self-executing.

On the other hand, one could argue that Article 94(2) of the UN Charter is not absolute. The subsection says that an ICJ judgment holder “may have recourse to the Security Council.” The subsection does not say that going to the Security Council is the only way for the judgment holder to enforce the ICJ judgment. Unlike the MLAT, the treaty language in Article 94 does not so clearly make that article non-self-executing.

But powerful states typically resist giving broad jurisdiction to international tribunals. Given the veto power over Security Council resolutions held by the five permanent members,

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218 One distinguished commentator analyzed Article 94(2) as essentially amounting to a directive to the United States to “make best efforts” to comply. “The Medellín opinion indicates that the Court concluded that ICJ judgments are not directly enforceable in the courts because Article 94, in effect, obligates the United States to do its best to comply with ICJ judgments . . . . This reading is further supported by the Court’s interpretation of Article 94(2), in conjunction with the fact that the United States retained a veto in the Security Council, as establishing that the United States had retained ‘the option of noncompliance.’” Vasquez, supra note 214, at 661. Professor Vazquez argues that Medellín should be so interpreted by lower courts. Id.

219 McDonnell, supra note 187, at 1428 (quoting Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir 1984) (“This Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence. . . .”).
drafting Article 94(2) presumably helped persuade these states—China, France, the United Kingdom, the then U.S.S.R., and the U.S (and perhaps others)—to accept the establishment of the International Court of Justice. Although imperfect, this argument forms a stronger basis for the Medellín Court’s decision than does misinterpreting the self-executing treaty doctrine.

Medellín exemplifies the truism that hard cases make bad law. It was a hard case because the petitioners were not asking the United States Supreme Court to affirm an international commercial arbitration or to recognize a foreign court’s judgment against a private party, but because they were asking the most powerful national court on the planet to accede to an order issued by the UN’s World Court against the United States itself, on an issue related to the controversial question of capital punishment.

B. Weak Precedent Asserting the Refugee Convention and Protocol are Non-Self Executing

A few federal courts of appeal have found the 1968 Refugee Protocol non-self-executing. These courts, however, ruled so summarily. At best, one can describe their analysis as conclusory.220 The Second Circuit, in a one-page 1973 per curiam decision, Ming v. Marks, adopted the district court’s opinion, which relied heavily on some statements in the Senate while debating giving its advice and consent to the Protocol, statements cited for the proposition that our immigration laws and regulations already comported with the 1967 Protocol.221 The per

220 See, e.g., Al-Fara v. Gonzales, 404 F.3d 733, 743 (3d Cir. 2005); Cuban American Bar Ass’n, Inc. v. Christopher, 43 F.3d 1412, 1426 n.13 (11th Cir. 1995).

221 Ming v. Marks, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), aff’d on opinion below, 505 F.2d 1170, 1172 (2d Cir. 1974)(per curiam). There, the district court quoted the following from the Senate’s hearing on the Protocol:

SENATOR [JOHN] SPARKMAN. Is there anything in here that conflicts with our existing immigration laws? MR. DAWSON. I would answer that briefly and then ask Mrs. McDowell [of the Treaty Section, Office of the Legal Advisor, Department of State] to give a more authoritative answer. I would say that Article 32 which prohibits the expulsion of a refugee who is lawfully in this country to any country except on grounds of national security or public order would pose certain questions in connection with section 241 of our Immigration and Nationality Act, which states the deportation provisions. But I do not believe it would be in conflict. We believe most of those grounds in 241 are grounds which can be properly construed as having the basis of national security or public order, and we also are assured that those relatively limited cases which perhaps could not be so construed could be dealt with by the Attorney General without the enactment of any further legislation . . . .

Id. at 678 (emphasis added).
curiam decision itself, while ostensibly adopting the district court’s opinion, seems to have
applied the 1951 Refugee Convention through the 1967 Protocol as the rule of decision.222

The S.D.N.Y. opinion upon which the Second Circuit opinion and other Circuit opinions
are ultimately based is unsound.223 First, the Ming district court neglected to examine the treaty
language to determine if it created a legal obligation.224 Second, the Supreme Court in I.N.S. v.
Stevic adopted a far more nuanced analysis of the 1967 Protocol than did the S.D.N.Y in Ming.
The Court in Stevic noted that there was a significant difference between the Protocol and United
States domestic law at that time:

The most significant difference was that Article 33 gave the refugee an entitlement to avoid
deportation to a country in which his life or freedom would be threatened, whereas domestic law merely provided the Attorney General with discretion to grant withholding of deportation on grounds of persecution. The Attorney General, however, could naturally accommodate the Protocol simply by exercising his discretion to grant such relief in each case in which the required showing was made, and hence no amendment of the existing statutory language was necessary. 225

The Court essentially interpreted the 1967 Protocol and Article 33 of the Refugee Convention to mandate the Attorney General to exercise his or her discretion in favor of the asylum applicant “in each case in which the required showing [under the Protocol and Convention] was made.” 226

So what was once the generally unfettered discretion of the Attorney General was now, because of the Protocol, an almost compelled exercise of discretion to grant withholding of deportation if the immigrant showed that he or she suffered a threat of persecution within the meaning of

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222 Ming v. Marks, 505 F.2d 1170 (2d Cir. 1974). Unfortunately, the Second Circuit adopted a strained interpretation of Convention Articles 31 and 32.
223 In Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982), the Second Circuit again incorrectly relied on Ming for the proposition that the Protocol and the Convention were non-self-executing on the ground that the Refugee Act of 1980 implemented the Protocol.
226 467 U.S. 407 at 428 (emphasis added).
Article 33 of the 1951 Refugee Convention. By effectively limiting the Attorney General’s exercise of discretion, Article 33 of the Refugee Convention (made binding in the United States by the 1967 Protocol) had become the rule of decision.

Ironically, the colloquy in the Senate quoted by the Ming district court likewise supports this proposition. Responding to Senator John Sparkman’s question, Lawrence Dawson, a State Department official, testified, “We also are assured that those relatively limited cases which perhaps could not be so construed [where then-current immigration law failed to comport with the 1967 Protocol] could be dealt with by the Attorney General without the enactment of any further legislation . . . .” In that same colloquy, another State Department official noted two additional ways in which the then-current immigration law and regulations differed from the requirements of the Protocol. “There are two categories, only two, that we think are not covered, and these are the deportation of an alien for reasons of mental illness or deficiency, where he has become institutionalized for that reason, or deportation on grounds that he has become a public charge. These two areas would not be enforced against refugees if the protocol were in force.”

Fundamentally, the testimony supports the Stevic Court’s proposition that the Protocol limits Executive discretion over matters the Protocol prescribes. Specifically, the testimony indicates that the Attorney General has virtually no choice but to comport with the 1967 Protocol and the relevant provisions of the 1951 Refugee Convention.

Moreover, had the Senate intended to make the 1967 Protocol non-self-executing, it could have attached a reservation, understanding or declaration so saying, during the advise-and-

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227 See id.
228 See Vazquez, supra note 206, at 51 (“[T]he acknowledgement that no amendment of the statute was required must have been a recognition that Article 33 had domestic legal force and superseded the inconsistent provisions of the immigration law.”).
consent process of ratification of the Protocol. The Senate never attached such a reservation, understanding, or declaration.230 In his memorandum submitting the 1967 Protocol to the Senate, the President never suggested that the Protocol should be considered non-self-executing. To the contrary, the President’s memorandum stated, “The Protocol constitutes a comprehensive Bill of Rights for refugees fleeing their country because of their political views, race, religion nationality, or social ties.”231

One might argue that the Refugee Act of 1980 suggests that Congress believed that the 1967 Protocol was non-self-executing and that implementing legislation was required. The Senate Committee Report on the bill that later became the Refugee Act notes, however, that the bill “improves and clarifies” asylum procedures, but continues the substantive standards of the 1967 Protocol and the relevant 1951 Refugee Convention articles:

The bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in November 1969.232


231 Lyndon B. Johnson, Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, PUBLIC PAPERS OF THE PRESIDENT, August 1, 1968, at 568. See also Vasquez, supra note 206, at ___ (quoting same language). The authors are indebted to Professor Vasquez for his deep and penetrating scholarship on these issues.

Professor Carlos Manuel Vasquez further refutes that argument:

As the House Judiciary Committee Report states, and as the Supreme Court made clear in Stevic, this change [the Refugee Act of 1980] was made ‘for the sake of clarity.’ . . . The amendment to the statute, which removed the discretion that the statute appeared to give the Attorney General, could have “clarified” existing law only if Article 33 itself served to limit the discretion that the Attorney General enjoyed before accession to the Protocol.233

Although Stevic concerns the non-refoulement obligation under Article 33 of the Convention, the same reasoning applies to Article 31 of the Convention.234 Article 31 is equally definite, containing mandatory language and stated in the negative.235 Because Article 31 as well as Article 33 is self-executing, and for all the reasons set forth above, federal courts should enjoin the Administration from prosecuting asylum-seekers who make out a prima facie asylum case and who satisfy Article 31 until their asylum claims are adjudicated. On the same basis, federal courts should enjoin the Administration from indefinitely detaining asylum-seekers who likewise make out a prima facie asylum case and who satisfy Article 31.

C. Interpreting Federal Statutes to Comply with International Refugee Law and International Human Rights Law

The Supreme Court has long held that international law is “part of our law”236 Aside from directly enforcing the Refugee Convention, federal courts are generally obligated to interpret federal statutes to avoid violating international law. Chief Justice John Marshall declared in Murray v. Schooner Charming Betsy237 that a statute “ought never to be construed to

233 Vasquez, supra note 206, at 52 (emphasis, Professor Vasquez’s).
234 Articles 3 and 4 of the Convention prohibiting discrimination on the basis of race, religion, and national origin are likewise more than adequately definite.
235 For similar reasons, Article 3 of the Refugee Convention is likewise self-executing, “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”
236 Hilton v. Guyot, 159 U.S. 113, 163 (1895) (“International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation . . . duly submitted to their determination.”). See Paquete Habana, 175 U.S. 677 (1900).
237 6 U.S. (2 Cranch) 64, 118 (1804).

8.19.19 Draft—Please do not cite.
violate the law of nations if any other possible construction remains.”238 The American Law Institute's Restatement (Fourth) Foreign Relations Law of the United States follows this canon.

“Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe.”239 Courts should find a later federal statute to supersede “an earlier rule of international law or a provision of an international agreement as law of the United States [only] if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.”240

Here there is little, if any, evidence of a Congressional purpose for the illegal entry statute to supersede the Refugee Convention or the Refugee Protocol.241 The undisputed purpose of the Refugee Act of 1980 was to bring U.S. law into harmony with international refugee law:

“If one thing is clear from the legislative history of the new definition of ‘refugee,’” and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees [and hence with the Refugee Convention of 1951]. . . .”242

As discussed above, Article 31 of the Refugee Convention generally prohibits the criminal prosecution of refugees for illegal entry or presence. The current Justice Department has adopted a policy of criminally prosecuting for illegal entry virtually everyone suspected of

238 Id.
240 Restatement (3d) of Foreign Relations, § 115(1)(a) (emphasis added).
crossing the border without inspection. The Justice Department and the Department of Homeland Security have done little to ensure that valid asylum-seekers are protected from such prosecutions. Clearly, the United States is violating this article of the Convention, and thereby transgressing an international law obligation.

The Refugee Convention does permit some initial administrative detention of *bona fide* asylum-seekers. However, the States Parties Executive Committee of the UN High Commissioner of Refugees, charged with monitoring compliance with the Convention, notes detention’s limits:

> [D]etention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order . . . .

There is considerable authority for the proposition, however, that prolonged administrative detention of refugees and *bona fide* asylum-seekers violates Article 31 of the Refugee Convention and hence international law.

Nothing in the legislative history of the criminal statute penalizing illegal entry suggests that either the Congress or the President were made aware that prosecuting refugees for illegal

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243 See supra notes 34-49 and accompanying text.
244 Id.
246 See, e.g., Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, supra note 131, paras, 25-28. Aside from detention itself are the exacerbating factors of conditions in detention, deliberate family separation, and interference with the right to counsel.

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entry or presence in the United States violated international law. Nothing in the Congressional Record, Committee Reports, or other evidence of legislative history shows that Congress intended to abrogate Article 31 of the Refugee Protocol. Absent clear congressional intention to abrogate an international law obligation, a court should “fairly reconcile” the treaty and the congressional statute to construe them as consistent with one another to the extent possible. Thus, federal courts should dismiss without prejudice any charges against asylum-seekers who have passed fair credible fear interviews. That is, asylum-seekers who have demonstrated a prima facie case of asylum eligibility, for example with a finding of credible fear. Should the asylum-seeker ultimately be unsuccessful in the pursuit of asylum, then the criminal charges can be reinstated against him or her.

In any event, criminal prosecution of migrants for “improper entry,” whether they are eligible or ineligible for asylum, is generally neither necessary nor compatible with international human rights law. Immigration into the United States was essentially unrestricted until 1875.

Prosecution of individuals for what is largely a status offense is disfavored and often unconstitutional. Before the current Administration, few first-time unauthorized entrants were

248 That is not to say the criminal prosecution of first-time unauthorized entrants is either necessary or fair. The United States had more than a century of open borders. Criminal prosecution of immigrants entering illegally was only adopted in 1929. See Kelly Lytle Hernandez, How Crossing the US-Mexico Border Became a Crime, The Conversation (Apr. 30, 2017), http://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604 (“It was not always a crime to enter the United States without authorization. In fact, for most of American history, immigrants could enter the United States without official permission and not fear criminal prosecution by the federal government. . . . With few exceptions, prosecutions for unlawful entry and reentry remained low until 2005. . . . By 2015, prosecutions for unlawful entry and reentry accounted for 49 percent of all federal prosecutions and the federal government had spent at least US$7 billion to lock up unlawful border crossers.”)
250 See Robinson v. California, 370 U.S. 660 (1962) (prosecution of defendant for “being an addict” violates due process and the Eighth Amendment). Here, the noncitizen is essentially prosecuted for “being a foreigner” and entering the United States without being inspected.
ever prosecuted for such entry. Prosecuting individuals who are fleeing persecution not only violates international law, but also elemental justice.

**CONCLUSION**

In the past two decades, a series of cataclysmic events has created a "perfect storm" resulting in social and economic upheaval that has led millions of people to cross international borders. These events include the 9/11 attacks, the widespread incidence of insurgencies, terroristic occupation and devastation of societies, and the emergence of brutal, corrupt, autocratic dictatorships, often theocratic or grounded in ethnic division. Violent conflict and outright civil and transnational wars have broken out in Iraq, Afghanistan, Syria, Libya, Nigeria, the Democratic Republic of Congo, Yemen, the Philippines, Kashmir, Ukraine and the Crimea, Myanmar, Haiti, Sudan and South Sudan, Somalia and Somaliland, El Salvador, Honduras, Guatemala, Nicaragua, Colombia, and now Venezuela and perhaps Brazil. Financial insecurity has spread throughout the international community with the devastating worldwide economic recession/depression of 2008, the revolutionary technological advances in communication and resulting digitization and robotic automation of the workplace and world economies displacing hundreds of thousands, if not millions of workers; climate change pushing multitudes in the Global South from ruined farms and villages; and the rise of civil strife in many other parts of the world, but again especially in the Global South. In many receiving countries, this perfect storm has simultaneously fueled virulently intense hostility, often tinged with violence, toward immigrants, even between communities that have peacefully cohabited for generations.\(^\text{251}\)

\(^{251}\) Reuters Investigates, *Reuters Wins Pulitzer Prize for “Myanmar Burning”* (2018) (excerpt from Pulitzer citation: “For expertly exposing the military units and Buddhist villagers responsible for the systematic expulsion and murder of Rohingya Muslims from Myanmar, courageous coverage that landed its reporters in prison.”)


https://www.pbs.org/newshour/show/facing-myanmars-brutal-persecution-rohingya-refugees-
Instead of standing as a bulwark against these pressures, which ultimately amount to fearing and blaming the foreigner—the “other”—the United States has not merely given into them but has exacerbated and exploited them for political gain. Since the end of World War II, the United States has generally seen itself as the undisputed world leader in human rights, known, among other things, for one of the most generous refugee programs in the world. A “Nation of Immigrants,” as this country has boasted for at least a century (until last year when USCIS removed that sobriquet from its Mission Statement252) the United States has taken full advantage of the remarkable contributions of successive waves of newcomers who continually reinvigorate both our economy and our democracy. The current Administration has turned its back on these ideals, using its vast discretionary power over immigrants to harshly enforce and often violate our immigration laws, undermining American values and staining our country’s international reputation.

Federal courts, moreover, have both the authority and the responsibility to enforce the 1951 Refugee Convention and the 1967 Refugee Protocol as well as international human rights norms to protect asylum-seekers from criminal prosecution and from prolonged immigration


Original:
“USCIS secures America’s promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.” (Emphasis added.)

New version:
“U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.”
detention. The Framers of the United States Constitution and its key amendments envisioned that federal courts would apply treaties as the rule of decision to protect foreigners and would serve as a check on an Executive that tramples on individual rights, particularly the rights of a vulnerable minority. To fulfill their constitutional obligations, federal courts must live up to that vision and stand up against a rogue Administration tilting towards authoritarianism and willfully disregarding the rule of law—both domestic and international.