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The Past as Present, Unlearned Lessons and the (Non-) Utility of International Law

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The Past as Present, Unlearned Lessons, and the (Non-)Utility of International Law

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The contemporary moment provides an acute illustration of the dangers of historical amnesia—as if the Trump Administration's policies of exclusion, extremist nationalism, and presidential imperialism were singular to 'now,' and entirely reversible in the next election. This Article argues to the contrary; that we have been down this road before, and the current crisis in immigration and refugee policies is the inevitable development of trends of racism, including anti-Arab, anti-Muslim racism and xenophobia, that have only become normalized by the populist resurgence of Trumpism. If this premise is correct—that we are experiencing a culmination of a historical trajectory—what lessons from past legal-activist

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mobilization around implementing international law can be applied to the present? Focusing on a few select efforts over time that used international law—human rights treaties and other instruments—and international legal interpretation to litigating refugee and asylum claims in the United States, this Article posits that the U.S. constitutional framework is inadequate to address the serious undermining of immigration and refugee rights. Although prior efforts at incorporating human rights norms have thus far been insufficient, more robust and strategic application of international human rights norms is urgently needed to seriously challenge the migration crisis of our time.

As support for this premise, it is useful to examine three prior periods of significance for the rights of refugees and immigrants: the refugee influx from Central America during the civil wars in the 1980s, the anti-Arab, anti-Muslim refugee and immigrant measures during the 1990s, and the post-9/11 Guantanamo litigation. What were some of the key challenges that lawyers and advocates made to the worst of the policies in those periods, and how useful were international law arguments to those strategies?

I draw on these examples from the past to illustrate that we have been down this road before. This is not the only time that racism and xenophobia have been normalized at the very top of government and mainstreamed by Congress and the media. Concurrently, however, there has been a massive response by civil society. Thousands of people spontaneously showed up at airports to protest the 'Muslim' ban, and lawyers volunteered all over the country to file habeas petitions to allow non-citizens to enter in defiance of the ban.[1] So far, the courts have mostly struck down the various versions of the Muslim ban, though that litigation is now pending at the Supreme Court.[2] However, prior efforts to push back against similar extreme measures against immigrants and refugees starkly illustrate the limits of constitutional protections, and that international legal rights are needed more urgently than ever to fill the lacunae in domestic legal protections. In this short introductory Article to the Symposium Issue, I offer no more than an overview of the issues raised during previous moments of legal crisis rather

1 *See* Jonah Engel Bromwich, *Lawyers Mobilize at Nation's Airports After Trump's Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html [https://perma.cc/REB3-BKJ5].

2 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018).

than an in-depth analysis of the merits of the arguments in the cases.

I. Mobilizing in the Wake of the Civil Wars in Central America

U.S. intervention in the Northern Triangle countries of Central America—Nicaragua, El Salvador, Guatemala, and Honduras—on behalf of huge corporate interests, particularly the food conglomerates, is by now a fairly well-understood historical fact.[3] However, the ongoing consequences of U.S. interventions, aimed at suppressing primarily indigenous and popular uprisings that challenged brutal and entrenched dictatorships, are rarely understood as directly linked to this historical past.[4] Although direct U.S. government intervention in the politics of the region began in the 1950s with the U.S. overthrow of the Jacobo Arbenz government in Guatemala, U.S. support for repressive regimes was arguably a main factor in exacerbating the civil conflicts across Central America in the 1980s and 1990s.[5] Interventions by the United States and the civil wars that ensued caused a massive refugee outflow across the region; approximately 600,000 Central American refugees fled to the United States during those years, not counting those seeking refuge in other Central and South American states as well as Europe.[6]

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3 *See, e.g.*, JASON M. COLBY, THE BUSINESS OF EMPIRE 3–4, 11 (2011); RONALD W. COX, POWER AND PROFITS: U.S. POLICY IN CENTRAL AMERICA 58–59, 116–17, 133–34 (1994).

4 *See* John H. Coastworth, *United States Interventions*, REVISTA (2005), https://revista.drclas.harvard.edu/book/us-foreign-policy-spring-summer-2005 [https://perma.cc/T2H4-ND5R]; CHRISTINA PERKINS, CENTER FOR STRATEGIC & INT'L STUDIES PROJECT ON PROSPERITY & DEV., ACHIEVING GROWTH AND SECURITY IN THE NORTHERN TRIANGLE OF CENTRAL AMERICA (Dec. 2016) (describing historical roots and current violence and economic instability in Northern Triangle and how it relates to US intervention and migration).

5 *See generally* Coastworth, *supra* note 4 (describing United States interventions throughout Latin America, dismissing as implausible most claims of security reasons, and describing theories that economic interests, domestic politics, and "the global strategy effect" were the true reasons for interventions).

6 The author was fortunate enough to begin her legal work as a *pro bono* lawyer with the San Francisco Lawyers' Committee at the time, then established and directed the Immigration Project at Public Counsel in Los Angeles. California hosted the vast majority of the refugees from Central America and was the center of significant mobilization of lawyers and a *pro bono* and clinical legal movement to provide representation to the individual refugees. At the same time, the joint public interest and private law partnership facilitated productive sharing of legal theories and evidence development that allowed

U.S. policy, despite the ratification of the Protocol on the Status of Refugees (Refugee Protocol), was to institutionalize a reading of the Protocol to deny the vast majority of Central American asylum cases.[7] During the height of the refugee crisis, the grant rate of Salvadoran claims was about 2%, while for Guatemalans it was about .05%.[8] Mass detention of Central American refugees followed, including harsh detention in large, newly-built centers near the border and in remote areas, such as at El Centro and Florence, Arizona. Government strategies, besides the restrictive interpretations of U.S./international refugee law and mass detention, included preventing children from being sponsored by family members in the United States for release from detention; huge bonds that few could raise; locating detention centers far from towns and cities with attorneys, and restricting access to detention facilities in various ways.[9]

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challenges to biased adjudications to move forward through the courts.

7 *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (incorporating the Convention Relating to the Status of Refugees and extending it to cover all who have become refugees, irrespective of the date, and without geographic limitation). Until new asylum regulations were issued in 1990, all immigration judges were required to forward copies of every asylum and withholding application to the Department of State Bureau of Human Rights and Humanitarian Affairs (BHRHA), which then issued an 'opinion' on the validity of the case. *See* JAMES SILK, U.S. COMM. FOR REFUGEES, DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES 29–30 (1986). Empirical research on the relationship between the BHRHA opinions and immigration court decisions concluded that there was almost complete congruence between the two. *Id.* at 30. This factor ensured government bias in every asylum adjudication. *See id.*; *see also* Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 253–54 (1984).

8 Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 35 L. & SOC. INQUIRY 569, 576 (2011) (noting that denial rates for asylum applications filed by Salvadorans was 97% and 99% for Guatemalans). Statistics for 1984 reflected a grant rate of 2% for Salvadoran asylum claims; 49% for Polish claims; and 66% for Iranian claims. *See* GOV'T ACCOUNTING OFFICE, GAO/GGD-87-33BR, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED OR DEPORTED 1 (1987). In 1989, the grant rates were 1.9% for Guatemalan claims, 2.3% for Salvadoran claims, 3.5% for Haitian claims. In sharp contrast, during the same period, 81% of Soviet claims were granted, 65.8% of Ethiopian claims, and 90.9% of the Romanian claims were granted. The BHRHA advisory opinions heavily weighted the government's Cold War bias in the grant rates for all claims for relief from deportation. *See id.* at 9–10; *see also* AMNESTY INT'L, REASONABLE FEAR: HUMAN RIGHTS AND UNITED STATES REFUGEE POLICY (1990).

9 *See generally* ROBERT S. KAHN, OTHER PEOPLE'S BLOOD: U.S. IMMIGRATION PRISONS IN THE REAGAN DECADE (1996) (examining illegal actions by the federal government in their treatment of refugees fleeing civil wars and death squads in Central America).

In response, private and public interest lawyer partnerships developed to provide *pro bono* legal representation in the face of insufficient legal resources for the hundreds of thousands of individuals who needed representation. Impact litigation challenging some of the worst policies became more robust because of the private/public interest partnership. Some of the most important decisions—both positive and negative—arose from this effort, such as the class action decisions of *American Baptist Churches v. Thornburgh* (*ABC v. Thornburgh*) on biased adjudications;[10] *Flores v. Meese*, on the rights of child asylum-seekers;[11] and *Immigration and Naturalization Service v. Cardoza-Fonseca* (*INS v. Cardoza-Fonseca*) on interpreting the standard of proof in asylum claims.[12]

On the activism side, lawyers, activists, and church groups formed partnerships to institutionalize the sanctuary movement, providing safe havens in towns, cities, and churches to refuse to turn Central American refugees over to government officials for detention or deportation.[13] Established organizations such as CARECEN and the Central American solidarity movement collaborated to spread information in schools, colleges, and universities, and spurred delegations from the United States to document first-hand the violence faced by refugees, and to set up sister cities between United States and Central American cities.[14]

The international legal strategies within the domestic framework at the time included arguments interpreting U.S. obligations under the Refugee Protocol based on international humanitarian and human rights law, both in individual cases and in

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10 American Baptist Church v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (approving class action settlement agreement to remedy mass denials of asylum applications by Guatemalans and Salvadorans by providing for de novo asylum interviews, stays of deportation, and work authorization).

11 Stipulated Settlement Agreement, Flores v. Reno, CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997) (agreeing to general policy favoring release of minors and requiring that children who are detained are placed in the least restrictive setting possible).

12 INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that the standard that applies to asylum claims is "well-founded fear of persecution").

13 *See* Coutin, *supra* note 8 (describing the efforts of sanctuary activists); *see also* Norma Stoltz Chinchilla, Nora Hamilton & James Loucky, *The Sanctuary Movement and Central American Activism in Los Angeles*, 36 LATIN AM. PERSP. 101, 105–07, 117 (2009) (outlining the coalitions involved in the sanctuary movement).

14 Chinchilla, Hamilton & Loucky, *supra* note 13, at 116–18 (describing CARECEN's efforts and the movement's spread to universities).

the consolidated and class actions.[15] These efforts continued into the Haitian refugee influx, which also precipitated strategies based on international law, both in individual cases and in class actions like the *Haitian Centers Council* litigation brought by Yale and the Miami advocates.[16] In individual asylum and refugee cases, advocates made international human rights and international humanitarian law arguments challenging the interpretation of the grounds of asylum, as well as a range of other practices.

Inevitably, there was backlash: attacks on CARECEN and CISPES and the broader Central American solidarity movement that included, for example, breaks-ins and raids on the casefiles of the Harvard legal clinic, arrests of prominent activists for public dissent, and various types of threats to solidarity organizations.[17] Despite the orchestrated backlash that included targeting by government entities, both statewide and nationwide challenges slowed the mass deportation efforts and resulted in the passing of extended voluntary departure, temporary protection status, and finally, the Legalization Program of IRCA and NACARA—providing permanent protection to thousands of Central Americans

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15 *See* In re Medina, No. A26 949 415 (Immigr. Ct., Harlingen, Tex., July 15, 1985), *aff'd on other grounds*, Matter of Medina, 19 I. & N. Dec. 734 (BIA 1988). *See also* In re Madrid-Norio, No. A24 292 084 (Immigr. Ct., San Francisco, Cal., Aug. 21, 1987); In re Aguilar-Moreno, No. A27 196 226 (Immigr. Ct., San Francisco, Cal., Oct. 18, 1988); In re Santos-Gomez, Santos-Trejos and Ramirez-Santos, Nos. A29 564 781, A29 564 785 and A29 564 801 (Immigr. Ct., Washington, D.C., Aug. 24, 1990) (all cited and discussed in Jennifer Moore, *Simple Justice: Humanitarian Law as a Defense to Deportation*, 4 HARV. HUM. RTS. J. 11, 11, 12, 26 (1991)).

16 Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (holding that the President is not prohibited by the INA or the Refugee Protocol from ordering the Coast Guard to intercept people traveling at sea from Haiti to the United States and return them to Haiti without considering whether they qualify as refugees); Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantanamo and Refoulement*, *in* HUMAN RIGHTS ADVOCACY STORIES 385–432 (Deena R. Hurwitz et al. eds., 2009) (explaining the strategies used in *Sale* and its impact).

17 *See* Coutin, *supra* note 8, at 578 (describing prosecutions of activists); Chinchilla, Hamilton & Loucky, *supra* note 13, at 107, 109, 117 (describing arrests of Sanctuary movement activists, warnings to churches to stop offering sanctuary to refugees, and INS efforts to cut off federal funds to Los Angeles when considered becoming a sanctuary city). On FBI involvement in raids on activists, legal clinics and others to suppress Central American activism, see ROSS GELBSPAN, BREAK-INS, DEATH THREATS AND THE FBI: THE COVERT WAR AGAINST THE CENTRAL AMERICA MOVEMENT 1–3 (1991); *see also* CHIP BERLET, THE HUNT FOR RED MENACE: HOW GOVERNMENT INTELLIGENCE AGENCIES & PRIVATE RIGHT-WING GROUPS TARGET DISSIDENTS & LEFTISTS AS SUBVERSIVE TERRORISTS & OUTLAWS 4, 62 (1994).

in the United States and allowing their families to join them and become residents.[18]

II. Defending the 'Secret Evidence' Cases of the 1990s

Although not the first laws and policies to single out Arab non-citizens as specific targets of law enforcement, in the 1990s the George H. W. Bush (Bush I) administration began a law enforcement surveillance and interrogation program that included fingerprinting all U.S. residents and immigrants of only Arab origin. The Clinton Administration passed two laws that included measures with harsh provisions that were almost exclusively enforced against Arab refugees and immigrants in the United States, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.[19] One cluster of cases during this period, however, was paradigmatic of the government's selective enforcement of immigration laws against Arabs and Muslims, widely known as the 'secret evidence' cases. The government's strategies in these cases were to use 'anti-terrorism' immigration regulations under IIRIRA and AEDPA to deport, exclude, and detain Arabs on the basis of evidence that it refused to disclose to the individuals, their families, or their representatives. IIRIRA authorized the use of secret evidence in deportation proceedings, and AEDPA established an Alien Terrorist Removal Court with specific proceedings to try 'alien terrorists.'[20] In the secret evidence cases, however, the government sidestepped the restrictions built into the new proceedings and courts for trying aliens charged on terrorism-related grounds, and relied on garden-variety immigration regulations to claim its evidence was classified and non-disclosure was warranted under the new laws.[21]

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18 *See* Coutin, *supra* note 8, at 580–81, 583–85 (explaining how pressure on the INS led to legal reform).

19 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). For a good review of the effects of AEDPA and IIRIRA on Arabs in the United States, see Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825 (2001).

20 AEDPA § 303(a), 18 U.S.C. § 2339B (2001); AEDPA § 401(a), 8 U.S.C. § 1533 (2003). *See* IIRIRA § 304 (codified as amended at 8 U.S.C. § 1229(a) (2000)).

21 A number of the individuals who were charged and detained on secret evidence

The test case for using immigration regulations to ground the government's actions in the secret evidence cases was the 17-year litigation known as the 'LA-8.' The eight LA-8 individuals who were arrested, detained, and placed in deportation proceedings were rounded up on the basis of their association with the Popular Front for the Liberation of Palestine (PFLP), which the government charged as an organization that advocated 'doctrines of world communism.'[22] The individuals were seven Palestinians and the Kenyan wife of one of them—all of whom were students and others active in the Los Angeles-area on Palestinian rights. The group had been the subject of FBI surveillance for over three years, and when the FBI found no evidence of criminal wrongdoing, it turned the case to Immigration and Naturalization Services (INS), recommending deportation. The government refused to produce its evidence in open court, which, when the courts struck down the use of secret evidence after almost two decades of litigation, turned out to be nothing more than entirely legal activity protected by the First Amendment.[23] During the course of the LA-8 litigation, the lawyers defending them were also subjected to FBI surveillance, which they discovered and challenged in separate proceedings in federal court.[24]

While the LA-8 litigation wound its way through the courts—in the end, all the way to the Supreme Court on a claim of selective immigration enforcement—the government continued using its

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were held for long periods of time, several for three and four years. For a sample of the decisions, see Al-Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001); Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999); In re Nasser Ahmed, (N.Y., EOIR, Immigr. Ct. May 1, 1996); Haddam v. Reno, 54 F. Supp. 2d 588 (E.D. Va. 1999); Haddam v. Holder, 547 F. App'x 306 (4th Cir. 2013). The author was co-counsel with Malea Kiblan and Rene Kathawala in the over 20-year litigation of Anwar Haddam, which ended in a grant of withholding, but the government continues to attempt to remove Dr. Haddam to Algeria as of the date of this writing, despite the death sentences against him by both the Algerian government and the terrorist organization, the Islamic Armed Group (GIA).

22 United States v. Hamide, 914 F.2d 1147, 1148 (9th Cir. 1990).

23 Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999); Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995); Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989), *rev'd on other grounds*, Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1991).

24 *See* ACLU v. Thornburgh, Civ. Action No. 89-2248 (D.D.C. June 26, 1989), *aff'd in part, rev'd in part sub nom*. ACLU Foundation of S. Cal. v. Barr, 952 F.2d 457 (D.C. Cir. 1991).

secret evidence strategies from that case in about two dozen other cases. Working together, the INS and the FBI used the immigration regulations and the claim of terrorism to refuse to disclose evidence, and proceeded to detain and place in deportation proceedings Arab and Muslim immigrants without providing the basis for charges against them. In most of these cases, the litigation focused on statutory and constitutional due process rights, but in some of the cases involving asylum claims, the petitioners' arguments involved the inconsistency between the application of asylum grounds and terrorism bars under US and international law.[25]

III. Mobilizing post-September 11, 2001 for Guantanamo Detainees

Turning to the third period of relevance, September 11, 2001, it is often described as an event when 'everything changed' in the United States and the "gloves came off" as Bush administration officials liked to say.[26] That stark before/after characterization stands to be disputed, as many of the policies that were put in place immediately after 9/11 had been tested by various government entities prior to 9/11. Nevertheless, much like the post-Trump period, policies previously considered to have dubious legality became normalized.[27]

Such policies included detentions without trial, using the label of administrative detention for criminal-related charges (such as terrorism-related immigration charges); the use of secret evidence to arrest, detain, and deport immigrants and other non-citizens;[28] the

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25 For a complete list of these cases and the laws and regulations under which charges were brought against the individuals involved, see Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999).

26 Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 22 (2009); William C. Banks, *9/11 Symposium: Five Years On: A Look at the Global Response to Terrorism: The Death of FISA*, 91 MINN. L. REV. 1209, 1240 (2007).

27 *See generally* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005) (detailing post-9/11 policies and their constitutional implications); Sonia R. Farber, *Forgotten at Guantanamo: The Boumediene Decision and Its Implications for Refugees at the Base under the Obama Administration*, 98 CALIF. L. REV. 989 (2010) (discussing the treatment of detainees over time, including decisions in *Hamdan*, *Rasul*, and *Boumediene*, and focusing on refugees still detained there).

28 *See* Martin Schwartz, Niels Frenzen & Mayra L. Calo, *Recent Developments on the INS's Use of Secret Evidence Against Aliens*, *in* 2001-02 IMMIGRATION &

targeting of Arabs and Muslims for 'special measures' that were extralegal or clearly unconstitutional, but mostly upheld by the courts;[29] and mass roundups and mass deportations through immigration detention without due process.[30] In the hysteria that surrounded these measures, both lawyer and activist mobilization was difficult and slow, primarily because of the widespread publicity that all Arabs and Muslims were terrorists because the 9/11 hijackers were Muslim and Arab.[31] Legal representation of individuals held in administrative detention was extremely difficult because of the incommunicado administrative detention under which most were held.[32] Lawyers, when they could locate clients, were routinely prevented access, and individuals were denied the right to call lawyers or their consulates for assistance.[33]

NATURALIZATION HANDBOOK 300 (2001).

29 *Supreme Court Allows Secrecy to Stand in Deportation Cases*, N.Y. TIMES, June 29, 2002, at A10.

30 Jim Edwards, *Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees*, N.J. L.J. 1 (Feb. 4, 2002); William Glaberson, *Closed Immigration Hearings Criticized as Prejudicial*, N.Y. TIMES, Dec. 7, 2001, at B7.

31 *See* Sahar F. Aziz, *Sticks and Stones, the Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 33–34, 37–39 (2009) (describing how stereotypes of Muslims and Arabs as terrorists became entrenched following 9/11). *See also* AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1991 REPORT ON ANTI-ARAB HATE CRIMES (1992); AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1995 REPORT ON ANTI-ARAB RACISM (1995); AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1996-1997 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB-AMERICANS (1997); AMERICAN-ARAB ANTI-DISCRIMINATION COMM., 1998-2000 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB-AMERICANS (2001); Dan Eggen & Cheryl W. Thompson, *US Seeks Thousands Ordered Deported: Middle Eastern Men are Focus of Search*, WASH. POST, Jan. 8, 2002, at A1; Dan Eggen, *Deportee Sweep Will Start with Mideast Focus*, WASH. POST (Feb. 8, 2002), https://www.washingtonpost.com/archive/politics/2002/02/08/deportee-sweep-will-start-with-mideast-focus/bab2ff0f-4637-4f34-bcbe-098e75987630/?utm_term=.e7bf83a2c3a6 [https://perma.cc/Z6G5-6GE6].

32 *See Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, HUM. RTS. WATCH (July 21, 2014), https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions [https://perma.cc/F6CJ-JQT3].

33 OFF. OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 130–37 (2003), *available at* https://oig.justice.gov/special/0306/full.pdf [https://perma.cc/FS64-R6JP]; OFF. OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE IN METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 1, 32–33 (2003), *available at* https://oig.justice.gov/special/0312/final.pdf [https://perma.cc/W6LC-VPGE]; AMNESTY

Meanwhile, Guantanamo became a paradigm of its own. As the United States began transferring individuals to Guantanamo, first from Afghanistan, then from all over the world, the Administration announced that the Geneva Conventions would not apply to persons captured in the war on terror.[34] The Office of Legal Counsel issued a memorandum claiming that no court would have jurisdiction to hear challenges concerning the detention of anyone held at Guantanamo.[35] One of the main goals of the Bush Administration in its massive detention strategy was to prevent independent court review as well as to severely curtail detainees' access to counsel, in order to ensure unfettered use of whatever interrogation techniques it chose to implement. For example, the United States labeled the Guantanamo prisoners 'enemy combatants,'[36] a term that is found nowhere in the Geneva Conventions. Other terms the United States suggested included 'underprivileged enemy combatants,'[37] 'security internees,'[38] 'criminal detainees,'[39] 'persons under U.S.

INT'L, UNITED STATES OF AMERICA: AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA 6–7, 17–18, 20–21 (2002); *DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists*, 78 INTERPRETER RELEASES 1816, 1817 (2001); Josh Meyer, *Dragnet Produces Few Terrorist Ties*, L.A. TIMES, Nov. 28, 2001, at A1.

34 *See Pentagon: Geneva Convention Doesn't Cover Detainees*, REUTERS (Jan. 11, 2002), http://www.crimelynx.com/nogen.html [https://perma.cc/MQV6-YPVL]; *see also* HUM. RTS. WATCH, A POLICY TO EVADE INTERNATIONAL LAW (2004), https://www.hrw.org/reports/2004/usa0604/2.htm#_ftn4 [https://perma.cc/NKJ4-E9MX].

35 *See* Letter from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2001), *available at* https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf [https://perma.cc/FH6A-S96X].

36 *See, e.g.*, Andrew Morgan, *Guantanamo Bay: Military Commissions and Enemy Combatants*, JURIST (July 20, 2013), https://www.jurist.org/archives/feature/guantanamo-bay-military-commissions-and-enemy-combatants/ [https://perma.cc/S6HX-B9HK].

37 *See* DEPT. OF ARMY INSPECTOR GENERAL, REPORT ON DETAINEE OPERATIONS 45–47 (July 21, 2004) [hereinafter DAIG REPORT], https://www.globalsecurity.org/military/library/report/2004/daig_detainee-ops_21jul2004.pdf [https://perma.cc/XFK9-8DNJ].

38 *See* Maj. Gen. George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 8 (2004), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 1018 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

39 *Id.*

forces control,'[40] and 'low-level enemy combatants.'[41] These terms are unrelated to any of the recognized international legal categories: prisoners of war;[42] civilian internees;[43] or non-privileged belligerents.[44] By avoiding the international-consensus application of the Geneva Conventions, the United States managed to avoid providing the Guantanamo detainees the fundamental protections entitled to persons in any of the recognized categories: military trials with fundamental due process for combatants accused of war crimes or release at termination of hostilities; civilian trials with full due process for non-combatants charged with crimes and immediate release for those found not to be a threat to the security of the United States; and, critically, protections against torture and cruel, inhuman and degrading, treatment or punishment.[45] To that end, the United States maintained that the only rules applying to the prisoners on Guantanamo were those in the 13 November 2001 Military Order on the Detention, Treatment and Trial in the War Against Terrorism, which allowed detainees to be detained indefinitely without charge or trial, or to be tried before a military commission.[46] The Order did not permit any of the detainees' access to the civilian courts within the United States, or to any other type of relief.[47]

Most troubling, as the comprehensive study conducted by Seton

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40 DAIG REPORT, *supra* note 37, at 45–47.

41 Hamdi v. Rumsfeld, 542 U.S. 507, 513 (2004) ("enemy combatant"); Rumsfeld v. Padilla, 542 U.S. 426, 431 (2004) ("enemy combatant"); Hamdan v. Rumsfeld, 548 U.S. 557, 570 (2006) ("enemy combatant" and "underprivileged belligerent"); Boumediene v. Bush, 553 U.S. 723, 732 (2008) ("enemy combatant").

42 *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

43 *See* Geneva Convention Relative to the Treatment of Civilian Persons in Time of War arts. 79–96, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

44 *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, art. 5.

45 *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, arts. 5, 17, 84, 118; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, *supra* note 43, arts. 3, 71, 118, 132–33. For gaps between the U.S. constitutional framework and fundamental international law protections highlighted in the Guantanamo cases, see Susan M. Akram, *Do Constitutions Make a Difference as regards the Protection of fundamental Human Rights? Comparing the United States and Israel*, *in* THE DYNAMICS OF CONSTITUTIONALISM IN THE AGE OF GLOBALIZATION (Frishman & Muller eds., 2010).

46 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

47 *Id.* at § 7.

Hall in 2006 illustrated, the vast majority of the detainees picked up in Afghanistan and elsewhere and transferred to Guantanamo had no involvement in hostilities against the United States.[48] This is reflected in the cases: only ten of the approximately 800 detainees held at Guantanamo since 2001 were charged with crimes, while the rest were denied the right to civilian trials and either held without charge or ultimately transferred to other countries for trial or further detention. Most were transferred or released to other countries by 2009. As of the date of this writing, 40 detainees remain on Guantanamo.[49]

In the first year or so after September 11, the burden fell on organizations such as the Center for Constitutional Rights, the National Lawyers Guild, and the American Civil Liberties Union to represent both individuals held in the United States and on Guantanamo arrested in the 'war on terror,' until private law firms started to understand the stakes involved in the cases and issues. Much like in the earlier secret evidence cases, one of the main challenges to defending both individuals rounded up in the post-9/11 Arab and Muslim detention and deportation cases and in the Guantanamo cases was the extreme secrecy and prevention of access lawyers faced in identifying and communicating with the clients.

In addition to attempting to use substantive international law arguments in the litigation, defense lawyers also tried to use international human rights mechanisms to implement the Supreme Court decisions that international law did apply to the detainees. These included attempts to seek access to the United Nations High Commissioner for Refugees (UNHCR) to conduct refugee status determinations at Guantanamo; to address the United Nations special mechanisms to request access to Guantanamo, conduct

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48 *See generally* MARK DENBEAUX & JOSHUA DENBEAUX, THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY (2006) (55% of the detainees committed no hostile acts against the United States; only 5 % were seized on the battlefield; 86% were turned over to U.S. custody by Pakistani or Afghan individuals for a $5,000 bounty per head; out of the over 700 people who have been at Guantanamo, only 10 have been charged with crimes).

49 *See Facts about the Transfer of Guantanamo Detainees*, HUM. RTS. FIRST, https://www.humanrightsfirst.org/resource/guantanamo-numbers [https://perma.cc/8M4D-SDCT]; *see also Guantanamo by the Numbers*, AM. C.L. UNION, https://www.aclu.org/issues/national-security/detention/guantanamo-numbers [https://perma.cc/UJZ4-QB9D].

investigations and issue their own reports; and other efforts at the Human Rights Council and the treaty bodies—particularly the Committees for the Conventions on the Elimination of Racial Discrimination (CERD) and on Civil and Political Rights (HRC). These efforts resulted in a flurry of outstanding United Nations Special Rapporteur reports, concluding observations and other interventions by the human rights mechanisms, but had basically no effect on U.S. policy or actions.[50] Ultimately, the lawyers never succeeded in getting UNHCR access to Guantanamo, or any traction on conducting refugee status determinations in cases where resettlement might have been an option. Although post-2004, there was growing legal mobilization for the Guantanamo detainees, there have been few victories and many long-lasting defeats.

IV. The Questionable Success of International Legal Strategies

This section explores generally the use of international legal strategies in the relevant periods to answer the question: how did the international legal strategies attempted by U.S. lawyers fare in these two prior periods presaging the current policies and immigration climate?

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50 *See, e.g.*, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, 48–53, 65, U.N. Doc. A/HRC/13/42 (Jan. 26, 2010); Leila Zerrougui, Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers, Manfred Nowak, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Asma Jahangir, Special Rapporteur on Freedom of Religion or Belief, & Paul Hunt, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Situation of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006); *see also* Statement of the United Nations Special Rapporteur on Torture at the Expert Meeting on the Situation of Detainees Held at the U.S. Naval Base at Guantanamo Bay (Oct. 3, 2013), *available at* https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E [https://perma.cc/6G2U-3JMC] (noting that the 2006 joint report "contains many conclusions and recommendations that are regrettably still relevant due to a lack of implementation by the government").

A. International Human Rights and Humanitarian Law in Refugee Claims in the 1980's and 1990s.

In re Medina, brought before the Immigration Court in Harlingen, Texas, was the first case based on a claim that deportation of an asylum-seeker to El Salvador, a country embroiled in violent civil conflict, violated U.S. obligations under the Fourth Geneva Convention and Article 33 of the Refugee Protocol. The applicant, Jesus del Carmen Medina, sought asylum and withholding of deportation (withholding of removal under current law) on the grounds that since El Salvador was in violation of Article 3 of the Fourth Geneva Convention (GCIV), and the United States was a party to the treaty, the United States was required under its Article 1 not to return her there.[51] She argued that both under GCIV and under customary international law, since El Salvador was in gross violation of humanitarian law rules which the United States was bound to respect, it must, at a minimum, withhold her deportation to the place engaging in such gross violations of humanitarian law. The immigration judge, surprisingly, agreed that GCIV applied, that Article 3 governed the obligations of El Salvador in the non-international armed conflict there, and that the United States, also a State Party, was required to provide relief in deportation proceedings under its Article 1 obligations. The judge also found that GCIV was self-executing, and that he had the authority to apply GCIV on deportability. However, he denied her request for asylum and withholding on the grounds that there was insufficient evidence of violations of international humanitarian law occurring in El Salvador. On appeal, the Board of Immigration Appeals (BIA) affirmed the denial of asylum and withholding, but on the basis that the Fourth Geneva Convention was not self-executing, and there was no corollary customary law protection for

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[51] In re Medina, No. A26 949 415 (Immigr. Ct., Harlingen, Tex., July 15, 1985), *aff'd on other grounds*, Matter of Medina, 19 I. & N. 734 (BIA 1988). Medina testified that many Salvadoran civilians were afraid of getting caught up in the violent military conflict between government and insurgent forces in El Salvador and were subjected to brutal treatment or killed. *Id.* at 4. *See also* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, art. 3 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum … (1) Persons taking no active part in the hostilities … shall be in all circumstances treated humanely"); *see id.* at art. 1 ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.").

relief other than what was codified in the INA. It also held that an immigration judge has no authority to consider any relief not explicitly authorized within the immigration statute and regulations.[52]

Following the first *Medina* decision, lawyers around the country began developing arguments for asylum and withholding based on claims that Central American refugees were fleeing flagrant violations of international humanitarian law.[53] After the *Medina* decision, the San Francisco immigration court decided two claims for asylum and withholding under similar arguments raised in the *Medina* case—that this relief was equivalent to a binding humanitarian law norm of 'temporary refuge.' In the cases *In re Madrid-Norio* and *In re Aguilar-Moreno*, the immigration court agreed that despite rampant violations of humanitarian law in El Salvador, the United States had no obligations under either GCIV or customary international law to grant relief from deportation to persons fleeing the civil war there.[54] In contrast, in *In re Santos-Gomez*, Washington D.C. Immigration Court Judge Nejelski granted the applicants relief on the temporary refuge argument on the basis that returning them to civil war would violate a customary international law obligation binding the United States not to return someone to risk of "murder, rape and destruction." Despite the BIA's ruling in *Medina* denying claims for relief under humanitarian law, the judge in *Santos-Gomez* explicitly found that U.S. immigration judges had jurisdiction to consider customary international law claims, and indeed, had an obligation to do so.

The *Santos-Gomez* decision gained no traction, however, as humanitarian law arguments in support of claims for asylum,

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52 *See* In re Medina, No. A26 949 415 (Immigr. Ct., Harlingen, Tex., July 15, 1985), *aff'd on other grounds*, Matter of Medina, 19 I. & N. 734 (BIA 1988). Matter of Medina, Interim Decision 3078 (BIA 1988) *available at* https://www.refworld.org/cases,USA_BIA,3ae6b6b14.html [https://perma.cc/S8HX-GM5N]. The author is indebted to the work of Jennifer Moore whose excellent analysis informs this discussion. *See* Moore, *supra* note 15.

53 These arguments were developed in large part due to the work of Karen Parker, whose expertise was invaluable for lawyers around the country in making their claims for temporary refuge. *See* Karen Parker, *Geneva Convention Protections for Salvadoran Refugees: An International Law Defense Against Deportation and a Justification for Sanctuary*, 13 IMMIGR. NEWSL. 7 (1984).

54 In re Madrid-Norio, No. A24 292 084 (Immigr. Ct., San Francisco, Cal., Aug. 21, 1987); In re Aguilar-Moreno, No. A27 196 226 (Immigr. Ct., San Francisco, Cal., Oct. 18, 1988) (cited by Moore, *supra note* 15).

temporary refuge, and protection for refugees were firmly rejected by the federal courts.[55] In *Echeverria-Hernandez*, the petitioner sought relief from deportation on the temporary refuge argument under customary international law, rather than the treaty argument based on GCIV. The Ninth Circuit Court of Appeals rejected the argument that temporary refuge for persons fleeing civil war had ripened into a customary law rule, as the petitioner had not proved that countries applying such a norm did so on the basis of *opinio juris*.[56] Critically, the Court ruled that the 1980 Refugee Act was the complete codification of U.S. law on admission of refugees, and any other international law norm was, therefore, precluded.[57]

In several cases that arose from civil society activism related to the civil wars, respondents/petitioners relied on international legal arguments to advance their claims. In the nationwide class action litigation *American Baptist Churches v. Meese* (*ABC v. Meese*), the petitioners claimed that prosecutions of sanctuary organizations and individuals involved in the sanctuary movement to prevent deportation of Central American refugees violated GCIV obligations and the customary norm of temporary refuge.[58] The District Court ruled that there was no binding norm of temporary refuge under international law that protected persons fleeing armed conflict; moreover, the 1980 Refugee Act precluded such claims.[59]

The *ABC* case ended in a settlement that terminated the deportation of Salvadoran and Guatemalan class members pending adjudication or re-adjudication of their asylum claims, and required that they be released from immigration detention, among other stipulations. However, the settlement was reached on the strength of the Court's findings that Central American asylum claims were routinely decided on discriminatory and ideologically-biased grounds that violated the United States' immigration laws and not on any international law ground.[60] The Ninth Circuit reached

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55 *See, e.g.*, United States v. Aguilar, 871 F.2d 1436, 1454 (9th Cir. 1989); American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756, 770–71 (N.D. Cal. 1989); Echeverria-Hernandez v. INS, 923 F.2d 688, 693–94 (9th Cir. 1991); Bradvica v. INS, 128 F.3d 1009 (7th Cir. 1997).

56 *See Echeverria-Hernandez v. INS*, 923 F.2d at 693.

57 *See id.* at 694.

58 *ABC v. Meese*, 712 F. Supp. at 756.

59 *See id*. at 771.

60 *Id.* at 756.

similar conclusions in *U.S. v. Aguilar* and affirmed the criminal convictions of activists involved in the sanctuary movement under the 'harboring of aliens' statute.[61] The *Aguilar* defendants appealed their convictions on grounds that their actions in defense of Central American refugees were protected under the Refugee Protocol as well as international norms governing the rights of individuals to refuge from civil war. The Ninth Circuit rejected both the customary international and treaty-based arguments—finding that even though the United States was a party to the Refugee Protocol, the treaty was not self-executing. Thus, the United States had no international legal obligations towards refugees other than to the extent of the Refugee Protocol's incorporation into the INA.[62]

The Supreme Court weighed in on several key arguments for refugees and asylum-seekers during this period. In three main cases, *INS v. Stevic*, *INS v. Cardoza-Fonseca*, and *Sale v. Haitian Centers Council*, the Supreme Court addressed claims on behalf of refugees and asylum-seekers seeking to interpret United States immigration law and its codification of the Refugee Protocol in a manner consistent with international standards. In *INS v. Stevic*, the Supreme Court was asked to interpret the obligation of *non-refoulement* and the scope of Articles 33 and Article 1(A)(2) under the Refugee Protocol.[63] The respondent claimed that United States codification of these provisions in the INA as withholding of deportation and asylum had to be interpreted consistently with the international consensus on the scope of Articles 33 and 1(A)(2).[64] He claimed these provisions had a generous meaning under international law—relying on the *UNHCR Handbook* and other

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61 *See United States v. Aguilar*, 871 F.2d at 1436.

62 *Id.* at 1454.

63 INS v. Stevic, 467 U.S. 407 (1984).

64 Withholding of deportation has been amended several times and is now termed withholding of removal. The version at issue in the *Stevic* case prohibited deportation of an alien 'to a country [where his/her] life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion.' *See* I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1976). Political asylum is governed by I.N.A. § 208(a), 8 U.S.C. § 1158(a), which authorizes the Attorney General to grant asylum to any alien who is unable or unwilling to return to his country because of 'persecution or a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.' For reasons peculiar to his case and governing law, Stevic was not eligible to apply for asylum, but was seeking an interpretation of the relief of withholding that was the equivalent of the 'well-founded fear' standard for asylum.

evidence of international consensus and state practice—and that all persons who qualify as a 'refugee' were entitled to *non-refoulement*, the core obligation of all States Parties under the Refugee Convention and Protocol. The Supreme Court rejected the international law arguments, finding that the scope of United States obligations under the Protocol were only as incorporated in the INA, and that not all refugees are entitled to *non-refoulement* under United States law. The Court found that the clear difference in language between the two statutory provisions meant that to be eligible for withholding of deportation an alien had to prove his/her life or freedom would be threatened—a 'clear probability of persecution' standard, while for asylum, s/he had to meet a lesser standard of 'well-founded fear of persecution.'[65]

Three years later, the Supreme Court addressed the question left open by *Stevic*, which was: what exactly is required to prove the 'well-founded fear of persecution' standard for asylum? In *INS v. Cardoza-Fonseca*, the respondent claimed that the well-founded fear standard was different and required a far lower standard of proof than withholding, and that based on her claim, she was entitled to asylum.[66] The Court agreed with the respondent. In what seemed like a deeper review of international law, the Court referred to the *UNHCR Handbook* and international and comparative legal experts to interpret the meaning of the Refugee Convention and Protocol. Although the outcome was favorable for the respondent, the Court's analysis and international legal interpretive methodology remained deeply flawed, and moved U.S. refugee jurisprudence farther away from international practice, as discussed further below.

The third case in this Supreme Court trilogy concerned Haitian refugees and continued the flawed interpretation of the prior two cases on international law in the protection of asylum-seekers. In *Sale v. Haitian Centers Council*, refugees fleeing the repressive policies of the Duvalier dictatorship in Haiti challenged the routine interception of their boats by U.S. coast guard cutters on the high seas and the summary return of refugees to Haiti.[67] The question before the Supreme Court was whether the *non-refoulement* provision in Refugee Protocol Article 33(1) prohibited the United

65 *INS v. Stevic*, 467 U.S. at 425, 430.

66 INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

67 Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993).

States from interdicting refugees on the high seas and returning them to a country from which they feared persecution; in other words, whether the *non-refoulement* obligation has extraterritorial application. The Supreme Court ruled that neither Article 33 of the Refugee Protocol nor the INA precluded the United States from intercepting refugees in international waters and returning them, even to a risk of persecution. The Court's analysis relied on a limited review of the *travaux preparatoires* of the Refugee Convention, but its reading, and ultimate interpretation of the provision at issue, was the opposite of the interpretation provided by the UNHCR and other international authorities in their *amicus* briefs in the case.[68]

B. International Human Rights Law in the Secret Evidence Cases of the 1990s

There were few international legal arguments raised in the two dozen secret evidence cases litigated in immigration proceedings in the aftermath of the passage of IIRIRA and AEDPA, and none on the challenge to the use of secret evidence. Reviewing just a few of the cases illustrates the reasons that international legal arguments were rarely raised to litigate the claims, and when such arguments were raised, why they received no traction in the courts.

The two respondents who were detained for the longest period of time on secret evidence were Mazen al-Najjar and Anwar Haddam—held for four-and-a-half years and close to four years respectively. Al-Najjar's counsel did not rely on international law, but Anwar Haddam's did at various stages of the two decades of litigating his case. Mazen al-Najjar was a Palestinian refugee from Gaza who had lived in the United States for 18 years prior to his arrest in 1997. He had entered initially as a student, obtained Masters and Doctorate degrees, married and had three U.S. citizen children with whom he was residing in Tampa. He worked in a think tank at the University of South Florida, the World and Islam Studies Enterprise (WISE), and was the editor-in-chief of its journal.[69] In a pattern eerily similar to the LA-8 case, the FBI

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68 *Id.* at 190–98 (Blackmun, J., dissenting); Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, McNary v. Haitian Ctrs. Council, Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) (No. 92-344).

69 *See* Al Najjar v. Reno, 97 F. Supp. 2d 1329 (S.D. Fla. 2000). *See* Akram, *supra* note 25, at 71–77.

targeted the Muslim community in Tampa for surveillance for four years for evidence of connections to 'terrorist groups' in the Middle East. When no such evidence was found, the investigation was terminated, but several individuals were turned over to INS for deportation proceedings, including al-Najjar and his brother-in-law, Sami al-Arian.[70] In immigration proceedings on deportability for visa overstay, al-Najjar and his wife were denied asylum. A few days after the decision, FBI and INS agents arrested al-Najjar based on classified information of connections with Middle Eastern terrorist organizations, and he was held without bond for posing a threat to national security.[71] Three and a half years in detention later, al-Najjar was released without being given information about the charges or evidence against him. A few months later, he was re-arrested and deported to an undisclosed country in 2002.[72]

Al-Najjar's case, like many of the secret evidence cases of this period, was based on evidence he was never able to challenge, and which ultimately proved to be grounded solely on association with alleged terrorists, on the basis of evidence provided by untested and unreliable *ex parte* witnesses.[73] Al-Najjar's challenge to the use of secret evidence to deny bond was ultimately successful on due process grounds, but not until two years into his detention, in habeas proceedings in federal district court. Despite the finding by the district court that using classified information against al-Najjar was a violation of due process, and that 'mere association' with alleged terrorist organizations was insufficient to find him a threat to national security, the court did not order his release.[74]

Anwar Haddam's case also reflects the insufficiencies of constitutional and statutory-based arguments in challenging the use of secret evidence. Anwar Haddam was an Algerian politician elected to Parliament in the first free elections in Algeria in its history, which brought his party, the Islamic Salvation Front (FIS),

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70 For an exposé of the FBI investigation into WISE and background into the Tampa and other Arab and Muslim secret evidence cases, see John F. Sugg, *Secret Evidence*, 32 THE LINK 1 (1999), *available at* http://ameu.org/getattachment/fd3114f0-2b78-466e-bf36-b7a65d7b266c/Secret-Evidence.aspx [https://perma.cc/D6H5-5BJM].

71 *Al Najjar v. Reno*, 97 F. Supp. 2d at 1333–34.

72 *See* Rachel La Corte, *Deported Ex-Academic Reunited with Family*, MIAMI HERALD, Feb. 6, 2003, at B3.

73 *See* Sugg, *supra* note 70 (describing the connections between Israeli consular officials and the investigation and targeting of the staff of WISE).

74 *See Al Najjar v. Reno*, 97 F. Supp. 2d at 1356–57, 1361–62.

to power in 1991. When the military staged a coup and overthrew the civilian government, the FIS President, and other elected members of Parliament were rounded up, detained, killed, or placed under house arrest. FIS supporters were also rounded up by the thousands, arrested, interned in concentration camps where they were tortured and killed, launching a brutal civil war that lasted until 2002. Haddam was able to flee the country, and entered the United States in 1992, with his wife and three children, two of whom were United States citizens, and applied for asylum. In December, 1996, he was detained, placed in removal (then-exclusion) proceedings, and charged with being a 'persecutor of others' on undisclosed evidence.[75] In the litigation over his asylum claim, the persecutor of others bar and his detention, his attorneys challenged the use of secret evidence on due process and constitutional grounds.[76] The BIA, in two decisions, ultimately reviewed the secret evidence and found it unpersuasive to support a claim that Dr. Haddam was a persecutor of others because the evidence was insufficient to show that he had 'ordered, incited, assisted, or otherwise participated in the persecution of any person.' The BIA found that the government's interpretation of the persecutor of others ground was based solely on his speech, association or silence, and was an impermissible interpretation.[77]

Throughout the case, Haddam's attorneys challenged the interpretation of the persecutor of others bar on statutory,

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[75] During his four years of detention, Dr. Haddam had three immigration court proceedings, two appeals to the Board of Immigration Appeals, in which he was granted asylum, two habeas corpus actions to seek his release, an extraordinary intervention by Attorney General Ashcroft who overturned his grant of asylum. Following his release, his case was appealed to the Fourth Circuit and then remanded for further immigration proceedings, ultimately resulting in the denial of asylum but a grant of withholding of removal over 20 years after the case began.

[76] The INA includes several bars to a grant of asylum, including the "persecutor of others" bar, which was at issue in the Haddam case. The bar prohibits the grant of asylum to an individual who 'ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.' Other bars include: (1) conviction of a "particularly serious crime" such that the applicant is a danger to the United Sates, (2) committing a "serious non political crime" outside the United States, (3) posing a danger to the Security of the United States, or (4) being resettled in another country before arriving in the United States. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., *Asylum Bars*, https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars [https://perma.cc/JC7K-2S7E].

[77] Matter of A-H-, 23 I. & N. Dec. 774, 777–78 (A.G. 2005) (citing Matter of A-H- (BIA 2000)).

constitutional and international law grounds. At the BIA and in the Fourth Circuit, counsel argued that the persecutor of others bar under the INA was based on the Refugee Protocol and therefore must be interpreted consistently with its equivalent, the Protocol's Article 1(F).[78] This provision has developed into customary international law practice, as discussed in the authoritative review found in UNHCR guidance.[79] Counsel cited a range of international cases on the interpretation of the equivalent of the United States persecutor of others ground in Article 1(F) to show that three main elements must be met for an individual to be barred from asylum on this ground, none of which were met in the Haddam case.[80] The BIA assessed and reviewed the international law argument and cases cited by Haddam's counsel and found that United States law was consistent with the international law norms underlying Article 1(F). Ultimately, although the Fourth Circuit agreed with the interpretation of the persecutor of others ground—and found for Haddam on this basis—its decision was based squarely on domestic, primarily Fourth Circuit, law and not international law.[81] Unfortunately, the Circuit Court affirmed the decision to deny Haddam asylum in the immigration judge's discretion. Haddam's challenges to the use of secret evidence were not successful, illustrating that neither due process nor the First Amendment were sufficient constitutional grounds to overcome the broad discretion given the government in immigration proceedings.

Although some of the cases resulted in the courts disallowing the government's reliance on secret evidence or requiring release of the evidence—including after *in camera* review revealed it was erroneously classified in the first place—none of the courts struck

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[78] *Id.* at 783–86; Haddam v. Holder, No. 547 F. App'x 306, 309–13 (4th Cir. 2013).

[79] *See* U.N. High Commissioner for Refugees, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, Annex C (2003), *available at* https://www.un.org/sc/ctc/news/document/unhcr-background-note-on-the-application-of-the-exclusion-clauses-article-1f-of-the-1951-convention-relating-to-the-status-of-refugees/ [https://perma.cc/5JXC-3QV4].

[80] Under international jurisprudence, the elements which must be met to be barred as a persecutor under Article 1(F) are that the individual must: (1) be a member of an organization which has committed international offences as a continuous and regular part of its operation; (2) have personal and knowing participation in the offences; and (3) have failed to dissociate himself from the organization at the earliest safe opportunity. *See* Ramirez v. Canada (Minister of Employment and Immigration), 89 D.L.R. (4th) 173 (Fed. Ct. App. Can. 1992).

[81] *See* Haddam v. Holder, 547 F. App'x 306 (4th Cir. 2013).

down the underlying legal provisions on which the government rested its claim of secrecy as facially unconstitutional. Moreover, legislation to repeal the use of secret evidence in immigration proceedings has so far been unsuccessful, while its use has expanded post 9/11, under the USA PATRIOT Act and under various other provisions used in the Guantanamo cases.[82]

C. International Human Rights Protections in Guantanamo Detainee Cases Post-9/11

The three major cases that came before the United States Supreme Court concerning Guantanamo detainees started in June 2004, and are particularly relevant to the efforts at incorporating international human rights and humanitarian law arguments to establish rights for the detainees. The first was *Hamdi v. Rumsfeld*.[83] Hamdi, an American citizen, was seized in Afghanistan and detained by American military as an 'enemy combatant.' The Court decided not only the constitutional question of lawful detention but also the application of international humanitarian law to enemy combatant classification.[84] In the second case, *Rumsfeld v. Padilla*, the Supreme Court dismissed the petition on jurisdictional grounds, not reaching the substantive question of whether a U.S. citizen could be held without due process by the executive as an 'enemy combatant.'[85]

The third and most important case on whether international human rights law applied to the detainees was *Rasul v. Bush*,

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82 *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, § 412, 115 Stat. 272 (2001) (codified at 8 U.S.C. § 1226(a)(3) (Supp. I 2001). *See* Stephen Townley, *The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada and the United Kingdom*, 32 YALE J. INT'L. L. 219 (2007).

83 *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that the Executive Branch may constitutionally detain "enemy combatants").

84 The Court's decision was a mixed bag; on the one hand, the plurality (O'Connor, CJ Rehnquist, Kennedy and Breyer) found that Hamdi's detention was lawful and that the Constitution permits executive detention, without triggering criminal process, of enemy combatants. On the other hand, the Court went on to hold that the military's proceedings were deficient, and that certain minimum due process requirements had to be met, such as notice of the factual basis for Hamdi's classification as an enemy combatant, and fair opportunity to rebut the Government's assertions before a neutral decisionmaker.

85 Rumsfeld v. Padilla, 542 U.S. 426 (2004) (holding habeas corpus jurisdiction only reaches the "district of confinement," including when military had custody of the detainee as an "enemy combatant").

involving habeas petitions filed by the lawyers of a number of the Guantanamo detainees.[86] The Supreme Court ruled 6-3 that the federal courts did have jurisdiction to hear the habeas claims of the detainees, as well as other related claims under domestic and, more important, international law.[87] The Court rejected the Bush Administration's argument that the United States did not have jurisdiction over Guantanamo, stating that the detainees were under the 'complete and exclusive control and jurisdiction' of the United States, no other state's laws applied to them, and they did have a right to challenge that their "custody. . .[was in] violation of the Constitution or laws or treaties of the United States."[88]

Of course, there was immediate pushback by the Bush Administration, which quickly established the Combatant Status Review Tribunals (CSRTs) to circumvent the habeas proceedings in federal courts. The Supreme Court decided two later cases on Guantanamo, *Hamdan v. Rumsfeld*[89] and *Boumediene v. Bush*.[90] In 2006, the Court decided in *Hamdan* that although the government could establish military commissions, they had to conform to the international laws of war and to requirements on courts martial under the United States Uniform Code of Military Justice.[91] The Commissions, as constituted, did neither, and hence were unlawful.[92] The final case decided by the Supreme Court in the

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86 Rasul v. Bush, 542 U.S. 466 (2004) (holding that the federal courts have jurisdiction to hear claims on the legality of the detention of detainees in Guantanamo Bay, a territory over which the US "exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'").

87 *Id.* at 472–73 (describing petitioners' claims of violations of domestic and international law and reversing a decision that the federal district court lacked jurisdiction over these claims).

88 *Id.* at 480, 494–95, 498–99 (detailing why detention on Guantanamo Bay is subject to federal court jurisdiction).

89 Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that that the military commission that tried a Guantanamo Bay detainee did not have power to move forward because its structure and procedures violated the US Uniform Code of Military Justice and the Geneva Conventions).

90 Boumediene v. Bush, 553 U.S. 723 (2008) (finding the Military Commissions Act of 2006 acted to unconstitutionally suspend the writ of habeas corpus, as procedures set up by the to review the status of detainees at Guantanamo were inadequate to substitute for habeas corpus).

91 *See Hamdan v. Rumsfeld*, 548 U.S. at 592–95 (explaining why the President's power to convene military commissions is subject to the limitation of the U.S. Uniform Code of Military Justice and the law of war).

92 *See id.* at 567 ("[W]e conclude that the military commission convened to try

Guantanamo litigation during this period was *Boumediene v. Bush*, which found unlawful the procedures set up by Congress in the Military Commissions and the Military Commissions Act of 2006.[93] Congress has had the last word, however, and the military commissions under the latest version of the military commission's law are the only courts adjudicating the remaining Guantanamo cases.[94]

While the domestic habeas litigation and other challenges were making their way through United States domestic courts, a parallel battle was being waged in the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights on behalf of the Guantanamo detainees. The IACHR's interventions began as early as 2002 with the issuance of the first precautionary measures on behalf of all the detainees.[95] In *Detainees at Guantanamo Bay*, the Commission reviewed claims that the arbitrary, incommunicado and prolonged detention, unlawful interrogation, and trials by military commission violated the American Declaration to which the United States was bound. It ordered precautionary measures against the United States, requiring that the detainees' status be adjudicated through a competent

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Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.").

93 *Boumediene v. Bush*, 553 U.S. at 733, 736 (finding that the Military Commissions Act of 2006 barred federal courts' jurisdiction over habeas corpus actions of Guantanamo detainees, with no adequate substitute).

94 *See* Military Commissions Act of 2009, 10 U.S.C. § 948 et seq. (2012). What we now know about the Guantanamo detainees has been revealed through the hard work of lawyers, intrepid journalists, activists, and a few of the detainees themselves who have managed to publish their stories. Among the critical information: 55% of the detainees have committed no hostile acts against the US; only 5% of the detainees were seized and taken into custody by US personnel on the battlefield; 86% of the detainees were arrested and turned into US military custody by Pakistani or Afghan individuals for a $5,000 bounty per head; of the over 700 people who have gone through Guantanamo as prisoners, only 10 have been charged with war crimes. The remaining hundreds of detainees were not charged with any crimes, and about 40 are now in their 16th year of detention at Guantanamo under the Executive's claim that they are enemy combatants and can be held indefinitely or until the end of the global war on terrorism—whenever that might be. *See Guantanamo by the Numbers*, HUM. RTS. FIRST (2012), https://www.humanrightsfirst.org/resource/guantanamo-numbers [https://perma.cc/EC5C-YRWL].

95 Persons Detained by the United States in Guantanamo Bay, Provisional Measures, Report No. 259/02, Inter-Am. Comm'n H.R. (2002); extension of PM 259/02 (2005); extension of PM 259/02 (2013).

tribunal. The United States ignored the precautionary measures and rejected the Commission's jurisdiction. The Commission continued to renew its precautionary measures multiple times, up to ten years after their first issuance. In addition to the collective precautionary measures, the IACHR issued precautionary measures in the individual Guantanamo detainee cases of Omar Khadr, Djamel Ameziane, and Moath al-Alwi, and heard and granted a number of individual petitions from the detainees. The Commission held multiple hearings over the years on the rights of the detainees, conditions of detention, and access to judicial review. It also repeatedly requested access to Guantanamo Bay to monitor the conditions of detention. All IACHR interventions were refused or rejected by the United States.[96]

Despite the constitutional foundation for the decisions in *Rasul* and *Hamdi*, the U.S. Constitution provided minimal support for the detainees' claims. The Court did not even address the torture claims, as the cases were fundamentally about the lack of access to judicial review. The strength of the Supreme Court's decisions and the constitutional rights involved were undermined by the executive and legislative actions that instituted parallel adjudications through the CSRTs that failed to provide the minimal due process guarantees that the Geneva Conventions and international law would require. The international legal arguments were ultimately unable to change the outcomes for the Guantanamo litigants, either, particularly on the fundamental norm to be free from torture. The prohibition against torture and cruel, inhuman and degrading treatment or punishment is unquestionably a *jus cogens* norm—prohibited for all states under all circumstances.[97] The Convention against Torture prohibits both the use of torture and the removal, transfer or extradition of a person to any country where she risks being

96 *See* INTER-AM. COMM'N H.R., TOWARDS THE CLOSURE OF GUANTANAMO, U.N. Doc. OAS/Ser.L/V/II Doc. 20/15 (June 3, 2015).

97 *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949; 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 16, Dec. 10, 1984, 1465 U.N.T.S. 85; U.S. CONST. art. 8.

subjected to torture. U.N. bodies and experts reinforced the cluster of obligations underpinning the prohibition of torture with respect to the Guantanamo detainees, including the prohibition of incommunicado detention, the use of evidence obtained by torture, and the requirement to prosecute and punish all those officials engaged in torture.[98] While the binding nature of the obligations is clear, the United States instituted policies intended to circumvent its obligations not to engage in torture and used the DOJ's OLC, DOD and military orders as cover to undermine its international commitment not to torture. Although the official 'torture policy' was rescinded by the Obama Administration,[99] no official has been charged for engaging in torture, and many of the policies circumventing robust review of detainee treatment remain in place as of this writing.

V. Limitations to the Use of International law in Refugee and Immigration Cases

In reviewing the outcomes of the strategies that have been tried, one can only conclude that the news is disheartening. In some ways it seems that the gains that were made on some of the strategies have been reversed; in other ways it seems that some of these hard-fought victories have been completely wiped out and advocates must start again. For the Central American cases, international legal arguments got no traction, even in that most immigration-friendly of courts, the Ninth Circuit. The outcome of the Haitian refugee litigation was similarly dismal for both the applicants and for adherence to international legal interpretations of the Refugee

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98 *See, e.g.*, LEILA ZERROUGUI ET AL., UN WORKING GROUP ON ARBITRARY DETENTION, SITUATION OF THE DETAINEES AT GUANTANAMO, UN Doc. E/CN.4/2006/120 (2006); *see also* Letter from Juan Mendez, U.N. Special Rapporteur on Torture, Ben Emmerson, U.N. Special Rapporteur on Human Rights and Counterterrorism, Monica Pinto, U.N. Special Rapporteur on Indep. of the Judiciary, Seong-Phil Hong, Chair-Rapporteur of the U.N. Working Grp. on Arbitrary Det., and Michael Georg Link, Dir. of the OSCE Office for Democratic Insts. and Human Rights to the Gov't of the U.S. on the Occasion of the 14th Anniversary of the Opening of the Guantanamo Bay Detention Facility, *available at* http://www.ohchr.org/Documents/Issues/SRTorture/OpenLetterGTMOJan11_2016.docx [https://perma.cc/7BAA-9VAY].

99 *See* Joby Warrick & Karen DeYoung, *Obama Reverses Bush Policies on Detention and Interrogation*, WASH. POST (Jan. 23, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/22/AR2009012201527.html [https://perma.cc/34P3-7K35].

Convention/Protocol.

As for the Arab/Muslim immigrant and refugee cases, the secret evidence litigation strategies were marginally successful on the international law arguments about the persecution bar. In fact, they were not even attempted in the many habeas proceedings brought to free the two dozen clients subjected to secret evidence in their cases. In terms of Guantanamo, the complexity of the issues and lack of proximity to Guantanamo Bay has meant that the public understands very little of the fundamental rights at stake, making it difficult for the legal strategies to tie into widespread civil society activism. None of the interventions from the international mechanisms—including the Inter-American Commission's decisions—made a dent in the policies towards the detainees. Despite the really rather astonishing decisions by the Supreme Court on the application and relevance of international humanitarian and human rights law, overall there has been serious damage to constitutional and international law protections by the Guantanamo cases, particularly on the fundamental guarantee to be free from torture, cruel, inhuman and degrading treatment.

As this snapshot of earlier efforts to defend against the excesses of executive power shows, there are significant barriers to the use of international legal strategies in refugee and immigration-related cases. Primary among the barriers is the disregard by the federal and administrative courts of Article VI of the Constitution.[100] Despite the clarity of Article VI, section 2, and the early Supreme Court decisions relying on it, jurisprudential doctrines such as self-executing treaties,[101] political question,[102] sovereign immunity, and act of state doctrines routinely defeat the application of both treaty and customary international law obligations in United States courts. The political question doctrine has been a particularly aggressive tool used by the federal courts and the government alike to refuse to hear the merits of cases that the government finds politically or ideologically unpalatable. In recent cases under the Alien Tort

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100 US CONST. art. VI, § 2 ("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, any Thing in the Constitution or Law of any state to the Contrary notwithstanding.").

101 *See* Foster v. Neilson, 27 U.S. 253 (1829).

102 *See* Mujica v. Occidental Petroleum Corp. (Mujica I), 381 F. Supp. 2d 1134, 1164 (C.D. Cal. 2005).

Claims Act (ATCA) and the Torture Victims Protection Act (TVPA)—claims which are grounded squarely on international human rights law norms—courts have been willing to assert the political question doctrine to pretermit claims on the merits relating human rights abuses. This has been so, even in cases where the government itself has not raised the objection, with courts reaching out on their own to invite the State Department to submit letters of interest to bar jurisdiction on political question grounds. Three cases brought under the ATCA illustrate the point: *Corrie v. Caterpillar*,[103] *Belhas v. Ya'alon*,[104] and *Matar v. Dichter*.[105] Each of these cases is a saga on its own, but the main point is that they were brought on international law as well as domestic law theories for victims of Israeli defendants or policies, and all were dismissed on sovereign immunity or political question grounds on the courts' own initiative.

Related to the setting aside of clear constitutional instruction of the primacy of international treaty law, the fact that the United States is party to few of the core international human rights treaties in the first place remains a significant barrier. Aside from the few human rights treaties the United States has signed, it has ratified even fewer. Of the dozen most widely-ratified human rights and humanitarian law treaties relevant to the issues in this discussion, the United States has ratified six.[106] Nor has the United States

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103 Corrie v. Caterpillar, 503 F.3d 974 (9th Cir. 2007) (finding that a suit against a company that sold bulldozers to the IDF to demolish homes in the Palestinian Territories was properly dismissed for lack of jurisdiction based on the political question doctrine).

104 Belhas v. Moshe Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008) (affirming dismissal of a suit against a retired general of the IDF for lack of jurisdiction under the Foreign Sovereign Immunities Act).

105 Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (affirming dismissal of a claim against the former head of the Israeli Security Agency for IDF bombings in Gaza, finding the defendant immune as a former officer under common law principles, and thus not reaching the question of whether he is also immune under the Foreign Sovereign Immunities Act).

106 The most widely-ratified treaties on human rights and humanitarian law are the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (CRC); the Convention on the Elimination of Violence against Women (CEDAW); the Genocide Convention; the Convention against Torture (CAT); the Statute of the International Criminal Court (Rome Statute); the Four Geneva Conventions (GC 1-IV); and the two Protocols Additional to the Four Geneva Conventions (AP I and II). Of these, the U.S. is party only to the ICCPR, the Genocide and CAT Conventions and the Four Geneva Conventions. It is now the only country in the world that is not party to the CRC and is one of very few non-state parties to the CEDAW and the Rome Statute (185 states

ratified the core regional human rights treaty attached to the OAS Charter, the American Convention on Human Rights, although its argument on non-applicability of the American human rights instruments is highly questionable and not accepted by the Inter-American human rights bodies or most states in the region.[107] Moreover, it has made limiting reservations to those few it has ratified that undermine the core obligations under the treaty. For example, the most common reservation the United States has made to its ratification of human rights treaties is that they are not self-executing.[108] The second most common reservation (or 'declarations and understandings' as the United States creatively terms what the human rights bodies include as reservations) is that the U.S. Constitution is supreme over any treaty obligation.[109] These common reservations put the United States in a directly opposing trajectory to the international consensus on the binding nature of treaties, and the fundamental rules that domestic law cannot be used to defeat treaty obligations and reservations are

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parties and 108 states parties respectively). Although not widely-ratified, the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW) is highly relevant to this discussion on protections of migrants in the United States, to which the US is not a party.

107 The United States has consistently taken the position that it is not bound by either the American Convention on Human Rights or the American Declaration on the Rights and Duties of Man because it has not ratified the first and the second is not a binding treaty. The Inter-American Commission has categorically rejected the second argument, explaining that the main instruments incorporated directly into the OAS Charter under its provisions are the Statute and Regulations of the IACHR and the American Declaration. The IACHR statutes and the Charter provide that the IACHR is the organ of the OAS having the jurisdiction to promote the human rights norms binding in the region, and those norms are incorporated into the American Declaration for states that are not parties to the American Convention on Human Rights. *See* Charter of the Organization of American States arts. 3, 16, 51, 112 & 150. For a detailed explanation of the Commission's position on this, see Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA Ser.L/V/II.54, doc. 9 rev. 1 (1981).

108 *See, e.g.*, Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321, 339 (2010) ("[T]he United States has generally included 'non-self-execution' declarations within its ratification of human rights treaties. These declarations are designed to prevent the treaties from being enforceable in U.S. courts in the absence of implementing legislation.").

109 For example, reservation 2 to the Genocide Convention states, "[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *See* Convention on the Prevention and Punishment of the Crime of Genocide art. IX, Dec. 9, 1948, 78 U.N.T.S. 277.

invalid if they defeat the object and purpose of the treaty itself.

International law obligations on treaty interpretation appear in the Vienna Convention on the Law of Treaties (VCLT), a treaty the United States Supreme Court routinely cites as customary law, but to which the United States is not a party.[110] The Supreme Court doctrine that interprets a relevant treaty through the lens of domestic law fundamentally subverts widely accepted treaty law interpretive rules. Under the VCLT, a state cannot "invoke the provisions of its internal law as justification for its failure to perform a treaty."[111] Moreover, a state must refrain from defeating the object and purpose of a treaty when the state has signed a treaty and pending its entry into force "provided that such entry into force is not unduly delayed."[112] A similar rule applies for reservations: reservations are considered invalid if incompatible with the object and purpose of the treaty.[113] Unfortunately, U.S. position and practice put it directly at odds with these rules.[114]

A direct consequence of the subversion of the rules of international law and the Constitution that place treaty and

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110 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. For a sample of decisions citing and discussing obligations to interpret treaties consistently with the VCLT, see De Los Santos Mora v. New York, 524 F.3d 183 (2d Cir. 2008); Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423 (2d Cir. 2001); Sanchez-Llamas v. Oregon, 548 U.S. 331, 390–91 (2006); Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638 (5th Cir. 1994); Pliego v. Hayes, 843 F.3d 226, 232 (6th Cir. 2016); Aquamar S.A. v. Del Monte Fresh Produce N.A., 179 F. 1279, 1296 (11th Cir. 1999).

111 VCLT, *supra* note 110, at art. 27.

112 *Id.* at art. 18. This provision is particularly applicable for treaties that the U.S. has signed but ratification has been pending for years if not decades. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights, signed in 1977 but not ratified; Convention on the Elimination of Discrimination Against Women, signed in 1980 but not ratified; Convention on the Rights of the Child, signed 1995 but not ratified; Additional Protocol I and II to the Geneva Convention, signed in 1977, but not ratified; American Convention on Human Rights, signed in 1977 but not ratified.

113 VCLT, *supra* note 110, at art. 19.

114 U.S. courts apply the 'last in time' and 'compatibility' interpretive rules, but these are inconsistent with the Constitution's Supremacy clause and the VCLT rules cited above. *See* RESTATEMENT OF FOREIGN RELATIONS LAW § 115 (AM. LAW INST. 2015) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States 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."). On the obligation to interpret domestic and international law provisions in a manner that ensures compatibility, see RESTATEMENT (THIRD) FOR FOREIGN RELATIONS LAW § 115, cmt. a, b (AM. LAW INST. 2015).

customary international law equally enforceable as domestic law, is the undermining of the principle that international law cannot be interpreted on the basis of domestic law, but the other way around. This methodology is what determined the outcome in *Stevic*, *Cardoza-Fonseca*, and *Sale*, in which the United States Supreme Court paradoxically interpreted the Refugee Protocol provisions to defeat the U.S.'s fundamental obligations under the treaty: that is, that all refugees are entitled to the guarantee of *non-refoulement*; that all refugees must be guaranteed the right to access asylum; and that no state can return a refugee coming under its jurisdiction to *refoulement*. Justice Blackmun explained this backwards reasoning in a scathing dissent in *Sale*, and expanded on the deeper domestic versus international law problem in a later law journal article. His explanation is worth quoting at length:

> In construing Sec. 243(h) and Article 33.1 in *Haitian Centers Council*, the Court once again failed to respect its first principles of international law. Turning first to the statute, the Court remarkably applied a presumption against extraterritoriality of Sec. 243(h) without considering the fact that the statute was enacted pursuant to a multilateral treaty, and without acknowledging the primacy of the principle of *non-refoulement* in customary international law. The Court thus ignored a maxim recognized since *Schooner Charming Betsy*: an Act of Congress and particularly a statute enacted pursuant to a treaty ought never to be construed to violate a coextensive treaty or otherwise to contract customary international law . . . .Having established that Sec. 243(h) does not apply beyond US borders, the Court then reasoned backwards to construe the language of Article 33.1—a global convention—in light of its interpretation of *American* immigration law. The language of Article 33.1 absolutely prohibits the "return' of any refugee 'in any manner whatsoever,' without geographical limitation. "The Supreme Court nevertheless concluded that the prohibition applies only after a refugee successfully enters US territory.[115]

This backwards logic permeates United States Supreme Court and federal court decisions in the cases discussed here. This

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115 Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 44 (1994).

incongruent methodology contributed to the inability of advocates in all these cases to rely on bedrock international norms that could challenge United States government actions that violated refugee-related guarantees of *non-refoulement*, access to asylum, and international interpretations of the refugee definition in the Central American cases of the 1980s. It also undermined the ability of advocates to bring international law to bear to the litigation in the secret evidence cases of the 1990s. It prevented advocates from successfully challenging U.S. obligations not to engage in torture, cruel and inhuman treatment in the Guantanamo and other post-9/11 terrorism-related cases. Were the federal courts to respect the primacy of international legal interpretations, international due process guarantees including prohibiting the use of secret evidence might have halted the erosion of rights that continue to be eroded in the present.[116]

Finally, the lack of U.S. adherence to its obligations as a member state in the Organization of American States towards the Inter-American human rights system has been a major barrier to more consistency between U.S. actions and implementation of international legal norms. In the Central American crisis of the 1980s, the Arab/Muslim targeting of the 1990s, and the Guantanamo detainee situation, the IACHR was proactive and responsive to the multiple legal violations raised by civil society—lawyers and activists alike. Its efforts fell on deaf ears due to the entrenched position of the United States that it is not bound to the American human rights instruments or to the jurisdiction of the human rights bodies.

VI. The Relevance of Re-Visiting International Law in the Current Crises

The current moment is in many ways a reprise of what was experienced in the immigrant and refugee communities and by their advocates in the 1980s and 1990s. Right now, the renewed assault on immigrants and refugees is occurring through policies similar to those challenged in earlier decades. The Muslim ban and refugee restrictions in the United States, however, are having massive

116 For a persuasive review of US treaty obligations that could support challenges to the government abuses in the secret evidence cases, see Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform our Immigration System*, 39 COLUM. HUM. RTS. L. REV. (2008).

negative consequences for millions more people around the world than ever before.

Today, the world is grappling with the greatest refugee crisis ever faced, yet the United States has completely abdicated its role and legal responsibilities.[117] The United States has pulled out of the Global Compacts on Refugees and Migrants,[118] and the Trump Administration has reduced the 110,000 refugee quota of the Obama Administration to 30,000—the lowest on record.[119] Moreover, less than half of those will succeed in overcoming the 'extreme vetting' that has been put in place. So far, only 12 Syrian refugees have been resettled in the United States during 2018-19, of the more than 5.6 million Syrians hosted in mostly a few Middle Eastern host states.[120] The new 'extreme vetting' process is making it impossible for even approved refugees in the pipeline to succeed in traveling to the United States.

Parallel to the limited effect international human rights and international humanitarian law has had in challenging the worst of U.S. policies towards refugees and immigrants, even in the more robust international law environment in Europe, core international law norms are rapidly eroding. For example, the research on the Syrian crisis in the frontline host states has found that their originally incredibly generous open-door policies have become closed-door policies towards the refugees in the last few years.[121]

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117 *See Figures at a Glance*, U.N. HIGH COMMISSIONER FOR REFUGEES, https://www.unhcr.org/figures-at-a-glance.html [https://perma.cc/7JVH-JRVT] ("We are now facing the highest levels of displacement on record.").

118 *See* Patrick Wintour, *Donald Trump Pulls US out of UN Global Compact on Migration*, GUARDIAN (Dec. 3, 2017), https://www.theguardian.com/world/2017/dec/03/donald-trump-pulls-us-out-of-un-global-compact-on-migration [https://perma.cc/KE8T-6MCX].

119 *See* Lesley Wroughton, *U.S. to Sharply Limit Refugee Flows to 30,000 in 2019*, REUTERS (Sept. 17, 2018), https://www.reuters.com/article/us-usa-immigration-pompeo-idUSKCN1LX2HS [https://perma.cc/992N-T9EG]; Joel Rose, *Trump Administration to Drop Refugee Cap to 45,000, Lowest in Years*, NPR (Sept. 27, 2017), https://www.npr.org/2017/09/27/554046980/trump-administration-to-drop-refugee-cap-to-45-000-lowest-in-years [https://perma.cc/3M2D-DSP2].

120 *See Admissions & Arrivals*, REFUGEE PROCESSING CTR. (Dec. 31, 2018), www.wrapsnet.org/admissions-and-arrivals/ [https://perma.cc/A6SX-7JHU].

121 *See, e.g.*, Krishnadev Calamur, *The Nativists Won Europe*, ATLANTIC (Mar. 16, 2019), https://www.theatlantic.com/international/archive/2019/03/europe-refugees-syria-borders/585097/ [https://perma.cc/NX8H-2LHF] ("European Union data released Thursday showed that the number of asylum seekers in the bloc declined for the fourth straight year.").

This phenomenon has echoed in the pushback policies of the frontline European Union states. For example, Greece and Bulgaria, which had no history of detaining refugees, have turned to constructing detention centers of isolating immigrants and refugees in closed area 'hotspots' to contain huge numbers of immigrants and refugees, preventing them from free access to asylum.[122]

But international human rights norms are even more relevant and necessary today. Among the needed strategies are norms to address statelessness among migrant and refugee populations across the world, including within the United States. It is more important than ever to focus on historical root causes, including United States policies in Central America that have created the push factors forcing thousands of individuals trying to enter to apply for asylum, and the concomitant international obligations the United States has towards ensuring the right to asylum for them. Equally critical is incorporating international norms in addressing the human rights crisis in migration, including the crisis of thousands of disappeared migrants from the Northern Triangle, and formulating transnational and international solutions in partnership with the families of the disappeared. Reviewing the lessons of the past, it is true that there has been little success in the efforts to build international human rights norms in advocacy work for refugees and immigrants. However, it is also obvious that the U.S. domestic constitutional framework has been woefully insufficient to protect the rights of the most vulnerable refugee and immigrant populations and that integrating international law norms into the domestic legal defense toolbox is more urgent than ever.

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122 *See Bulgaria 2017/2018*, AMNESTY INT'L, https://www.amnesty.org/en/countries/europe-and-central-asia/bulgaria/report-bulgaria/ [https://perma.cc/QG4Z-JME9]; *see also Greece 2017/2018*, AMNESTY INT'L, https://www.amnesty.org/en/countries/europe-and-central-asia/greece/report-greece/ [https://perma.cc/E62M-78MP].